



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mgandia v Mgandia & 2 others (Civil Suit 105 of 2020)  
[2022] KEELC 15691 (KLR) (21 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15691 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
CIVIL SUIT 105 OF 2020  
AE DENA, J  
NOVEMBER 21, 2022  
(FORMERLY 159 OF 2015)**

**BETWEEN**

**SAID MBUI MGANDIA ..... PLAINTIFF**

**AND**

**MGANDI MZUNGU MGANDIA ..... 1<sup>ST</sup> DEFENDANT**

**NYONDO GEU ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**The Application**

1. The application the subject of this ruling is dated January 29, 2022. It is brought by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. It seeks for inter alia consolidation of this suit with Kwale High Court ELC 131 of 2021(formerly Mombasa 226 of 2020) that the suit be struck out and stay of proceedings in ELC 131 of 2021(formerly Mombasa 226 of 2020) pending the determination of this application.
2. The grounds for the application are stated in the face of the application and supported by the supporting affidavit of Edward Gichana counsel for the applicants. It is stated that he acts for the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein as well as 1<sup>st</sup> – 4<sup>th</sup> defendants in ELC 131 of 2021(formerly Mombasa 226 of 2020). He avers that upon perusal of both files he noted that the 1<sup>st</sup> defendant in this suit is also the 3<sup>rd</sup> defendant in ELC 131 of 2021, the primary parcel of land in both cases are 742, 743 and 744 which have been subdivided in various portions and thus common questions of law and fact will arise. That in the present suit the plaintiff seeks a declaration that sub divisions 1242, 1243 and 1244 were issued by mistake, rectification and cancellation. These subdivisions are from 743 and 744. In ELC



131 of 2021 the plaintiff seeks a declaration that he is the rightful owner of 742 and 744, revocation of title and damages.

3. It is stated that all the parties participated in the adjudication proceedings all the way to objection proceedings therein meaning there are common issues in the proceedings that will save judicial time and resources.
4. The 1<sup>st</sup> defendant in ELC 131 of 2021 also filed a supporting affidavit stating he has received compensation payment in respect of Mwache Dam Project for his parcel No. 1238 and that he has no interest capable of being protected. It is averred that the title for 1238 was issued after the plaintiff herein failed to owner 3 summons to appear for the hearing of the objection lodged by the 1<sup>st</sup> defendant. He also states that the suit herein was filed hot in the heels of information of the impending compensation and was an abuse of the court process. He wants the suit struck out.

### **Response to the Application**

5. The application is opposed by the plaintiff Said Mbui Matsungu through a replying affidavit filed on 23/2/22. He states that the parties in the two suits are not the same neither are plots 742,743 and 745 common. That in the present suit the plaintiffs claim is based on the sub division of plot 743 (see amended plaint filed on March 31, 2021). That he has no interest in any portion derived from plot 742 and 744 which to him are the subject of the plaintiff's (Gatsi Gojama) claim in ELC 131 of 2021. He avers that the said Gatsi Gojama is his witness in this suit. he states that consolidation will bring confusion since the causes of action are different, the issues for determination and the plaintiffs are totally different. That the court will encounter challenges in the framing of the issues for determination.
6. Gatsi Gojama the plaintiff in ELC 131 of 2021 also opposes the application through his replying affidavit filed on 7/6/2022. He avers he is not a party in the present suit and that Nyondo Geu the 2<sup>nd</sup> defendant herein is not a party on ELC 131 of 2021. That the defendants in ELC 131 are not parties in the present suit. He finds no reasons for the consolidation.

### **Submissions**

7. The application was disposed of by way of written submissions. The applicants 1<sup>st</sup> -4<sup>th</sup> defendants' submissions were filed on 5/7/22, the plaintiffs Saidi Matsungu on 5/08/2022. Which I have considered in this determination

### **Analysis and Determination**

8. I have considered the application on record, the responses thereto as well as the submissions by the respective parties. The main issue for determination is whether the two suit HC ELC 105 of 2020 and HC ELC 131 of 2021 should be consolidated. The application is brought under section 1A, 1B, 3A of the *Civil Procedure Act*, order 2 rule 15, 8 rule 11 of the *Civil Procedure Rules*.
9. Consolidation of suits have been entrenched in practice as part of case management for efficiency in tandem with the objectives of the *Civil Procedure Act*. Basically, consolidation is aimed at avoiding unnecessary separate hearings and duplicity and multiplicity of suits, ease determination of the issues, save on judicial and administrative resources and prevent prospect of conflicting decisions. My brother Justice CK Yano in *Thomas Schiering v Nereah Michael Said* [2020] eKLR aptly captured the guidelines to be followed when considering whether to consolidate thus; -
  - a. whether the same questions of law or fact arise in the cases proposed for consolidation,



- b. whether the rights or reliefs claimed in the cases arise out of the same transaction or series of transactions,
- c. if any party will be disadvantaged or prejudiced or,
- d. whether consolidation will confer undue advantage to the other party.

Relevant to this suit I should add whether the subject matter is the same.

10. Do the same questions of law or fact arise in the case targeted for consolidation herein? The first point to consider in this regard is whether the parties are the same including the subject matter. The applicant points that the 1<sup>st</sup> defendant in ELC 105 of 2020 (herein present suit) is also the 3<sup>rd</sup> defendant in ELC 131 of 2021. The court agrees with this observation. However not all the defendants are the same, since in addition to the 1<sup>st</sup> defendant Mgandi Mzungu Mgandia in the present suit, ELC 131 of 2021 has an additional two defendants Mgandi Nyondo Chitumbo, Henry Becha Mbiza, District Land Adj & Settlement Officer Kinango Subcounty and Frontman Consultants. The Registrar of Lands is not a party in the ELC 131 of 2021 while the National Land Commission isn't a party in ELC 105 of 2021
11. But having made the above observations I'm inclined to further inquire into the remoteness of these parties? Is there any common thing that links all of them notwithstanding their not being named as parties in or either of the suits herein? The answer in my view would lie in the claims or cause of action and facts surrounding them and which should run in tandem with the subject matter. My review of the pleadings and evidence proposed reveal a number of commonalities. These are the subject is the Mazeras Adjudication Section, the parcels 742, 743, 744 all feature in the amended plaint filed on 31/03/2021 and in ELC 105 of 2021 and Plaint in ELC 131 of 2021. It is apparent that behind all these claims or disputes is the land compensation for project affected persons in the Mwache dam project, While the plaintiff in 105 of 2021 is not named as party in ELC 131 of 2021 by Gotsi Gojama he seems to feature prominently in respect of plot 743 in both suits. Then there is the issue of the disputes that arose during the land adjudication process which features substantively in both suits and therefore the Land Adjudication & Settlement Officer ought to be useful in both suits in as much as he is not named as a party by Said Mbui Matsungu and this applies to the Land Registrar though not named a party by Gotsi Gojama in 131 of 2021. The issue of the subdivisions is also alluded to in 105 of 2021 also features in the defence of the 1-4<sup>th</sup> defendants in 131 of 2021.
12. My analysis would be incomplete if I do not touch on the reliefs sought. In 131 of 2021 Gotsi Gojama wants to be declared the rightful owner of plot 742 and 744 having notably left 743 which the defendants seem to have problem with. He wants a cancellation of the titles issued to Tuku Nyondo, Mgandi Nyondo Chitumbo, Mgandi Mzungu, and Henry Becha Mbizah who claim that the land did not belong to the Gojama clan but the Mwachanda clan which they belong to. That the process of adjudication was to affirm and not create new rights. But which are these titles issued to these defendants? Though not specifically identified by title number some are the subdivisions referred to in ELC 105 of 2021 filed by Said Mutsungu (see paragraphs 17(A), 20A, 21A of the amended plaint).
13. The upshot of the foregoing is that it is more desirable that the suit are consolidated in order for all the issues to be substantively resolved once and to enable a just determination of the matter. I do not see any party will be prejudiced by the consolidation both suits had not progressed to hearing thus no prejudice shall be occasioned to either party. To me the consolidation will avoid unnecessary separate hearings, duplicity and multiplicity of suits, save on judicial and administrative resources and prevent prospect of conflicting decisions. It will be convenient and expedient for all parties involved in the two suits to be heard as one. In view of the allegations and counter allegations, the shared history interalia



all the parties involved in the dispute will meet under one roof and their evidence will be tested, then the truth shall be known and it will set them free.

14. Having made the above orders, I will not render myself on the invitation to strike out the suit. Each case must be decided on its merits and having appreciated the circumstances of both suit the best course I must take is to let every party involved have their day in court. In any case the courts have frowned upon striking out pleadings for substantive justice. The fundamental duty of this court is to do justice for all the parties See *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR.
15. The upshot of the foregoing is that the application partly succeeds on the prayer for consolidation and is allowed in terms of orders (a) and (b). Costs shall follow the event.

Orders accordingly.

**DELIVERED AND DATED AT KWALE THIS 21<sup>ST</sup> DAY OF NOVEMBER 2022**

**AE DENA**

**JUDGE**

**Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

Gichana for applicants Defendants

Mr. wameyo

Mr. Birir

Mr. Denis Mwakina- Court Assistant.

