



Muchiri v Waweru (Suing as the personal representative of the Estate of the Bartholomew Joseph Waweru Titi (Deceased)) (Environment & Land Case 240 of 2018) [2022] KEELC 14887 (KLR) (17 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 240 OF 2018
JG KEMEI, J
NOVEMBER 17, 2022**

BETWEEN

DOROTHY WAMUYU MUCHIRI PLAINTIFF

AND

MOSES MWANGI WAWERU DEFENDANT

SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE BARTHOLOMEW JOSEPH WAWERU TITI (DECEASED)

RULING

1. The plaintiff/applicant filed the instant Notice of Motion dated October 12, 2021 seeking Orders That;
 - a. That this honorable court do issue an order to consolidate this matter with Thika Elc 15 Of 2019 – Moses Mwangi Waweru (Suing as the personal representative of the estate of Bartholomew Joseph Waweru Titi – deceased) vs. Dorothy Wamuyu Muchiri & Anor. And Thika Elc 16 of 2019 - Moses Mwangi Waweru(Suing as the personal representative of the estate of Bartholomew Joseph Waweru Titi – deceased) v Dorothy Wamuyu Muchiri & anor.
 - b. That the matters be heard together.
 - c. That the court makes any order it deems fit for expeditious disposition of the matters.
 - d. That costs be provided for.
2. The Application is supported by the affidavit of even date sworn by Dorothy Wamuyu Muchiri, the plaintiff. She averred that she is the Plaintiff herein and the 1st defendant in both Thika ELC 15 & 16 of 2019. The copies of the Statements of Defence for both Thika Elc 15 & 16 of 2019 were annexed as 'A' and 'B' respectively. That consolidation of the matters is necessary because the claims are intertwined and none of the parties shall be prejudiced thereto.



3. The Application is opposed vide the defendant's replying affidavit sworn by Moses Mwangi Waweru on 11/5/2022. He avowed that save for the parties involved, the three suits are different in substance and content. He recounted that in the instant suit, the Plaintiff seeks a declaratory order as the owner of plot No. 4953/43/11 which she forcefully entered in December 2015; in ELC 15 of 2019 he sued the Plaintiff inter alia for restraining orders against the plaintiff and 5 others in respect of Land parcel Ndarugu/Kamunyaka/395 and in ELC 16 of 2019 he seeks an order for subdivision of Ndarugu/Kamunyaka/177 into two equal portions.
4. The Application was canvassed by way of written submissions; the firm of Waweru Nyambura & Co. Advocates filed submissions dated 10/6/2022 on behalf of the Plaintiff whereas the defendant's submissions dated 22/6/2022 were filed by the firm of Nyambura Mwangi Advocates.
5. The plaintiff submitted that the three matters are intertwined with similar and common questions of law. That the same witnesses are expected to testify in their claims and such consolidation will enable timeous resolution of the disputes. That the defendant's claim that the subject matters are different is not correct because the suit properties in contention are Ndarugu/kamunyaka/177 and Ndarugu/kamunyaka/395. Supporting that proposition, the cases of *Selecta Kenya Gmbh & Co KG v Chase Bank Kenya Ltd & 2 others* [2018] eKLR and Supreme Court Petition No. 14 *Law Society of Kenya v The Centre for Human Rights and Democracy* were cited.
6. The defendant summarized the prayers in the three matters as follows; that the Plaintiff herein seeks a declaration that she is the registered owner of Plot 4953/43/11; in ELC 15 OF 2019 the instant defendant seeks general damages for trespassing and restraining orders against the plaintiff and five others from interfering with Ndarugo/Kamunyaka/395 and lastly in ELC 16 of 2019 the instant defendant seeks equal subdivision of Ndarugo/Kamunyaka/395 (sic) in his favor and the late Bartholemew Joseph Waweru Titi. Reciting the Supreme Court case of *LSK (supra)*, the defendant argued that save for parties being the same in the said suits, the subject matters are distinct and consolidating them will result in a significant change of their nature and substance. That if the application is allowed, the defendant's right to a fair hearing would be violated. He also accused the plaintiff of the inordinate delay in filing the instant Motion which would result in further delay in the hearing and disposal of the suits.
7. The sole issue for determination is whether the Application is merited.
8. In determining the application I find that a summary of the parties claims in the 3 files will be useful.
9. Thika ELC 240 of 2018 – (formerly Nbi 182 of 2016) the plaintiff filed her Complaint dated 29/2/2016 as the widow of late Onesmus against the late Bartholomew Waweru (both were brothers who acquired properties jointly and severally in some instances). That the two brothers had saved monies and jointly purchased a number of properties and a presumption of trust arose between them. That Onesmus died in 1989 before transferring his shares in the said properties to his name. In particular, the suit is in respect of land known as L.R 4953/43/II in Thika Town registered in Bartholemew's name. That in determining ownership of the land, on 21/11/2015 the Chief and village elders held that the suit land ought to be solely owned by Onesmus' family. The plaintiff prays for an order of transfer of the suit land to her in terms of the said verdict and costs of the suit.
10. The suit is opposed. The defendant filed an amended Defence and counterclaim dated 25/11/2020. He maintained that Bartholomew exclusively purchased the suit land in 1970 and possessed it as such until his demise. In the Counter claim, he accused the plaintiff and her son for trespassing on the suit land and prayed for a permanent injunction against them and loss of income at Kshs. 60,000 monthly since 1/12/2015 until the Plaintiff's son vacates the suit land.



11. Thika ELC 15 of 2019 (formerly Nbi 843 of 2016) is currently being prosecuted by Moses Mwangi Waweru (suing as the legal representative of Bartholomew Joseph Waweru Titi) against the instant plaintiff, Dorothy Wamuyu Muchiri and five others. Vide an amended Complaint dated 28/10/2020 Moses Mwangi contends that his father, the late Bartholomew Waweru was the registered owner of parcel of land known as Ndarugo/Kamunyaka/395 and accused the 1st and 2nd Defendants of trespassing on the land and damaging a tea plantation thereon. He prays for a restraining order against the defendants from any further interference with Ndarugo/Kamunyaka/395; general damages for trespass; special damages and costs of the suit. According to the amended Complaint, the cause of action against the 3rd - 6th defendants is not clearly pleaded/specified.
12. The suit is opposed vide the joint statement of Defence and Counterclaim by all the defendants dated 14//12/2016 filed by Kamata & Co. Advocates. They contended that despite the late Bartholomew's sole registration as the owner of the suit land, the suit land was jointly purchased by the late Bartholomew Waweru and his late brother Onesmus Muchiri Titi – the husband of Dorothy Wamuyu Muchiri, the 1st defendant. They accused the late Bartholomew of reneging on the brotherhood trust between him and Onesmus by treating the entire suit land as his own prompting disputes over the land's ownership at the Chief's office. They denied trespassing on the suit land and in the counterclaim, prayed for a declaration that the late Bartholomew and the late Onesmus jointly purchased the suit land and other listed parcels of land but they were registered under Bartholomew's name under a common trust. That an order do issue for transfer of half the shares and accrued proceeds in the said parcels of land to Dorothy Wamuyu as the legal administrator and widow of the late Onesmus.
13. Thika ELC 16 of 2019 (formerly Nbi 842 of 2016) is also currently being prosecuted by Moses Waweru (suing as the legal representative of Bartholomew Joseph Waweru Titi) against the instant plaintiff, Dorothy Wamuyu Muchiri and Peter Githaiga Muchiri. Vide an amended Complaint dated 24/11/2020 Moses Mwangi contends that Peter is Dorothy Wamuyu's son. That in 1965 two brothers; the late Bartholomew and late Onesmus jointly purchased a parcel of land known as Ndarugo/Kamunyaka/177 measuring 4.96 Ha with each of them occupying/developing half share of the land in equal shares. That Onesmus passed on in 1988 but prior to that in 1987, Onesmus had filed a claim at Gatundu Land Dispute Tribunal Case No. 20 of 1987 seeking *inter alia* equal division of the land between the two brothers. That Bartholomew constructed his home and commercial units on his portion of the land and later when he wanted to sell a part of the land to Kenya Tea Development Authority (KTDA), he faced objection from the 1st defendant. That Bartholomew filed a suit Nbi 2924 of 1997 against the 1st defendant seeking subdivision of the land but the same was later dismissed for want of prosecution.
14. Para. 16 of that amended Complaint discloses that there is no other pending suit regarding the subject matter save for ELC 240 of 2018 in respect of plot no. L.R 4953/43/II. The plaintiff prays for restraining orders against the Defendants from half the portion of Ndarugo/Kamunyaka/177 belonging to Bartholomew; subdivision of Ndarugo/Kamunyaka/177 into two equal portions; compensation for damaged trees and crops and costs of the suit.
15. The suit is opposed. The defendants filed their joint defence and counterclaim dated 28/1/2019. They admitted that the Bartholomew and Onesmus jointly purchased the suit land but accused Bartholomew for solely utilizing the entire land and their attempts to demarcate the land in two equal portions have been in vain. They prayed for refund of half of the proceeds of the suit land since 1965 and an order for sub-division of the suit land into two equal portions in favor of the Plaintiff and defendants respectively.



16. In both Thika ELC 15 & 16 of 2019 Applications for joinder for joinder of interested partys were dismissed bycourt on 21/3/2022 & 17/2/2022 respectively. A similar application was filed herein and was also dismissed herein vide a Ruling dated 10/2/2022.
17. The instant Application is expressed under Order 24(3)(1) of the Civil Procedure Rules which provides for the Procedure in case of death of one of several Plaintiffs or of sole plaintiff. That provision is not applicable to the prayers sought in the Motion. That said I shall determine the application on its merit.
18. The Court’s power to order for consolidation of suits can also be traced to Order 11 Rule 3 of the Civil Procedure Rules that;

“ Case Management Conference [Order 11, Rule 3]

- (1) The purpose of a case management conference shall be to—
 - (a) promote the expeditious disposal of cases;
 - (b) afford the parties an opportunity to use alternative dispute resolution mechanisms to determine the case;
 - (c) afford the parties an opportunity to settle the case;
 - (d) determine any other matter relating to the management, hearing or disposal of the case;
 - (e) deal with pre-trial applications at first instance or formulate a timetable to deal with them as the Court may deem fit; and
 - (f) identify the issues for determination.”
19. Courts of Law have established widely accepted parameters be taken into account before an order for consolidation of suits is made. In Prem Lala Nabata & anor v Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551, the India Supreme Court held as follows: -

“It cannot be disputed that the court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

20. In the case of Law Society of Kenya v Center for Human Rights & Democracy & 12 others [2014] eKLR, the Supreme Court of Kenya pronounced itself thus: -

“ The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”



21. In the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2000] eKLR, the court held: -

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same Court where: -

- a. Same common questions of law or fact arises in both or all of them.
 - b. The rights or reliefs claimed in them are in respect of the same transactions;
 - c. For some other reasons, it is desirable to make an order for consolidating them.”
22. From the foregoing summaries of the three cases, it is not in doubt that the suits are currently being conducted by legal representatives of the son and wife of the deceased two brothers; Bartholomew and Onesmus respectively. The subject matters of the three suits are properties allegedly purchased by the said brothers in their lifetime. The rights and reliefs sought by the rival parties are therefore in respect of similar transactions. The averments in para. 7 of the defendant’s replying affidavit that there is no connection in the causes of action is thus not correct in light of the highlighted facts of the cases.
23. The suit land in Thika ELC 16 of 2019 for instance is Ndarugo/Kamunyaka/177 which the parties seek a common relief of sub-division of the land in two equal shares in line with their occupation/use of the land. In ELC 15 of 2019, the bone of contention is in respect of Ndarugo/Kamunyaka/395 where the plaintiff (Moses) seeks a declaration to own the entire land whilst the defendants have counterclaimed for half share in the land.
24. In the end I am persuaded that the Application is merited. I allow it as follows;
- a. An order of consolidation of this suit with Thika Elc 15 Of 2019 – Moses Mwangi Waweru(Suing as the personal representative of the estate of Bartholomew Joseph Waweru Titi – deceased) v Dorothy Wamuyu Muchiri & Anor. and Thika Elc 16 of 2019 - Moses Mwangi Waweru(Suing as the personal representative of the estate of Bartholomew Joseph Waweru Titi – deceased) vs. Dorothy Wamuyu Muchiri & Anor. be and is hereby made.
 - b. Noting that ELC 15 of 2019 and ELC 16 of 2019 are before Court 1 it is hereby ordered that this file be placed before the saidcourt for further orders and directions.
 - c. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT THIKA THIS 17TH DAY OF NOVEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Plaintiff - Absent

Waithera Mwangi for Defendant

Court Assistant – Kevin

