



REPUBLIC OF KENYA



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**Omanwa v Kanyuku & 2 others (Environment & Land Case
078 of 2022) [2022] KEELC 15533 (KLR) (20 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15533 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 078 OF 2022**

**JO MBOYA, J
DECEMBER 20, 2022**

BETWEEN

HEDRICK MASAKI OMANWA PLAINTIFF

AND

JULIUS KANYUKU 1ST DEFENDANT

CYRUS KIBERA MAINA 2ND DEFENDANT

EMBAKASI RANCHING CO LTD 3RD DEFENDANT

RULING

Introduction And Background

1. Vide Notice of Motion Application dated the May 9, 2022, the 1st and 2nd Defendants/Applicant herein (hereinafter referred to as the Defendants), have sought for various reliefs.
2. For clarity, the reliefs sought for are as hereunder;
 - i. That the application be certified urgent and be heard *ex parte* in the first instance. That the Honourable Court be pleased transfer from the Chief Magistrates Court, Milimani Commercial Courts to this Honourable Court the following Suits with this Suit:-
 - a. Milimani CMCC (ELC) 1410 of 2018, Anne Kiboi v Embakasi Ranching Co Ltd Samuel Mwangi Thuita & Cyrus Maina.
 - b. Milimani CMCC(ELC) 10128 of 2018, Cyrus Maina v Joseph Njoroge Macharia, National Land Commission & The Hon Attorney General



- ii. That the honourable court be pleased to grant an order to consolidate and/ or hear together the following Suits:-
 - a. Milimani ELC) E078 of 2022, Hedrick Masaki Omanwa v Julipis Kanyuku, Cyrus Kibera Maina & Embakasi Ranching Co Ltd & 2 Others
 - b. Milimani CMCC (ELC) 1410 of 2018, Anne Kiboi v Embakasi Ranching Co Ltd Samuel Mwangi Thuita & Cyrus Maina.
 - c. Milimani CMCC (ELC) 10128 of 2018, Cyrus Maina v Joseph Njoroge Macharia, National Land Commission & The Hon Attorney General.
 - iii. That the honourable court be pleased to issue Directions on the hearing of the three Suits, including amendments of Pleadings, if any.
 - iv. That the Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the Interest of Justice;
 - v. That the costs of this Application be provided for.
3. The instant application is premised and predicated on the various grounds which have been alluded to in the body thereof. Besides, the instant application is supported by the affidavit of the 2nd Defendant/ Applicant sworn on the May 9, 2022 and to which same has attached/annexed a bundle of documents, inter-alia copies of pleadings filed in respect of Milimani CMCC (ELC) No 1410 of 2018 and CMCC (ELC) No 10128 of 2018, respectively.
 4. Upon being served with the instant application, the Plaintiff/Respondent responded thereto vide Replying affidavit sworn on the May 31, 2022. For clarity, the Plaintiff/Respondent has also annexed assorted pleadings filed in respect of the suits which are currently obtaining before the Chief Magistrate's Court.
 5. Suffice it to point out that the 3rd Defendant/Respondent, did not file any response, either by way of Replying affidavit or Grounds of opposition.
 6. Be that as it may, when the instant Application came up for hearing, the Parties/Advocates for the Parties agreed to canvass and dispose of the Application by way of written submissions. In this regard, the Parties thereafter proceeded and filed their written submissions.
 7. For coherence, the 1st and 2nd Defendants/Applicants filed their written submissions dated the July 8, 2022, whereas the Plaintiff/Respondent filed written submissions dated the November 22, 2022.
 8. In this regard, it is appropriate to state that the written submissions filed by the respective parties forms part and parcel of the record of the Honourable court.

Submissions By The Parties:

a. 1st And 2nd Defendant's/applicant's Submissions:

9. The 1st and 2nd Defendants/Applicants filed written submission dated the July 8, 2022 and in respect of which same has isolated, highlighted and amplified Three (3) issues for consideration.



10. First and foremost, counsel for the 1st and 2nd Defendants/Applicants has submitted that there are two other suits, namely, Milimani CMCC (ELC) No 1410 of 2018 and CMCC (ELC) No 10128 of 2018, which are currently pending before the chief magistrate's court at Milimani commercial court.
11. Secondly, counsel for the 1st and 2nd defendants has further submitted that the said suits (details which have been enumerated vide the preceding paragraphs) touch and concern the same suit properties which are the subject of the current suit.
12. In the premises, counsel for the 1st and 2nd defendant/applicant has therefore contended that to the extent that the two suits touch and concern the same properties, it would be appropriate and expedient to have same tried together or better still consolidated with the current suit.
13. Thirdly, it has been submitted that the Parties involved in the two named suits, which are pending before the Chief Magistrate's court are the same as the Parties before this Honourable Court. In this regard, it has been contended that the Parties would therefore avert and abate costs if the suits are consolidated and tried together.
14. On the other hand, counsel for the 1st and 2nd Defendant has submitted that the intended consolidation of the suits which are pending in the Chief Magistrate's Court (subject to transfer thereof) with the suit herein, shall not occasion any prejudice or injustice to any of the Parties or at all.
15. In support of the foregoing submissions, counsel for the 1st and 2nd defendants/applicants has cited and quoted the decision in the case of *Republic v Paul Kihara Kariuki & 2 others ex-parte Law Society of Kenya* [2020] eKLR, *Samuel Ndungu Ngugi & others v Chief Land Registrar & another* [2021] eKLR, *Benson G Mutahi v Raphael Gichovi Munene Kabutu & 4 others* [2014] eKLR and *Chesinende Farmers Cooperative Society Ltd v Joel K Bet (being sued on his on behalf and on behalf of Chesinende Rural Craft) and 25 others* [2018] eKLR.
16. Premised on the foregoing, counsel for the 1st and 2nd defendants/applicants has therefore implored the Honourable court to inter-alia, transfer the two suits from the Chief Magistrate's Court and thereafter to consolidate same with the instant suit.

b. Plaintiff's/respondent's Submissions

17. The Plaintiff/Respondent filed written submissions dated the November 22, 2022 and in respect of which same has similarly, isolated and canvassed three issues for consideration by the Honourable court.
18. The first issue that has been canvassed and ventilated by counsel for the Plaintiff/Respondent touches on and concerns whether the Parties in the matters pending in the lower court are the same as the Parties in respect of the instant matter.
19. To this end, counsel for the Plaintiff/Respondent has pointed out that the Parties in the matters before the Chief Magistrate's court are separate and distinct from the Parties in respect of the subject matter, save for the 2nd Defendant/Applicant herein, who is a Party in the two named suits before the Chief Magistrate's Court.
20. Secondly, counsel for the Plaintiff/Respondent has submitted that the causes of action/properties which are the subject of dispute before the Chief Magistrate's Court are also separate and distinct with the Property which is the subject of the instant suit.



21. In respect of Milimani CMCC (ELC) No 1410 of 2018, counsel has pointed out that the dispute therein relates to Plot number V14113 (Parcel number 6128), which is being claimed by the named Plaintiff/Respondent therein.
22. Additionally, counsel for the Plaintiff has further contended that in respect of the said suit, the Plaintiff therein claims and avers that the 2nd and 3rd Defendants, have trespassed by fencing a portion of the suit property measuring 3meters by 36 meters, albeit without the consent of the Plaintiff.
23. In respect of Milimani CMCC (ELC) No 10128 of 2018, it has been pointed out that same relates to and touches on Properties known as V917, V918, V919 and V920 on one hand and L26 on the other hand. For clarity, it has been pointed out that none of the said properties corresponds and/or relates to the suit property which was hitherto known as Plot Number B302.
24. Notwithstanding the foregoing, counsel for the Plaintiff has further added that even the cause of action alluded to and captured vide Milimani CMCC (ELC) No 10128 of 2018 is also distinct from the cause of action in respect of the subject matter.
25. Thirdly, counsel for the Plaintiff/Respondent has submitted that where a suit has been filed before a court without the requisite Jurisdiction, such a suit cannot be transferred to a court with competent Jurisdiction or at all.
26. To vindicate the foregoing submissions, counsel for the Plaintiff/Respondent has cited and relied on various decisions *inter alia*, [Kenya Ports Authority v Modern Holdings \(EA\) Ltd](#) [2017] eKLR and [Joseph Muthii Kamau & another v David Mwangi & another](#) [2013] eKLR.
27. In view of the foregoing, counsel for the plaintiff/respondent has therefore implored the Honourable court to find and hold that the current application has neither met nor satisfied the requisite conditions to warrant inter-alia, the intended transfer and consequential consolidation with the instant suit.
28. In a nutshell, counsel for the plaintiff/respondent has therefore submitted that the instant application is devoid of merits and thus ought to be dismissed.

Issues For Determination

29. Having reviewed and evaluated the application May 9, 2022, and having reviewed the Replying Affidavit filed in opposition thereto and upon considering the written submissions filed on behalf of the respective Parties, the following issues do arise and are thus germane for determination;
 - i. Whether the causes of action in respect of Milimani CMCC (ELC) 1410 of 2018 and 10128 of 2018, on one hand are the same as the cause of action in respect of the instant matter.
 - ii. Whether the 1st and 2nd Defendants/Applicants have met and satisfied the requisite threshold for consolidation of the named suits.

Analysis And Determination

Issue Number 1 and 2;

Whether the causes of action in respect of Milimani CMCC (ELC) 1410 of 2018 and 10128 of 2018, on one hand are the same as the cause of action in respect of the instant matter.

Whether the 1st and 2nd defendants/applicants have met and satisfied the requisite threshold for consolidation of the named suits.



30. The subject application primarily seeks the order to have the two named suits which are currently pending before the Chief Magistrate’s Court, namely, Milimani CMCC (ELC) 1410 of 2018 and 10128 of 2018, to be transferred and thereafter consolidated with the instant suit.
31. Essentially, the ultimate goal to be achieved vide the current Application is to have the two named suits pending before the Chief Magistrate’s Court to be consolidated with the subject suit for hearing and eventual disposal.
32. To the extent that the ultimate goal is consolidation of the named suits, it is therefore imperative to state and underscore that the Applicants herein would be called upon to prove and establish inter-alia, that the causes of action and the Parties in the named suits are same or similar to the one beforehand, as precursor to such consolidation.
33. In any event, the law to be applied prior to and or before any two or more named suits are consolidated was elaborately discussed and underlined vide the case of *Republic v Paul Kihara Kariuki & 2 others Ex-parte Law Society of Kenya* [2020] eKLR, where the honourable court stated and observed as hereunder;

11. The principles of consolidation of suits are settled. They were best explained in *Stumberg and another v Potgeiter*[1] as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

12. The Supreme Court Case of India in *Prem Lala Nahata & v Chandi Prasad Sikaria*[2] had this to say: -

“...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose 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 to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

13. In *Law Society of Kenya v The Centre for Human Rights and Democracy*,[3] the Supreme Court of Kenya had this to say about consolidation of suits: -

“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 meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.” (Emphasis added)



14. From the above jurisprudence, a broad principle emerges relating to consolidation of suits. That is, where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered. However, it is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical.
34. In my humble view prior to and before granting an order for consolidation of two or more suits, it is incumbent upon the court to ascertain and authenticate the existence of various issues, inter-alia,
- i. Whether the Parties in the named/related suits are the same/similar to the existing suit in respect of which consolidation is sought.
 - ii. Whether the causes of action/issues that belie the named suits are similar/same to the issues obtaining in the suit in respect of which consolidation is sought.
 - iii. Whether there are common questions of law and fact which cut across both/all the named suits to warrant their consolidation.
 - iv. Whether the reliefs sought in respect of the named suit are related to and bear close semblance with the relief sought in the suit in respect of which consolidation is sought.
 - v. Whether the intended consolidation would enable the issues in dispute to be tried and determined expeditiously and cost effectively.
 - vi. Whether the Parties involved shall not be exposed to hardship, prejudice or Injustice if the impugned consolidation is undertaken.
35. Premised on the various aspects and issues which I have distilled in terms of the preceding paragraph, I am now minded to interrogate the various suits, which are pending before the chief magistrate's court and to ascertain whether same bear any semblance to the current suit before this court.
36. Firstly, I wish to deal with Milimani CMCC (ELC) No 1410 of 2018. In respect of the said matter, it is appropriate to state that the Plaintiff therein is one Ann Wairimu Kiboi and same has sued inter-alia Samuel Mwangi Thuita and Cyrus Maina.
37. On the other hand, it is imperative to note that the cause of action therein relates to a property known as V14113 (6128), which the named Plaintiff contends to have been trespassed upon by the 3rd Defendant (Cyrus Maina) by fencing a portion thereof measuring 3 meters by 36 meters, albeit without the consent of the named Plaintiff.
38. In any event, the reliefs that has been sought at the foot of the said suit relates to a declaration that the named Plaintiff is the registered proprietor of Plot No V14113 (Parcel number 6128) and thereafter an order to restrain the Defendants from interfering with the named Plaintiff's occupation and possession of the suit property, whose details have been duly amplified.
39. Suffice it to point out that the suit property, which is the subject of litigation vide Milimani CMCC (ELC) 1410 of 2018, is separate and distinct from the cause of action obtaining in respect of the subject matter.



40. Additionally, it is also appropriate to state and underscored that the Parties therein are significantly different save for the 2nd Defendant herein, who is a common figure in both the named suits and the current one.
41. Finally, the nature of the reliefs sought vide the named suit (Milimani CMCC (ELC) No 1410 of 2018) is also separate and distinct from the reliefs, which are sought at the foot of the instant suit.
42. In view of the foregoing observation, I am of the humble view that any of the intended consolidation between Milimani CMCC(ELC) No 1410 of 2018 and the current suit shall not facilitate proportionate and expeditious determination of (sic) the subject suit or otherwise.
43. In respect of Milimani CMCC (ELC) No 10128 of 2018, it is imperative to note that the said suit has been mounted by the current 2nd Defendant as against inter-alia, National Land Commission and the Attorney general. For clarity, neither of the Respondents herein nor the 1st Defendant in respect of the subject matter, is a Party thereto.
44. Notwithstanding the foregoing, the claims at the foot of the said suit touches on and concern Properties, namely, Plot Numbers V917, V918, V919 and V920, respectively, which are being claimed as against the named Defendants in the said suits.
45. I beg to point out that the subject suit in respect of the matter herein, which was hitherto known as Plot number B302 (currently L.R No Nairobi/Block 105/6130 Ruai), is not one of the Properties that is being disputed/ contested before the Chief Magistrate's Court.
46. Other than the foregoing, it is also imperative to underscore that the Plaintiff herein who lays a claim to ownership over and in respect of LR No Nairobi/Block 105/6130, is not a Party to the said suit before the Chief Magistrate's Court.
47. In the premises, it is hard to fathom and imagine what common issues of facts and (sic) of law that exists between the named suits before the Chief Magistrate's Court and the instant suit, to warrant the intended consolidation.
48. To the contrary, it is evident that there is a clear distinction and dichotomy between the named suits which are pending before the Chief Magistrate's Court and the one herein. For clarity, the causes of action and the concerned Properties, are all distinct and separate.
49. Premised on the forgoing, I come to the considered view and conclusion that the 1st and 2nd defendants/applicants have neither met nor established the requisite threshold to warrant the intended consolidation.
50. In any event, it is also appropriate to state and underscore that given the clear dichotomy between the two named suits pending before the chief magistrate's and the instant suit, any attempt to consolidate same would only convolute the issues for determination and thereby exacerbate the controversy.
51. Consequently, it is evident and apparent that the intended consolidation is neither in the interests of justice nor shall same culminate into the efficient and proportionate utilization of the precious judicial time.

Final Disposition:

52. Having calibrated on the issues that were mentioned, identified and highlighted in the body of the subject ruling, it is now appropriate to render the final and dispositive orders.



53. Nevertheless, I must point out that whereas consolidation of suits which raise and espouse common issues of law and facts, ought to be allowed, the honourable court must exercise due caution/ circumspection and avert convoluting issues for determination and thereby defeating the overring objective as setout vide section 1A and 1B of The Civil Procedure Act, chapter 21 laws of Kenya.
54. Be that as it may, I find and hold that the application dated the May 9, 2022, is devoid and bereft of merits.
55. Consequently and in the premises, the impugned application be and is hereby dismissed with costs to the plaintiff/respondent.
56. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER 2022.

OGUTTU MBOYA

JUDGE

In the Presence of;

Benson - Court Assistant.

Mr. Moindi for the Plaintiff/Respondent.

Mr. Macharia Nderitu for the 1st and 2nd Defendants/Applicants.

Ms. Chemutai h/b for Kiarie for the Iroposed interested Parties.

N/A for the 3rd Defendant/Respondent

