



**Tukuro v Wanyang' & another (Environmental and Land Originating
Summons 12 of 2023) [2025] KEELC 2997 (KLR) (1 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 2997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 12 OF 2023**

MN MWANYALE, J

APRIL 1, 2025

BETWEEN

DANIEL R. TUKURO PLAINTIFF

AND

AMMOES MOURICE WANYANG' 1ST DEFENDANT

JACKSON LETAANI YIAMBOI 2ND DEFENDANT

RULING

1. Coming up for determination is the Notice of Motion Application dated 20.11.2024 seeking consolidation of this suit with Kilgoris ELC No. E013 of 2023 and the suits be heard together/and/or simultaneously. The application was filed by the Defendants.
2. The Application is based on the grounds interalia;
 - i. That both suit touch on claims and rights over a common parcel of land otherwise known as L.R No. Transmara/Olontare/223, the parties litigating over the same subject matter as pertains to right, occupation and title to land against each other.
 - ii. That Kilgoris ELC No. E013 OF 2023 is a cross suit (counter-claim) as the plaintiff herein, mounted separately vide way of plaint in so far as counter-claim cannot be impleaded by way of replying affidavit in answer to summons.
 - iii. If the files are tried separately there shall arise the issue of subjudice and/or *Resjudicata*.
 - iv. It will save the courts precious and limited resources if the consolidation were to be allowed.
 - v. That the rules permit consolidation of suits and the court equally has discretion to direct that one of the suits to operate as plaint while th other as defence/counter-claim.



3. In opposition to the application is the Replying affidavit by the Plaintiff/Respondent Mr. Daniel R. Tukero who deposes that the present suit in E012/2023 is pursuant to the doctrine of adverse possession over Transmara/Olontare/223 while the suit in E013/2023 instituted by the Applicants herein seeks their eviction from the suit property and the Defence and Counter-claim in Kilgoris E013/2023 is founded on the doctrines of constructive trust and proprietary estopped.

That the defence and counter-claim relate to a dispute between a buyer and seller of land, and hinges on unjust enrichment, which claim is distinct and separate from the current suit hence no common questions of law and facts arises in the two suits and there is thus no duplication of prayers in both suits.

4. The court directed the disposal of the application by way of oral submissions, whereat Ms. Opondo learned counsel argued the application on behalf of the 1st and 2nd Defendants/Applicants while Mr. Ole Kamwaro learned counsel submitted for the Plaintiff/Respondents
5. In her submissions Ms. Opondo argued the court to allow the application as both suits involved Transmara/Olontare/223 and the parties litigating were the same. That common issues of law and facts were present in both suits which involved occupation and title to the suit property, in that whereas in E012/2023 the Plaintiff sought adverse possession, in E013/2023 the Plaintiff sought eviction of the Plaintiffs; hence E013/2023 was filed as a cross suit.

In E013/2023 there was counter-claim.

6. In support of her submissions, she placed reliance on the decisions in the case of *Benson G. Mutai v Raphael Munene*, as well as *Saitoti Ole Lukumwon v Robert Omweka George* where in both cases the court allowed consolidation of an OS with a plaint for eviction.
7. On his part Mr. Ole Kamwaro placed reliance on the Replying Affidavit deponed on 24.01.2025 and submitted that the suits had distinct prayers and different causes of actions, in E013/2023 there was a counter-claim based on constructive Trust. He further submitted that Order 25 allowed consolidation where they were common issues of law and facts, and that issues of constructive Trust, unjust enrichment and proprietary estopped were different issues from the issues of adverse possession and thus no common issues to warrant consolidation. He placed reliance on the decisions in the case of *County Council of Nakuru v Simon Ole Kimenta*, and equally the decision in the case of *LSK v Centre for Human Rights and Democracy*.
8. He urged the court to dismiss the application.
9. In her brief response, Ms. Opondo indicated that this suit was filed first, and E013 filed a month later.
10. Before framing issues for determination, the courts note the following undisputed facts;
 - i. The suit property in both suits is Transmara/Olontare/223.
 - ii. In *E012/2023*, the Plaintiff is Mr. Daniel R. Tukero who is the Defendant in E013/2023, Ammoes Mourice Wanyang and Jackson Letaani Yiamboi are the Defendants in E012/2013 while Mr. Jackson Letaani Yiamboi is the Plaintiff in E013/2023 and both Mr. Jackson Letaani Yiamboi and Mr. Ammoes Mourice Wanyang are the Defendants in the Counter-claim filed by Daniel R. Tukero.

Issues For Determination

11. Having analysed the application, the affidavits and heard the submissions of the learned counsels.
The court frames the following issues for determination;



- i. Whether or not the Application meets the criteria for consolidation?
- ii. Whether or not the Application is merited?
- iii. What orders ought to issue?
- iv. Who bears the costs of the suit?

Analysis And Determination

12. As observed in the foregoing paragraphs both suits relate to the same parcel and are litigated by the same parties.
13. Mr. Kamwaro's main objection for the joinder is that the counter-claim he filed in E013/2023 raised the issue of constructive Trust and/or proprietary estoppel which is a different legal issue from the adverse possession that his client raised in this matter, and that as such there is no common issues or facts and law; for a consolidation to be considered.
14. The issue of constructive Trust and Proprietary Estopped have been raised as defences in E013/2023 which suit seeks eviction.
15. As will be demonstrated shortly a claim of adverse possession can also be raised as a defence in an eviction suit, just like the issue of proprietary Estopped and Constructive Trust. In *Gulam Miriam Noorden v Julius Karisa Charo*, as well as the decision in *Chevron (K) Ltd v Harrison Charo Shutu*, the courts dealt with the said issues of adverse possession as a foundation of a claim and as a defence; in an eviction suit.
16. As observed in *Gulam Miriam Noorden v Julias Charo Karisa* where the claim was raised in the defence, the court in rejecting the objection to the procedure observed as follow;

“where a party like the Respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by Originating summons, it has also been held that the procedure of originating summons is not suitable for resolving complex and contentious questions of law and fact. Be that as it may, and to answer the question whether it was erroneous to sanction a claim of adverse possession only pleaded in the defence, her refer to the case of *Wabala v Okumu* which like this appeal the claim for adverse possession was in the form of a defence in an action for eviction. The Court of Appeal in upholding the claim did not fault the procedure. Similarly, in *Bayete Co. Ltd v Kosgey* where the plaint made no specific plea of adverse possession, the plea was nonetheless granted.”
17. Hence Constructive Trust and adverse possession, both being available defences to a claim of eviction are common issues of law.
18. Mr. Kamwaro in opposition to the consolidation cited the decision in the case of *Law Society of Kenya v Centre for Human Rights and Democracy*. I have perused the said decision specifically the Supreme Court decision being Petition Non. 14/2013, the court in allowing consolidation observed interalia;

“it would serve the interests of justice where the parties are the same, and the Central issue is the same although worded differently”.



19. As already found and held, there is a common is law and fact and the parties are the same, the court further finds there would be no injustice occasioned to the respondent, hence it is th court's view that the Applicant has met the criteria for consolidation in answer to issue 1 and that the application is merited and therefore allows the Application in terms as follows;

The upshot is that the application is allowed in terms

- i. That E012/2023 and E013/2023 Kilgoris are hereby consolidated to be heard together as one suit, with E012/2023 being the lead file.
- ii. The Plaintiff in E012/2023 shall consolidate his claim of adverse possession and his counter-claim in E013/2023 of Constructive Trust and proprietary Estoppel as one suit against the Plaintiff in E013/2023 who together with the Defendant in the counter-claim shall be defendants in the consolidated suit.
- iii. Parties to amend the pleadings to reflect the consolidation within 30 days from today.
- iv. Each party shall have 15 days, to effect the amendments.
- v. Costs of the application shall be in the cause.

DATED AT KILGORIS THIS 1ST DAY OF APRIL, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel

Mr. O.M Otieno for Applicant

Mr. Ole Kamwaro for the Respondent

