



REPUBLIC OF KENYA



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Mbuti & 632 others v Malili Ranch Limited & 5 others (Environment & Land Case 2 of 2010) [2023] KEELC 417 (KLR) (6 February 2023) (Ruling)

Neutral citation: [2023] KEELC 417 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 2 OF 2010
CA OCHIENG, J
FEBRUARY 6, 2023

BETWEEN

STEPHEN KING'OO MBUTI 1ST PLAINTIFF
JOSHUA MAWEU KILONZO 2ND PLAINTIFF
BENJAMIN KYALO MUTHOKA 3RD PLAINTIFF
RAJABU MUTHUSI MOHAMED 4TH PLAINTIFF
SIMION MUIA MUINDI 5TH PLAINTIFF
MUTWIW'A MUTETEI & 627 OTHERS 6TH PLAINTIFF

AND

MALILI RANCH LIMITED 1ST DEFENDANT
**CABINET SECRETARY TO MINISTRY OF INFORMATION,
COMMUNICATIONS AND TECHNOLOGY (FORMERLY PERMANENT
SECRETARY, MINISTRY OF INFORMATION & COMMUNICATIONS) 2ND
DEFENDANT**
**CABINET SECRETARY TO NATIONAL TREASURY OF KENYA (FORMERLY
PERMANENT SECRETARY TO TREASURY OF KENYA) 3RD DEFENDANT**
KONZA TECHNOPOLIS DEVELOPMENT AUTHORITY 4TH DEFENDANT
ATTORNEY GENERAL 5TH DEFENDANT
**REGISTRAR OF TITLES, LANDS REGISTRAR, NAIROBI LANDS
REGISTRY 6TH DEFENDANT**



RULING

1. What is before court for determination is the plaintiffs/applicants' notice of motion application dated the March 8, 2022, where they seek the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That the above High Court Machakos ELC No 2 of 2010, *Stephen King'oo Mbuti & others v Malili Ranch Ltd* and others, the said Makueni ELC Petition No E 2 of 2020 *Malili Ranch Limited v The County Government of Makueni & others* be consolidated and/or transferred to this court and be heard and disposed of together in the above Machakos suit.
 5. That such other or further relief this honourable court deems fit and just to grant.
 6. That costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Benjamin Kyalo Muthoka where he deposes that he is familiar with the two suits being Machakos ELC No 2 of 2010 and Makueni ELC Petition No E 2 of 2020 *Malili Ranch Limited v The County Government of Makueni & others**. He explains that the instant suit was filed in 2010 while during its pendency, the Makueni Petition No E 2 of 2020 was filed and the pleadings were never served on them nor their advocates on record. He claims they only learnt of the existence of the Makueni suit when one of the parties therein sought legal representation from their present advocates on record. He avers that the principle issue raised in the Makueni suit is in tandem with the issues raised in the instant suit. He explains that, by its own admission, in the petition, the petitioners in the Makueni case, brought the suit on its behalf and on behalf of its members who had been allocated or sold parcels of land within Malili Trading Centre being portions of LR No 4902. Further, that the suit land belonged to shareholders, hence the need for the Makueni petition and the instant case to be consolidated. He insists that the petitioner in the Makueni suit and the 1st defendant in the instant suit only retained nominal title interest in the already subdivided land.
3. In response, the 1st defendant filed a replying affidavit sworn by Leonard Kyania Kitua, its director where he deposes that the application is not only unmerited and misconceived but also an abuse of the court process. He avers that the two suits are not capable of being consolidated owing to the fact that one is a Constitutional petition while the instant one is purely a land matter. Further, that the cause of action, parties and the subject matter in the two suits are clearly different. He reiterates that the application is meant to further delay the hearing of this suit which has not been prosecuted for over twelve (12) years.
4. The application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the notice of motion application dated the March 8, 2022 including the respective affidavits, annexures as well as rivaling submissions, the only issue for determination is whether Machakos ELC No 2 of 2010, *Stephen Kingoo Mbuti & others v Malili Ranch Ltd and*



others and Makueni ELC Petition No E 2 of 2020 Malili Ranch Limited v the County Government of Makueni & others should be consolidated.

6. The applicants in their submissions reiterated their averments and contended that the two suits even though worded differently ought to be consolidated as they revolve around the same subject matter and raise substantially common issues of law and fact. They reiterate that there will be no prejudice suffered if the two suits were consolidated. To support their averments, they relied on the following decision: Law Society of Kenya v Centre for Human Rights & Democracy & 12 others (2014) eKLR.
7. The 1st defendant in its submission insists that the issues raised in the aforementioned petition challenges the proposed amendment, review and changes on approved subdivision Plan in respect to land LR No 4902 which is different from the subject matter in the instant suit. Further, that the instant suit involves alleged unlawful sale of LR No 9918/3 which it seeks to stop. It reiterates that the issues and facts herein are distinctly different from the issues including facts in ELC Pet E2 of 2010. To buttress its averments, it relied on the following decisions: Mombasa HCCC No 992 of 1994 Nyati Security Guards & Services v Municipal Council of Mombasa and Benson G Mutahi v Raphael Gichovi Munene Kabutu & 4 others (2014) eKLR.
8. On consolidation of suits, order 11 rule 3(1) (h) of the Civil Procedure Rules provides *inter alia*:
 - “(1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a case conference in which it shall—
 - (h) consider consolidation of suits.”
9. In the case of Benson G Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR the learned Judge explicitly provided the criteria for consolidation of suits and held as follows:

“The Civil Procedure Rules mandate courts to consider consolidation of suits and in so doing, to be guided by the following:-

 1. Do the same question of law or fact arise in both cases?
 2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction
 3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party.”
10. Further in the case of Law Society of Kenya v Centre for Human Rights & Democracy & 12 others (2014) eKLR. 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.”
11. In associating myself with the abovementioned judicial authorities while relying on the legal provisions cited above and applying them to the circumstances at hand, I hold that the two suits sought to be consolidated have different parties and seek varied reliefs. Further, the rights or reliefs claimed in the two cases did not arise out of the same transaction. I further note that the suit lands are also different. Insofar as I concur with the applicants that consolidation would be convenient, it is not that simple



since in the instant suit the plaintiffs seeks orders of permanent injunction restraining the defendants from selling or disposing or receipt of purchase price in respect to Land Reference No 9918/3 Malili Ranch as well as general damages. While in the aforementioned Makueni Petition, the fulcrum of the dispute revolves around challenge to the proposed amendment, review and changes to the approved subdivision plan in respect to land LR No 4902. At this juncture, I opine that consolidation would delay the matters instead of expediting them, and this might disadvantage or prejudice a party. I am of the view that the two suits should proceed separately but simultaneously. It is my considered view that the plaintiffs' in the instant suit are free to apply for transfer of this suit to Makueni ELC for hearing and final determination, if they so wish.

12. It is against the foregoing that I find the notice of motion application dated the March 8, 2022 unmerited and will disallow it.
13. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6TH DAY OF FEBRUARY, 2023.

CHRISTINE OCHIENG

JUDGE

