



**Mulyungi v Kassim & 13 others; County Government of Busia (Interested Party)
(Environment & Land Case 1 of 2021) [2023] KEELC 16045 (KLR) (6 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 1 OF 2021**

**BN OLAO, J
MARCH 6, 2023**

BETWEEN

PHELESIA MWIKALI MULYUNGI PLAINTIFF

AND

IBRAHIM AROSS KASSIM & 13 OTHERS DEFENDANT

AND

COUNTY GOVERNMENT OF BUSIA INTERESTED PARTY

RULING

1. What calls for my determination is the Notice of Motion by the County Government of Busia (the Applicant) dated 25th May 2021 seeking the main order that Busia Chief Magistrate’s Court ELC Cases No 39 of 2020, 46 of 2020 and 64 of 2020 be transferred to this Court and be consolidated with this case. The application is premised on the provisions of Sections 3, 3A and 17 of the *Civil Procedure Act* and Order 15 Rule 3 (the proper provision is Article 11 Rule 3) of the Civil Procedure Rules.
2. The application is based on the grounds set out therein and supported by the affidavit of Everline Teresia Mbingi dated 25th May 2021 as well as her further supporting affidavit dated 25th July 2022.
3. The gravamen of the application is that Busia CMCC ELC Cases No 39, 46 and 64 of 2020 all involve the same subject matter that is in dispute in this case and which are sub-divisions of parcels of land that were fraudulently hived from the parent title being BUKHAYO/MUNDIKA/101 and which was public land held by the Applicant in trust for use by the public. That infact on 7th October 2020, the subordinate Court consolidated Busia CMCC ELC Case Nos 39 of 2020, 46 of 2020, 64 of 2020 and this suit which was then cited as Busia CMCC ELC Case No 65 of 2020 before being transferred to this Court. That since Busia CMCC ELC Case No 65 of 2020 has now been transferred to this Court, it is imperative that Busia CMCC ELC Cases No 39 of 2020, 46 of 2020 and 64 of 2020 be transferred to this Court for consolidation with this case.



4. It is the Applicant's case that the land parcels NO BUKHAYO/MUNDIKA/14369, 14370, Plots NO 6 and 7983 D are resultant sub-divisions of the land parcel NO BUKHAYO/MUNDIKA/101 which was previously held in trust by the then Ministry of Research, Technical Training and Technology and reserved for public use. That to-date, the following facilities have been constructed thereon i.e.;

1. 10 permanent jua-kali Nyayo shades.
2. A well and water tanks.
3. Permanent Administration Blocks/offices.
4. Permanent Ablution Block.
5. Busia Public Recreation Park.
6. Tree Nursery.
7. Permanent Sentry House.
8. Fencing.
9. Allotment of plots to the public for trading.
10. A Public Hall.
11. Busia main sewer line.

That the registration of the plaintiffs, in the cases sought to be consolidated, as owners of the parcels of land created out of the land parcel NO BUKHAYO/MUNDIKA/101 could only have been procured through a process that was fraudulent and in a clandestine manner. That the sub-division of the parent title to the land parcel NO BUKHAYO/MUNDIKA/101 by the plaintiffs in the suits sought to be consolidated is prejudicial to the interests of the residents of BUSIA COUNTY.

5. That as per the adjudication register, the land parcel NO BUKHAYO/MUNDIKA/101 measuring 1.7 Hectares was registered in the name of one BULUMA AURA as at 12th March 1969 before being transferred to one PAULO JUMA OTAGA on 11th February 1983. It was then sub-divided to create land parcels NO BUKHAYO/MUNDIKA/13705 and 13706. The land parcel NO BUKHAYO/MUNDIKA/13705 was further sub-divided to create land parcels NOs BUKHAYO/MUNDIKA/14369, 14370, 14371 and 14372. There is therefore a nexus between the land parcel NO BUKHAYO/MUNDIKA/101 and the land parcels the subject of the cases sought to be consolidated.

6. The following documents are annexed to the two supporting affidavits of Everline Teresia Mbingi the Applicant's chief officer in charge of Housing, Land and Urban Development:

1. Approved Development Plan No 34 of 9th September 1990.
2. Survey Plan.
3. Beacon Certificate.
4. Letter of Allotment dated 7th October 1996 together with payment receipt dated 21st November 1996 for Kshs.5,980 issued to the Ministry of Research, Technical Training and Technology.
5. Adjudication register for the land parcel NO BUKHAYO/MUNDIKA/101.



6. Title deed for the land parcel NO BUKHAYO/MUNDIKA/101 in the name of Buluma Aura dated 5th September 2007.
 7. Transfer of land parcel NO BUKHAYO/MUNDIKA/101 from Buluma Aura to Paulo Juma Otaga.
 8. Letter of Consent for transfer of land parcel NO BUKHAYO/MUNDIKA/101 from Buluma Aura to Paulo Juma Otaga.
 9. Mutation Form.
 10. Green Cards for land parcels. BUKHAYO/MUNDIKA/14369, 14370, 14371 and 14372.
 11. Certificate of Search for land parcel NO: BUKHAYO/MUNDIKA/14369, 14370 and 14371.
7. The application was opposed by Phelesia Mwikali Mulyungi (the plaintiff herein) who filed grounds of opposition dated 19th October 2021 stating, inter alia, that the land parcel BUKHAYO/MUNDIKA/101 is not the subject of this suit. Further that the plaintiff and all the defendants herein are not parties in BUSIA CMCC ELC CASE NO 39 of 2020 or BUSIA CMCC ELC CASE NO 46 of 2020. That consolidating the suits as sought will cloud the issues for determination and the plaintiff is likely to suffer prejudice as the matter will become complex with several parcels of land and litigants. In any event, the Applicant has not annexed any evidence to demonstrate that the land parcel in this suit is related to the land parcels in the other suits. This application therefore lacks merit and should be dismissed with costs.
 8. The application has been canvassed by way of written submissions. These have been filed both by Mr Rodgers Sekwe the Applicant's Solicitor and Counsel and by Mr Maxwel Okeyo instructed by the firm of OKeyo Ochiel & Company Advocates for the plaintiff.
 9. I have considered the application, the supporting affidavits and annexures thereto, the grounds of opposition and the submissions by counsel.
 10. I must start by observing that counsel for the Applicant did not annex the pleadings in the cases sought to be consolidated with this case. That has indeed been pointed out by counsel for the plaintiff in ground No 5 of the grounds of opposition. A party seeking the consolidation of two or more suits must at least avail the pleadings in the suits sought to be consolidated to enable the Court make an informed decision. How else will this Court be in a position to conclude that the subject matter in this case is the same issue in dispute in the other cases unless those pleadings are perused by this Court? It should not be the business of the Court to presume a fact which is within the knowledge of a party and can be made available to the Court unless of course it is a matter which the court can take judicial notice of under Section 60(1) of the *Evidence Act*. It must be remembered that the suits sought to be consolidated with this case are currently in another court and registry.
 11. That notwithstanding, and in keeping with the overriding objectives of the Civil Procedure Rules and Articles 159(2) (d) of *the Constitution*, I did call for my perusal BUSIA CMCC ELC CASE files No 39, 46 and 64 of 2020 in the course of drafting this ruling.



12. The principles of consolidation of suits were re-stated in the case of *Stumberg & Another -v- Potgeiter* 1970 E.A. 323 where the Court said:

“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.”

In the case of *Law Society of Kenya -v- Centre for Human Rights and Democracy*, Supreme Court of Kenya Petition no 14 of 2013, the Supreme Court said:

“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.”

Consolidation of suit is also among the issues that the Court considers during the pre-trial process vide Order 11 of the Civil Procedure Rules. Indeed where a Court becomes aware of the fact that there is another matter before it raising the same issues of fact and law, it can invoke its inherent powers *suo moto* and make orders consolidating all suits in which the same subject matter is under litigation. This is because, by consolidating such suits, the Court saves the parties costs and time. Besides, judicial time and other resources are not limitless. They should therefore be applied prudently and not extravagantly by channeling them towards determining a multiplicity of suits when they can be harnessed towards determining one composite suit. In opposing the application, the plaintiff has raised the following objection in ground NO 3 of the grounds of opposition:

“3: “That consolidating the suits will therefore cloud the issues for determination and the plaintiff is likely to suffer prejudice as the matter will become complex with several parcels of land and litigants forced to litigate in one suit.”

Of course the consolidation of suits will invariably result in bringing more parties on board thus making the matter more laborious and complex. However the benefits to be achieved by consolidating cases involving the same subject matter far out weight what will be achieved by different courts hearing fragmented cases and arriving at different conclusions involving the same subject matter.

13. Having said so, I have called for and perused Busia CMCC ELC CASES NO 39, 46 and 64 of 2020 which are sought to be consolidated with this case. I have found a consent order in BUSIA CMCC ELC CASE NO 46 of 2020 dated 16th September 2020 and adopted by the Senior Principal Magistrate Hon. P. A. OLENGO on 23rd June 2020 consolidating those two cases. The subject matter in BUSIA CMCC ELC CASE NO 46 of 2020 is plot NO 6 while the subject matter in BUSIA CMCC ELC CASE NO 64 of 2020 is land parcel NO BUKHAYO/MUNDIKA/14370. The plaintiffs and defendants in those two cases are different although the plaintiff in BUSIA CMCC ELC CASE NO 46 of 2020 is the defendant in BUSIA CMCC NO 64 of 2020. I also notice from the proceedings dated 3rd March 2021 in BUSIA CMCC ELC CASE NO 39 of 2020 that it was consolidated with BUSIA CMCC ELC NO 24, 65 and 46 of 2020 although it is not clear when that consolidation was done. BUSIA CMCC ELC CASE NO 65 of 2020 is this case in which the Applicant and the National Land Commission were, by consent of the parties, enjoined herein as interested parties. It would appear to me also, albeit from the not very clear proceedings in Busia CMCC ELC Case No 39 of 2020, that infact this case and Busia CMCC ELC Case No 46 of 2020 and another case No 24 of 2020 (which I think is a typing error)



have already been consolidated. The proceedings of 3rd March 2021 in Busia CMCC ELC Case No 39 of 2020 in which Mr Sekwe is listed as appearing for the Interested Party reads:

“Omieri - It is for direction. Parties have not complied.

Wambura - It was consolidated with ELC 24/20, 65/20,
46/20.

Court - The Interested Party given time to apply.”

Those proceedings would appear to suggest that infact the orders sought herein have already been granted by the subordinate court.

14. I have however considered the application as I should and it is clear from the Applicant’s case that the land parcels NO BUKHAYO/MUNDIKA/14369 which is the subject in this suit, plot NO 6 which is the subject in Busia CMCC ELC Case No 46 of 2020, land parcel NO BUKHAYO/MUNDIKA/14370 which is the subject in Busia CMCC ELC Case No 64 of 2020 and plot NO 7983 D which is the subject in Busia CMCC ELC Case No 39 of 2020 were al resultant sub-divisions of the parent title being land parcel NO BUKHAYO/MUNDIKA/101. According to the Applicant, the title to the land parcel NO BUKHAYO/MUNDIKA/101 was held in trust by the Applicant and reserved for public utility but was fraudulently sub-divided to create other parcels of land. Whether indeed the land parcel NO BUKHAYO/MUNDIKA/101 was held in trust by the Applicant for public utility will be a matter to be determined during the plenary hearing. Suffice it to say that having considered the Notice of Motion dated 25th May 2021 and after further perusing the pleadings in Busia CMCC ELC Case No 39 of 2020, 46 of 2020 and 64 of 2020, I am persuaded that the Applicant has made out a case to warrant this Court to order a consolidation of the above cases together with this case. It is therefore proper that the said cases be transferred to this Court for appropriate orders and directions as to hearing.
15. Ultimately therefore, this Court makes the following orders:
1. The Notice of Motion dated 25th May 2021 is allowed.
 2. Busia Chief Magistrate Court ELC Case Files No’s:
 - a. 39 of 2020
 - b. 46 of 2020, and
 - c. 64 of 2020 are hereby transferred to this Court and consolidated with this case for hearing and final determination.
 3. This file (formerly Busia CMCC ELC Case No 65 of 2020) shall be the lead file for purposes of recording proceedings. Other directions shall be made when all these files are mentioned on 13th March 2023. The Deputy Registrar to advice all the parties accordingly.
 4. No orders as to costs.

RULING DATED, SIGNED AND DELIVERED ON THIS 6TH DAY OF MARCH 2023 BY WAY OF ELECTRONIC MAIL WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO



JUDGE

