



REPUBLIC OF KENYA



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**Masha v Mango & another (Land Case 7 of 2013)
[2022] KEELC 15483 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15483 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 7 OF 2013
LL NAIKUNI, J
DECEMBER 7, 2022**

BETWEEN

BEATRICE MBEYU MASHA PLAINTIFF

AND

MOHAMED MANGO 1ST DEFENDANT

ABDALLA GUDE 2ND DEFENDANT

RULING

I. Introduction

1. The plaintiff/applicant herein, Beatrice Mbuyu Masha, moved this Honorable Court through filing of the Notice of Motion application dated March 31, 2022 for its determination. The application was brought under the provisions of sections 1A, 1B, 3A and 63 of the [Civil Procedure Act](#) cap. 21 of the Laws of Kenya.

II. The Plaintiff/Applicant's case.

2. The Plaintiff/Applicant sought for the following orders: -
 - a. That an order be issued to the Deputy Registrar and the firm of Opolu & Co. Advocates to provide file no. Civil Suit No. 356 of 2010 (O.S.) for purposes of consolidation as ordered by the late Justice Mkunya on the February 27, 2013.
 - b. That an order be issued for construction of a skeleton file, in Civil Suit No. 356 OF 2010 (O.S.) for purposes of reconstruction or production of that file in this file for consolidation as ordered by the court in the February 27, 2013.
 - c. That an order be made for the expedite hearing and determination of this suit on merit without further delay.



3. The plaintiff/applicant's application was premised on the testimonial facts, grounds and averments of the Seven (7) Paragraphed supporting affidavit of Beatrice Mbeyu Masha sworn and dated on April 1, 2022 together with two (2) annexures Marked as "BMM – 1 & 2" annexed thereof. She deposed being the Plaintiff/Applicant herein and well conversant with the matter herein.
4. She averred that she was made to understand that the matter was listed for dismissal for want of prosecution. Further, that she was always ready and willing to have this matter heard and determined. On the February 27, 2013, the late Hon. Justice Mukunya ordered Civil file no. 356 of 2010 to be consolidated with this file but to this day, the said Court file could not be found. She informed Court having written several letters to that effect in vain, copies of which she produced and marked as "BMM – 1".
5. On the September 19, 2018, Hon. Justice Yano while delivering a ruling where the same issues were highlighted. She annexed a copy of the said ruling by Justice Yano Marked as "BMM – 2".
6. She deposed that for many years for various reasons the matter could not be heard in circumstances beyond her control, including missing pleadings, missing files, transfer of judges and recently the global Corona Virus Pandemic. She prayed for the matter to be heard on merit as it concerned land.

III. The responses by the Defendants

7. On April 21, 2022, the Learned Counsel for the defendants, the Law firm of Messrs. Stephen (aka Suleiman) Macharia Kimani Advocates filed a six (6) pointer Grounds of Opposition dated the April 20, 2022. They contended that:-
 - a. In an adversarial system like ours, the plaintiff's application was misconceived, and otherwise an abuse of the court process, for vainly soliciting the assistance of the Deputy Registrar and a disinterested third party to prosecute her case.
 - b. The plaintiff/applicant had not pretended to explain the delay in not prosecuting the matter since the date of the consolidation order reportedly made on March 27, 2013.
 - c. The consolidation order was an antithesis of tardy hearing and could not be an excuse for any party to the consolidated suits not to prosecute his/her suit. In any event, the plaintiff/applicant had never moved the court for de-consolidation or parallel hearing of the two suits.
 - d. The plaintiff/applicant who claimed to be amongst the plaintiffs in the other suit (i.e. ELC (Mombasa) NO. 356 of 2010 (OS), could not regularly seek reconstruction of that file on bed of this file as the defendants could not 'inter alia' vouch for copies of whatever documents she may have introduced as the record of the court in the other matter. Moreover, the plaintiff/applicant had not explained the reason the Honorable Court had not moved in that other file for whatever order that may on legal advice, be necessary to give effect to the consolidation order.
 - e. The plaintiff/applicant went to sleep after the ruling of the court on September 19, 2018, and the ensuing delay was both inordinate and unexplainable.
 - f. The Limitation of Actions Act had caught up with the plaintiff/applicant's action

IV. Analysis and Determination

8. I have considered all the pleadings in this matter arisen from the bounds of the Notice of Motion application dated March 31, 2022 by plaintiff/applicant herein and in response by the defendant/



respondent vide the filed Grounds of Opposition herein, the relevant provisions of the Constitution of Kenya 2010 and statutes thereof.

9. The main three (3) issues for determination are: -
- a). Whether an order should be issued for the construction of a skeleton file in Civil Suit ELC (Mombasa) No. 356 of 2010 (OS) for purposes of re – reconstruction; or
 - b). Whether there should be re – production of the said file for purposes of the consolidation of these two in these Suit in accordance with the Court Orders made on the February 27, 2013.
 - c). Who will bear the Costs of the application.

ISSUE No. a). Whether an order should be issued for the construction of a skeleton file in Civil Suit ELC (Mombasa) No. 356 of 2010 (OS) for purposes of re – reconstruction.

10. It is well established that matters of re – construction of skeletal files and consolidation are at the discretion of the High Court. The said discretion should be exercised judiciously and not capriciously. These orders are expressly granted upon court being moved through a substantive motion. The principles and parameters regarding the re – construction of files is done through a court order. The order is granted with utmost circumspect and prudence as it is one that is likely to be abused and/or misused by parties to the chagrin of the other party to defeat the wheels of justice or stealing the match. It is commonly known as sharp practice. Ideally, an applicant has to persuade court that the filed court file has completely gone missing and despite all efforts made through numerous correspondences and otherwise the file cannot be traced from its usual safe keeping place at the Court’s Registry.
11. Further, the applicant as part of the application, has to prepare a duplicate of all the pleadings within their custody and the ones envisaged to have been filed in the main court file without making any extra additions likely to prejudice the other party. The prepared duplicate bundle of documents have to be filed and served for thorough scrutiny by court and the other party to ensure that these indeed were the documents and proceedings filed in the original court file. At this juncture, the other Party is always at liberty to reject or even make additional document if they so wish. It is upon having gone through this intense process that the orders for the re – construction of the skeletal file would be allowed by the Honorable Court.
12. The plaintiff/applicant averred that on the February 27, 2013, the late Hon. Justice Mukunya ordered the Civil file no. 356 of 2010 to be consolidated with this file. But despite that order being made to this day, the said court file could not be found. She informed court having written several letters to that effect in vain, copies of which she produced and marked as “BMM – 1”. Further to this, on the September 19, 2018, Hon. Justice Yano while delivering a ruling, the same issues were highlighted. She annexed a copy of the said ruling by Justice Yano Marked as “BMM – 2”. She deposed that for many years for various reasons the matter could not be heard in circumstances beyond her control, including missing pleadings, missing files. From a quick assessment of the surrounding facts and inferences, the Court is persuaded that the plaintiff/applicant has made out a clear case for the re – construction of the Court file – Civil Case Number ELC (Mombasa) No. 356 of 2010. Certainly, by all means possible and efforts made, the court is convinced that this particular original or otherwise file cannot be traced from its place of safe keeping within the registry of the ELC (Mombasa) Court at all.

ISSUE NO. b). Whether there should be re – production of the said file for purposes of the consolidation of these two in these Suit in accordance with the court Orders made on the 27th February, 2013.



13. The legal principles as regards the consolidation of files have been dealt with so elaborately by the provisions of the law and myriad of court decisions. To begin with, in a fundamental way, the Civil Procedure Rules mandates this court to consider consolidation of suits with a view of furthering expeditious disposal of cases under the provision of section 81 (h) of the Civil Procedure Act, Cap. 21 and Order 11 Rule 3 (1)(h) of the Civil Procedure Rules, 2010. As indicated, the Civil Procedure Rules which mandates courts to consider consolidation of suits is guided by the following:-
- a. Do the same questions of law or fact arise in both cases?
 - b. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?
 - c. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?
14. Ideally, one of the issues that a trial court considers during the pre - trial directions and conferences under Order 11 Rule 3 (1) (h) of the Civil Procedure Rules, 2010 is the consolidation of suits in appropriate cases. This is with a view to furthering the expeditious disposal of the cases and to ensure proper case management. I dare add for avoidance of multiplicity of suits which may lead to courts eventually rendering embarrassing, confusing and conflicting decisions over the same subject matter.
15. The court will now proceed to explore the journey upon which courts in its many decisions have addressed and held on the issue of consolidation of suits. The principles involved when a court is to consider consolidation of suits were amply set out in the case of “*Nyati Security Guards & Services Limited v Municipal Council of Mombasa* [2004] eKLR as follows:
- “The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-
- i. Some common question of law or fact arises in both or all of them; or
 - ii. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
 - iii. For some other reason it is desirable to make an order for consolidating them.”
16. Additionally, the principles of consolidation of suits was re-stated in the case of:- “*Stumberg and another – versus - Potgeiter* 1970 E.A. 323 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”
17. Further, in the Indian case of “*Brij Kishore v Bir Singh & others* At The High Court of Punjab And Harana (L.R 5922 of 2013 Justice Paramjeat Singh quotes the following from the Supreme Court Case of ‘*Prem Lala Nabata & another v Chandhi Prasad Sikaria*, (2007) 2, Supreme Court Cases 551 at paragraph 18:-
- “It cannot be disputed that the court has power to consolidate suits in appropriate cases. 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”

18. The court wishes to further refer to the case of “[*Law Society of Kenya v The Centre for Human Rights and Democracy*](#), Supreme Court of Kenya, Petition No. 14 of 2013, 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 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.”

19. The task before this court is therefore one of comparing the suits sought to be consolidated, to determine whether the same involve common questions of law or fact, whether the reliefs claimed arise out of the same transaction or whether it is convenient and efficient to pursue the same in a consolidated suit.
20. Now this court wishes to directly proceed to apply these elaborate and graphic legal principles to the instant case. From the surrounding facts and inferences herein, From the facts of the case, the common factors in the two suits are that the plaintiff/applicant and the suit property which is all that parcel of Land known as Land Reference Numbers Plot No. 173/MN, as per annexure as “BMM – 2” by the plaintiff/applicant. It is true that the plaintiff/applicant is also a party to the Civil case ELC No. 356 of 2010 as a member of the Chembani Plot No. 173/11/MN. Nonetheless, the court has taken cognizance to the fact that the defendants are not party in the Civil suit ELC No. 356 of 2010.
21. In that case which was commenced by way of an originating summons, the plaintiffs are seeking that they have become entitled to ownership of portions of land out of land reference Plot No. Mainland North/section II/173 (Cr. No. 1086) by way of Land Adverse possession taking that as they allege to have been in possession of the said parcel of land continuously and without any interruption for a period of more than twelve (12) years as stipulated by statutory requirements in such cases. They sought for the title held by the defendants to be extinguished through cancellation and consequently the plaintiffs should be the duly registered as the bona fide proprietors of the said suit property by virtue of the Land doctrine of adverse possession.
22. In this current case which was commenced by way of chamber summons and a notice of motion application, the Plaintiff who is a Plaintiff in the Civil suit ELC No. 356 of 2010 is seeking for an order of permanent injunction to be issued against the defendants restraining them from dwelling on all that parcel of land known as Land Reference Numbers Plot no. 173/MN. Clearly, there exists a lot of similarities on all these matters and the safest solution is to cause these suits to be consolidated as envisaged by law and precedents herein.
23. However, this could not have been done earlier with respect to these two cases sought to be consolidated because the Civil suit ELC No. 356 of 2010 (OS) was filed on October 12, 2010 while this current case having been filed on January 17, 2013 which begs the question where was the plaintiff/applicant the whole of this entire period to have filed this application only on the February 27, 2013. To worsen the matter, and the court fully concurs with the submission tendered by the Learned Counsel for the defendant to the effect that upon being granted the orders by this court, the plaintiff/applicant



went to deep slumber and silent until this current application seeking the same orders that were granted in 2013.

24. By and large, the main issue here is whether the instant suit is amenable to consolidation with the Civil Suit ELC (Mombasa) No. 356 of 2010. Considering all the above, it is my view that this is a proper case for consolidation. In the long run, the issue at hand for the determination by this honorable court will be the legal ownership of land parcel No. Plot No. Mainland North/sectionII/173 (Cr.No.1086). I discern that it will not be an efficient of available judicial and administrative resources for one court to determine that issue differently in this case and another court to determine it differently in the other case.
25. I am not in agreement with the grounds of opposition by the Learned Counsel for the defendant that the remedy lies to striking out this case because from the court record the plaintiff's advocate on record has always been present to execute this case.

IV. Conclusion and Disposal.

26. Ultimately, from the above detailed analysis of facts and law prefacing of facts and law pertaining to this application I find the Notice of Motion application dated March 31, 2022 by the Plaintiff has merit and should be and is hereby allowed. Specifically, the court grants the following orders upon fulfilment of the stated pre - conditions. These are:-
 - a. That the Notice of Motion application dated March 31, 2022 be and is hereby allowed with costs in its entirety.
 - b. That order be and is hereby made to the Environment & Land Court, Deputy Registrar and the Law firm of Messrs. Opolu & Co. Advocate to provide file no. Civil Suit No. 356 of 2010 (O.S.) for purposes of consolidation as ordered by the late Justice Mkunya on the February 27, 2013 within the next fourteen (14) days from this date.
 - c. That an order be issued for construction of a skeleton file, in Civil Suit No. 356 of 2010 (O.S.) for purposes of reconstruction or production of that file in this file for consolidation as ordered by the court on the February 27, 2013 within the next Sixty (60) days from this date.
 - d. That an order be and is hereby made for the plaintiff to have filed a duplicate bundle of documents for purposes of the re – construction of the skeletal file of the civil suit ELC (Mombasa) no. 356 of 2010 (OS) within the next forty five (45) days from this date.
 - e. That this case and civil suit ELC (Mombasa) Case No. 356 of 2010 are hereby ordered consolidated for purposes of being heard and determined together and the hearing shall be on the basis of the pleadings already filed in the two suits subject to any subsequent amendments.
 - f. That this file shall be the lead file for purposes of filing any further pleadings and recording of proceedings.
 - g. That for expediency sake, the consolidated suit should be fixed for hearing within the next one hundred and eighty (180) days from this date that is on May 15, 2023 and a mention on February 27, 2023 for Pre – Trial Conference under the provision of Order 11 of the [Civil Procedure Rules, 2010](#) and to ascertain compliance of these orders.
 - h. That failure to adhere with any of the above pre – conditional orders and timelines, the Notice of Motion application dated March 31, 2022 will stand dismissed automatically time being of essence.



i. That costs shall be in the cause.

27. IT IS SO ORDERED ACORDINGLY.

RULING DELIVERED, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF DECEMBER, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIRONMENT AND LAND COURT AT MOMBASA

In the presence of:

a. M/s. Yumna, Court Assistant;

b. No appearance of an Advocate or party for the Plaintiff/Applicant despite notice having been issued.

c. No appearance for an Advocate or party for the Defendants despite of notice having been issued.

