



REPUBLIC OF KENYA



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Miserez v Hazina Investments Co Ltd & another; Mayugo (Interested Party) (Environment & Land Case 71 of 2021) [2023] KEELC 726 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEELC 726 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 71 OF 2021**

AE DENA, J

FEBRUARY 1, 2023

BETWEEN

JANE NJERI MISEREZ PLAINTIFF

AND

HAZINA INVESTMENTS CO LTD 1ST DEFENDANT

LAND REGISTRAR KWALE 2ND DEFENDANT

AND

SALIM ATHUMAN MAYUGO INTERESTED PARTY

RULING

1. 1 The Interested Party/Applicant herein vide chamber summons dated September 29, 2022 craves for orders;
 - a. That this honourable court be pleased to grant leave to enjoin the intended interested party in this case for he has filed a similar case ELC No E30 of 2022.
 - b. That this honourable court be pleased to consolidate this case ELC No 71/2021 with ELC No E30/2022 for both matters involve the same parties, the same subject matter and the same question of law.
 - c. That costs of this application be provided for.
- 2 The application is premised upon grounds listed on its face and which summarily state that the Plaintiff/Applicant in ELC No E30 of 2022 has sued the Defendant/Respondents herein for fraud of their parcel of land Kwale/Galu Kinondo/783 (suit proper) and the orders ought to be granted in the interests of justice. The chamber summons is accompanied by the supporting affidavit of Geoffrey Kabiara Counsel for the intended Interested Party/Applicant who avers that the suit property



mentioned belonged to the applicant's father. That the Applicant has filed a suit before this court designated as ELC No 30 of 2022. That the said suit raises similar questions of law which is fraud over the same subject which is the suit property. The applicant seeks for the intended interested party to be enjoined to this suit and for consolidation of ELC 71 of 2021 and ELC 30 of 2022.

Response

3. In response to the application, the 1st Defendant filed grounds of opposition on November 15, 2022. The following grounds are raised;
 - a) The said application is misconceived and not well founded in law
 - b) The causes of actions in the two suits are separate and distinct and conflicted and cannot be conveniently tried together
 - c) The 1st Defendant/Respondent is a bonafide purchaser for value without notice from the registered proprietor at the time of purchase and is not a necessary party in the applicants suit
 - d) The application is otherwise an abuse of the process of the honourable court from the foregoing
4. The 1st Defendant further filed a replying affidavit sworn by one David Gitonga Muriithi a director of the 1st Defendant company. He avers that in suit no ELC 71 of 2021 the 1st Defendant is a bonafide purchaser for value without notice while in ELC E30 of 2022 the 1st Defendant has been sued on allegations of fraud by the Plaintiff who is a stranger to the 2nd Defendant company. As such the two suits will be conflicted should they be consolidated.
5. It is further averred that as much as the Applicant is seeking to have the two suits consolidated, no summons to enter appearance have been served on the 1st Defendant to enable them file their defence and as such the application for consolidation is premature and bad in law. The 1st Defendant urges the court to dismiss the application for being an abuse of the process of the court.
6. The Plaintiff did not file a response to the application and neither did the 2nd Defendant. The court notes that the Plaintiffs Advocate Mwangi Kihira has filed chamber summons dated November 29, 2022 seeking to withdraw from acting on behalf of the Plaintiff Jane Njeri Miserez, the application is unopposed. The procedure for an advocate who desires to withdraw from acting for a client, is provided under Order 9 Rule 13 and as long as there is no affidavit of service is on record in confirmation of service of the application to cease acting having been served upon the plaintiff, the firm of Mwangi Kihira is deemed to be still on record for the plaintiff until proper service is effected.

Submissions

7. The application was canvassed by way of written submissions.

Applicant's submissions

8. The applicant's submissions are filed on November 24, 2022. Narrating a brief background of the applicant's case, it is stated that the applicants grandfather Said Suleiman Juma[deceased] was the registered owner of the parcel of land Kwale/Galu Kinondo/408. That the applicant and other family members have been in peaceful occupation of the suit parcel and cultivated the same. The Applicant states that he applied to the district Land Registrar Kwale to be furnished with a certified copy of the green card for the suit parcel and discovered that the land had been subdivided into two portions



- Kwale/Galu Kinondo/782 and 783. That the same shows that the 1st Respondent became the owner of the parcel 783 on September 18, 2009.
- 9 That the second entry on the green card indicates that the late Said Suleiman Juma sold the parcel of land Kwale/Galu Kinondo/408 to the 1st Respondent on August 11, 1989 and in exercise of due diligence the Applicant applied and was served with the mutation by the District Land Surveyor Kwale. That the mutation reveals that the deceased agreed to sub divide plot Kwale/Galu Kinondo/408 on May 7, 1989. That it is clear the 1st respondent [Jane Njeri Miserez] was intent on defrauding the deceased off his property as the same was later sold to the 2nd respondent. That the 2nd Respondent [Hazina Investment Co Ltd] later subdivided the suit property into two portions namely Kwale/Galu Kinondo/2773 and 2774. It is upon this background that the applicant is seeking leave to be enjoined as a party in this suit.
10. On whether the threshold for consolidation of the two cases has been satisfied it is submitted that it can easily be discerned from a look at the files, that the parties are similar, that the subject matter of the two suits are the same, that is the parcel of land Kwale/Galu Kinondo/783 was further subdivided into two portions.
- 11 The court was referred to the case of Getrude Awinja [suing as the personal representative of the estate of *Daniel Ochiel*] v *County Government of Busia & Another* [2022] eKLR where it was held that consolidation of suits is done for purposes of achieving the overriding objective of the *Civil Procedure Act*, that is expeditious and proportionate disposal of civil disputes. In response to the 2nd respondent's allegation that the application should not be allowed because he is a bonafide purchaser, it is submitted that the suit land belongs to the applicant's grandfather and that the land was not purchased from him as alleged as he died on May 24, 1984. That fraud can only be demonstrated by the respondents if this case is consolidated with ELC 30 of 2022. That the doctrine of bonafide purchaser cannot suffice as the transaction was founded on fraud. The court is asked to grant leave for joinder of the applicant in this case. The Applicant further submits that no prejudice will be occasioned to the parties if the applicant's application is allowed.

1st Defendants' Submissions

- 12 The 1st Defendant's submissions are filed on December 14, 2022. It is submitted that an application for consolidation cannot be mounted before the Defendants have been served with the requisite summons to enter appearance have been duly issued and served as the law requires. That ELC E30 of 2022 was filed on September 29, 2022 but the plaintiff is yet to take out and serve the summons. That the application for consolidation is premature and incompetent in the premises given that the defendants case is yet to be placed before the court.
- 13 It is contended that for the court to determine whether the sought consolidation is necessary and convenient in adjudication of the cases involved, all pleadings must be placed before the court for consideration. The same is not the case in this matter. It is submitted that in ELC No 71 of 2021, the 1st Defendants' case is that it is the bonafide purchaser for value without notice from Jane Njeri Miserez who was the registered proprietor of the land at the time of purchase. That consequently the interested party is a total stranger to the 1st Defendant and the allegation of fraud as against the 1st Defendant would be farfetched and unsustainable in the circumstances.
- 14 It is also submitted that in both cases the core issue is fraud, the parties involved are different and the transaction were between different persons/parties at different times, it would not be convenient to consolidate the two cases. The court is asked to dismiss the application with costs.



Determination

15. I have considered the application, affidavits and the submissions by both Counsels. The issue falling for determination is whether the Interested Party /Applicant has made out a case for consolidation of this case (ELC No 71 of 2021) and ELC No E30 of 2022.
16. This suit was commenced vide a plaint dated May 11, 2011 seeking judgement against the Defendants jointly for a declaration that the title deed to the suit property Kwale/Galu Kinondo/783 issued to the 1st Defendant on September 18, 2009 is illegal as the plaintiff is the lawful proprietor of the suit property. The 1st defendant filed its statement of defence on September 27, 2022. It denied the allegations as stated in the plaint and claimed that the suit property had been sold to it by the Plaintiff at a consideration of Kshs 18,000,000/-It is noteworthy that since inception of this suit, the same has never been heard. Several applications have come up and at one point the suit was dismissed for want of prosecution. On July 4, 2022 the suit was reinstated vide an order of this court.
17. Guidelines used by the Courts in the consideration for consolidation were stated and applied by Maraga, J (as he then was) in *Municipal Council of Mombasa v Municipal Council Of Mombasa [2004] eKLR* thus:

Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.

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

Some common question of law or fact arises in both or all of them; or

The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or

For some other reason it is desirable to make an order for consolidating them.

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.

18. The application for consolidation is pegged on the assertion that ELC No E30 of 2022 is over the same subject matter as the present suit. That it also raises the same issues of law and hence necessitating the consolidation. I have looked at the affidavit in support of the application, the only document attached is the summons to enter appearance addressed to the rest of the parties in this suit indicating that ELC No E30 of 2022 has been filed against them. No plaint has been annexed for ease of perusal in determining whether the prayers sought are similar in nature to the instant suit.
19. The interested party states that ELC 71 of 2021 and ELC E30 of 2022 raises issues of fraud. From the application the Interested Party states that the suit parcel Kwale/Galu Kinondo/783 initially belonged to his late grandfather before the same was transferred to the plaintiff Jane Njeri Miserez. However, no evidence has been tendered in confirmation of this allegation. The court is not able to tell whether or not the land was ever registered in the deceased's name. The Applicant speaks of such information having been obtained from copies of green cards to the suit property and a mutation form but the



- same is not annexed to the application. As it stands no basis has been formed to put the courts mind at ease over a relationship emanating from the Intended Interested party ownership of the property to ownership of the suit property by the rest of the parties herein.
20. From the foregoing it is clear that the claim for ownership of the suit properties do not form part of the same transaction. The 1st Defendant claims to have purchased the suit land from the plaintiff and who states that she has sold the land to the 1st defendant as claimed. The Interested Party on the other hand has not demonstrated how he came into occupation of the suit land, whether the same is ancestral land or purchased and how the same came to be registered in the plaintiff's name. Prima facie the fraud allegations are unsubstantiated.
 21. The Applicant states that the logic behind consolidation of suits is to meet the overriding objective of the Civil Procedure Act which is the timely disposal of suits, however in meeting the same, the Applicant is reminded that the suit herein has been pending before court for the past 12 years, the court cannot therefore be expected to meet the obligations set out by the provisions of sections 1A,1B,and 3A of the Civil Procedure Act if it is to entertain one application after another at the expense of hearing parties and conclusively dealing with a suit. I find that a case has not been made out to warrant consolidation of the two suits as prayed.
 22. The Applicant further seeks to be enjoined as an Interested Party to the suit. Order 1 Rule 10 (2) of the Civil Procedure Rules provides for a party to be enjoined in a suit as a necessary party as follows:

' The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'
 23. In the celebrated case of Werrot & Co Ltd & 3 Others v Andrew Douglas Gregory & 2 Others [1998] eKLR Justice Ringera J stated thus, 'for determining the question who is necessary party there are two tests;
 - a. There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and
 - b. it should not be possible to pass an effective decree in the absence of the party
 24. The Interested Party/Applicant has failed to demonstrate any prejudice that will be suffered in the event that the application sought is not allowed. No evidence has been produced in a bid to prove that the reliefs sought are necessary as the party has failed to prove whether they are in occupation or use of the suit property or that he is the lawful proprietor of the same. As such the claim that the land belongs to the deceased is just a mere allegation as documents of such ownership or the process as to how the land came into belonging to them has not been presented.
 25. Looking at the prayers sought by the Applicant, it is my view that this court cannot fail to pass an effective decree in the event that the intended interested party is not enjoined in the suit. The failure to demonstrate why he feels he is an interested and necessary party to the suit leaves the court in limbo as to what it can rely on as a basis for grant of the orders sought.
 26. For the above reasons the court declines to grant the orders sought in the instant application. The same is dismissed. There will be no orders as to costs.



It is so ordered.

DELIVERED AND DATED AT KWALE THIS 1ST DAY OF FEBRUARY 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mwangi Kihira for the Plaintiff

Mr. Nduati for the 1st Defendant/Respondents

Ms Kiti for 2nd Defendant/ Respondent

Mr Kabiaro for the Interested party

Mr. Daniel Disii Court Assistant.

