



**Ndwiga & 2 others v Mutungo (Environment and Land Miscellaneous Application 2 of 2021) [2023] KEELC 18828 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 18828 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 2 OF 2021**

**A KANIARU, J**

**MAY 4, 2023**

**BETWEEN**

**JAMES NJERU NDWIGA ..... 1<sup>ST</sup> PLAINTIFF**

**NYAGA NJOGU ..... 2<sup>ND</sup> PLAINTIFF**

**SAMUEL NYAGA JOSHUA ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**GABRIEL MUTURI MUTUNGO ..... DEFENDANT**

**RULING**

1. By a motion on notice dated 3/3/2021 and filed on 5/3/2021, the applicants – James Njeru Ndwiga, Nyaga Njogu, and Samuel Nyaga Joshua – want this court to grant orders directing transfer of Civil suit No. MCL & E No. 28 of 2020, Siakago with a view to consolidating it with ELC Misc. Application No. 8 of 2020(O.S.) in order that the two can be tried together. The suit at Siakago was instituted by way of a plaint, with the plaintiff being Gabriel Muturi Mutungo while the defendant is James Njeru Nyaga. The suit before this court was instituted via an originating summons (O.S.), with James Njeru Nyaga, Nyaga Njogu, and Samuel Nyaga Joshua as applicants while Gabriel Muturi Mutungo is the respondent.
2. A more point-blank expression of the prayers is as follows:
  1. That the honourable court do order the transfer of Siakago MCL & E Case No. 28 of 2020: Gabriel Muturi Mutuongo v James Njeru Ndwiga to the Environment and Land court at EMBU.
  2. That this honourable court be pleased to consolidate Siakago MCL & E Case No. 28 of 2020 and EMBU ELC Misc. Civil Application NO. 8 of 2020 (O.S.) to facilitate quick disposal of the said suit.



3. That the cost of this application be provided for.
3. The application is premised on the grounds, inter alia, that the two suits relate to the same subject matter; that the orders sought will not prejudice any party; and that it is in the interests of justice to grant the orders. The supporting affidavit that came with the application elaborates the grounds stated in the application.
4. The respondent responded to the application via a replying affidavit dated 28/4/2021 and filed on 30/4/2021. According to the respondent, the application is incompetent and should be dismissed. He deposed, inter alia, that the suit in the lower court involves only himself and the 1<sup>st</sup> applicant – James Njeru Ndwiwa. The other two applicants – Nyagah Njogu and Samuel Nyagah Joshua – are not part of it. That suit also was said to have been filed earlier than the one before this court. It is the respondent’s position that the suit in the lower court should be heard and determined first.
5. The applicants filed a supplementary affidavit on 23/2/2022. It was deposed that the 1<sup>st</sup> applicant had earlier on filed Civil case No. 132 of 2014 (O.S.) here in Embu but withdrew it on the understanding that the respondent would transfer 4½ acres of the land in dispute to him. The respondent reneged on that understanding and thus necessitated the filing of the case now before this court. The 2<sup>nd</sup> and 3<sup>rd</sup> applicants are also said to have been living on the land for a long time.
6. The application was canvassed through written submissions. The applicants submissions were filed on 27/10/22. The applicants noted that the suit in the lower court seeks to evict the 1<sup>st</sup> applicant from the disputed land while the one before this court essentially contests the ownership of the same land by the respondent. Consolidation was said to be necessary in order to save time and save on costs. The cases of *Arnold Kipkorui Langat v Atticon Ltd & 7 others*: HCC No E201 of 2021 and *Nyati Security Guard & Services Ltd v Municipal Council of Mombasa* [2000] eKLR were cited and quoted for persuasion and/or guidance.
7. The respondent’s submissions on the other hand were filed on 19/7/2021. The respondent submitted that the application is incompetent because it fails to give particulars of the cases it seeks to consolidate. The applicants were faulted for not making available copies of pleadings to show that they relate to the same subject matter. To drive the point home, the case of *Joseph Okoyo v Edwin Dickson Wasunna* [2014] eKLR was cited. It was also submitted that the case in the lower court does not involve the 2<sup>nd</sup> and 3<sup>rd</sup> applicants. For that reason, it is said to be different from the one before this court and consolidation is therefore deemed undesirable. The case of *Young Traders (Tigoni) Limited v Julius Njoroge Kamau & Daniel Kimani Chege* [2016] eKLR was cited to emphasize the point.
8. Further, the respondents point out that in order to decide whether or not to consolidate, the court should consider, inter alia, whether some common question of law and fact arise in the matters sought to be consolidated; whether the rights or reliefs sought in the suit arise out of the same transaction or series of transactions; or whether it is desirable to consolidate for some other reasons. According to the respondents “the facts, causes of actions and the reliefs claimed in the two cases that seek to be consolidated are materially different and arise out of very different transactions”. The cases of *Solomon Wanyoike Wainaina vs Sunrise Synthetics Limited* [2020] eKLR and *Young Traders (Tigoni) Limited (supra)* were cited to reinforce the point made.
9. The case in the lower court was also said to be at an advanced stage of trial. According to the respondent, he will suffer loss and inconvenience if the application herein is allowed. In this regard the respondent cited the case of *Adrian Nyagah Muriithi & another v Moses Clement Mubia Njoroge & 6 others* [2019] eKLR to support his position.



10. I have considered the application, the response and counter-response made by the parties, rival submissions, and the decided authorities cited and relied upon. The subject matter in both the lower court suit and the suit before this court is Land parcel No. Evurore/Nguthi/1254. In the lower court matter, the respondent in this application is the plaintiff and he wants the 1<sup>st</sup> applicant, who is the defendant in that suit, to be evicted from the land for reasons, inter alia, that the 1<sup>st</sup> applicant is in the land illegally. The respondent is the registered owner. The defence filed in the lower court was made available here and what I make of it is that the applicant is claiming entitlement to 4½ acres from the same land.
11. In the suit before this court, the applicants are seeking rights of legal ownership of some portions of the same land. At the core of the two suits therefore is the issue of ownership of the land by the parties. In my view it is very desirable that only one court addresses itself to the issue of ownership. There is danger that two courts may make conflicting findings.
12. The first prayer in the application is about the transfer of the lower court matter to this suit. Section 18 of the *Civil Procedure Act* (cap 21), states 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 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 disposal to any court subordinate to it and competent to try or dispose of the same; or
    - iii. retransfer 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 for transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
13. From the foregoing, it is clear that this court has a general power to transfer suits and this power can be exercised at any stage of the proceedings. It can be exercised suo moto or at the instance of a party. Where a party is requesting for transfer, a strong case must be made out to justify the transfer. It is not always enough to say that convenience of the parties justify a transfer. More cogent reasons are required. The court needs to consider questions of expense, interests of justice, possibilities of undue hardship to all or some of the parties, and the imperative of overriding objective in handling of civil matters as spelt out in sections 1A and 1B of the *Civil Procedure Act*.



14. In the case of *Hangzhou Agrochemicals Industries Limited v Panda Flowers Ltd*: [2012] eKLR the court expressed itself as follows:

“... in my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interests of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.”

15. I have already pointed out that what is central in both disputes is the issue of ownership. It appears to me that the lower court would face jurisdictional challenges trying to establish whether the 1<sup>st</sup> applicant is entitled to the kind of ownership – which is adverse possession – that he has alluded to in his defence before that court. Only this court can make definitive or conclusive findings on that issue. It is also more cost-effective, time-saving, and convenient to all parties if the lower court suit is transferred here. I therefore grant the prayer of transfer.
16. The other consideration is that of consolidation of the suits. Consolidation takes place where two or more matters are pending in court and it becomes apparent that common issues or questions relating to law or facts will arise in the suits or that the remedies sought arise out of the same transactions. Consolidation is largely about case management and Order 11 of *Civil Procedure Rules*, which deals with pre trial directions and conferences provides for it under rule 3(1) (h). It is aimed at furthering expeditious disposal of cases and/or to prevent multiplicity of suits.
17. In the Indian case *PRM Lala Nabata & Another v Chandi Prasad Sikaria* [2007] 2 Supreme Court cases 551, the philosophy behind consolidation was expressed thus:
- “It can not be disputed that the court has power to consolidate suits in appropriate cases ... The main purposes of consolidation is therefore to save costs, time, and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suit are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suits.”
18. There is a real possibility that if the matters sought to be consolidated here are not handled by one court, conflicting judgement may issue.
19. When the application under consideration now first came before it exparte, the court decried the lack of enough information to make the orders sought. But the material now before the court is reasonably sufficient to enable it to make a decision. I am persuaded that the order of consolidation should also be granted so that the two cases can be disposed of at the same time. I hereby grant that prayer too.
20. The upshot is that the merits of the application have been demonstrated before me. I hereby allow the application. Costs in the cause.



**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 4<sup>TH</sup> DAY OF MAY, 2023.**

**In the presence of Mugambi for M/s Ndorongo for applicants and M/s Chepkorir for M/s Mukami for respondent.**

**Court Assistant: Leadys**

**A.K. KANIARU**

**JUDGE**

**04.05.2023**

