



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 133 OF 2019

BERNARD MBALILWA JUMA

MARTIN KHATAKA JUMA

MARY LUMONYO JUMA

CELESTINE INJILA ALOGONGO.....APPLICANTS

AND

ZAKARIA MBALILWA ADRIANO

(Being sued as the legal representative of the estate of Adriano

Mbalilwa Shitembete a.k.a Mbalilwa Tembete).....RESPONDENT

RULING

The application is dated 1st March 2021 and is brought under Section 17 & 18 of the Civil Procedure Act seeking the following orders;

1. That this matter be transferred to the Chief Magistrate's Court Kakamega and be consolidated with Kakamega MC E & L. 8 of 2020 with a view to having both of them heard and determined as one case.
2. That the costs of this application be provided for.

It is based on the affidavit of Peter Khalumi Maina and the ground that the two cases relate to the same parcel of land that is Isukha/Lukoe/937.

The respondent submitted that the suit herein is for a declaration that L.R. No. Isukha/Lukose/937 be registered in the joint names of the applicants via the doctrine of adverse possession while the lower court suit filed by the respondent, namely, Kakamega MCLE Cause No. E8 of 2020 is a burial dispute seeking to restrain the remains of Mary Lumonyo Juma from being interred on plot 937 as can be discerned from the exhibits marked 'BMJ 1 and 2' which are copies of a motion and resultant order respectively in the lower court suit. Thus, the causes of action in both suits are distinct and hence a consolidation of the same is legally incongruous. That at any rate, even if both suits were similar in nature Section 6 of the Civil procedure Act dictates that the later suit (In this case, the lower court case) be stayed pending the determination of the earlier suit (which in this case is this one).

This court has considered the application and the submissions therein. The application seeks to have this matter be transferred to the Chief Magistrate's Court Kakamega and be consolidated with Kakamega MC E & L. 8 of 2020 with a view to having both of them heard and determined as one case. It is based on the ground that the two cases relate to the same parcel of land that is Isukha/Lukoe/937. The respondent submitted that the causes of action in both suits are distinct and hence a consolidation of the same is legally incongruous. That even if both suits were similar in nature Section 6 of the Civil procedure Act dictates that the later suit (in this case, the lower court case) be stayed pending the determination of the earlier suit (which in this case is this one). Section 18 Civil Procedure Act provides as follows;

“18 (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage -

- a. transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent

to try or dispose of the same; or

b. withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter -

i. try or dispose of the same; or

ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

iii. re-transfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

I find that this court has jurisdiction to transfer this suit to the lower court. On the issue of consolidation of suits, in the case of *Nairobi ELC Suit No. 1000 of 2012 Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR*, which cited with approval the case in *Mombasa HCCC No. 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa* the court stated that;

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

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

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

(c) For some other reason it is desirable to make an order for consolidating them.”

In the case of *Law Society Of Kenya vs The Centre for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 Of 2013*, the Supreme Court of Kenya stated that;-

“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 intended to occasion any disadvantage towards the party that opposes it”

Again also in the case of *Korean United Church of Kenya & 3 Others vs. Seng Ha Sang (2014) eKLR* where the court observed that:

“Consolidation of suits is done for purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

In the instant case I find that parties are the same and so is the subject matter of the case. The basic issue is the question of ownership of the said suit land. I find that a common question of law or fact arises in both the cases. I find that it would also be expeditious disposal of the said dispute. This consolidation will also save costs and time. For these reasons I find that the application is merited and I grant the same and the costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 21ST APRIL 2021.

N.A. MATHEKA

JUDGE