



**M'ikiburu v Karea (Environment and Land Appeal E027 of 2022)
[2023] KEELC 20374 (KLR) (4 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E027 OF 2022**

CK YANO, J

OCTOBER 4, 2023

BETWEEN

CHARLES KALIUNGA M'IKIBURU APPELLANT

AND

MARY KAREA RESPONDENT

JUDGMENT

1. This appeal emanates from the ruling of Honourable A.G Munene (PM) dated 18th May 2022 in Maua Chief Magistrate's Court ELC Case no 126 of 2021. Pursuant to that ruling, the learned trial magistrate allowed the respondent's application dated 2nd November, 2021 which sought to consolidate the said suit with Maua CMC ELC Case no 082 of 2021.
2. In his memorandum of appeal, the appellant raised the following grounds.
 - i. The learned Magistrate erred in law and in fact in finding that the different suit properties and different requisite prayers sought in the two different files could be heard in a consolidated file simply because the different parties are siblings without giving legal reasons for such conclusion.
 - ii. The learned magistrate erred in law and in fact in that he failed to appreciate that the parties in the two files are different, and each separate file seeks different prayers arising from different suit properties that would make the parties and issues non related as they are separate and distinct.
 - iii. The learned magistrate erred in law and in fact in that he failed to appreciate that the parties in the two files are disputing over separate distinct properties and the orders sought are against different parties per suit basis and the mere fact that they are siblings is immaterial in consolidating these two very distinct claims.



- iv. The learned magistrate erred in law and in fact in that he failed to give directions as to which of the two consolidated files would be the lead file to proceed with and failed to take into consideration that the parties in the two files are represented by different counsels and consolidation would only lengthen and burden the court process.
 - v. The ruling of the learned magistrate is bad in law as it failed to consider the threshold necessary for consolidation of suits.
 - vi. The learned trial magistrate erred in law and in fact in that he failed to consider the applicant's (sic) submissions in opposition of the consolidation application wherein precedents had been relied on ably disputing the consolidation of suits and stipulating the legal threshold applicable in consolidation of suits.
3. The appellant seeks to have the ruling delivered by the learned trial magistrate set aside and costs of this appeal to be borne by the respondent herein.
 4. The application for consolidation was anchored on the grounds inter alia, that the appellant instituted case no E 126 of 2021 seeking for eviction and permanent injunction orders against the respondent over land parcel no Amwathi/Maua/147"B" while the 1st and 2nd interested parties had filed case no E082 of 2021 against the appellant herein and the 3rd interested party over plot no 147 "A" within Maua Township. Whereas the appellant and the 3rd interested party claimed exclusive ownership of the two suit properties, the respondent who is their sister, alleged that the suit land was given to her and the 1st interested party by their late father, M'Ikiburu M'Mwambia (deceased).
 5. The appellant opposed the consolidation on the grounds inter alia, that the two matters were totally different and raises totally different question of law.
 6. In allowing the application for consolidation, the trial court found that the parties in both suits are brothers and sisters, that the subject matter in both cases were acquired from their father who is now deceased and that the issue in dispute is the ownership of plot no 147 "B" and 147 'A" Maua township and their status on the ground. The learned trial magistrate concluded that the issue could be resolved in one file to avoid giving contradictory orders/ruling/direction/judgment in the matters.
 7. The appeal was canvassed by way of written submissions. In his submissions dated 24th May 2023 and filed in court on 29th May 2023 through the firm of M/s Mutembei & Kimathi Advocates, the appellant relied on the case of *Society of Kenya v The Centre for Human Rights and Democracy* [2013]eKLR, the Supreme Court of India case of *Premlala Nabata v Chaudi Prasad Sikara* 2007 and *Benson G Mutahi v Rapabel Gichori Munene Kabutu & 4 others* [2014] eKLR, and submitted that the two matters are distinct and that the issues for determination and facts in both suits differ in a great context and as such do not raise the same question of law or fact. It is the appellant's submissions that the plaintiffs in ELC E82 of 2021 seek to declare a common corridor serving the two properties as part of their property yet the said corridor goes through the premises and serves the properties of both parties as a route of access and the said corridor is provided for as per the town by laws and physical planning laws, while in ELC 126 of 2021, the plaintiff is seeking eviction orders. That further in ELC 126 of 2021, there are only two parties whereas in case no E082 of 2021 there are four parties who have engaged the services of different firm of advocates to represent them.
 8. The appellant further submitted that the plaintiff in ELC 82 OF 2021 will be relying on physical planning laws, town by laws and county government laws to prove his case while in ELC 126 OF 2021, the plaintiff will be proving ownership of the suit property and establish trespass. The appellant



submitted that it is clear that the two matters are distinct, do not relate and that the parties do not intend to use the same witness to prove their cases.

9. In further demonstration on why consolidation of the matters will cause an injustice, the appellant's advocates relied on the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2004] eKLR in which Margaga J (as he then was) outlined some of the situations where Consolidation may be ordered and include some common question of law or fact arising in both suits or all of them, or where 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 consolidation, and went on to state-;

“There are however situations where consolidation is undesirable like where in two actions a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer and the purpose of saving time will be defeated.”

10. Learned counsel for the appellant submitted that the plaintiff in ELC 126 OF 2021 is the defendant in ELC 82 of 2021 hence fails the test for consolidation. That consolidating the two suits will confuse issues and injustice will be occasioned and parties will not have been accorded a fair hearing. Counsel for the appellant submitted that the learned trial magistrate misconstrued blood relationship as a factor of consolidation of a suit and not similar questions of law. The appellant's counsel urged the court to set aside the ruling of the subordinate court, dismiss the application for consolidation and allow parties to prosecute their cases separately. Learned counsel for the appellant also relied on the case of *Eunice Nyairungu v Libey Njoki Munene & 2 others* [2015] eKLR.
11. In her submissions dated 6th June 2023 and filed in court on 9th June 2023 through the firm of M.D Maranya & Co advocates, the 1st interested party submitted that the parties in the two suits in the lower court are siblings and that the appellant is a party in both suits. That in determining whether to consolidate two or more suits, the courts are required to consider whether the claims have the same subject matter, whether the claims raises similar issues of law and whether the claims arose from the same set of facts or series of facts. It is the 1st interested party's submissions that the claims raise similar issues of law and arose from the same set of facts or series of facts and urged the court to find so. Learned counsel for the 1st interested party relied on the case of *TSS Transporters Ltd & 2 others v Pamela Akinyi Lidambiza* [2018] eKLR, *Law Society of Kenya v Centre for Human Rights and Democracy & 12 others* [2014] eKLR.
12. On the argument that the learned trial magistrate did not give directions as to which of the two consolidated files would be the lead file, counsel for the 1st interested party submitted that there is no known law that dictates that the court should give such directions. That the appellant's counsel should have sought clarification as to which file was to be the lead file. It is the 1st interested party's submissions that the consolidation of the two files would minimize wastage of the court's time and would ease the burden of expenses that the litigants would have incurred. Counsel for the 1st interested party relied on the Indian case of *Brij Kishore v Bir Singh & others* at the High Court of Punjab and Harana L.r 5922 of 2013 and *Joseph Okoyo v Edwin Dickson Wasuna* [2014] eKLR.
13. The 1st interested party's submission is that the application for consolidation met the required threshold, adding that the trial court considered submissions of all the parties and arrived at a right decision. That the appeal is miserable and ought to be dismissed with costs.



14. The respondent and 2nd, 3rd and 4th interested parties filed their submissions dated 14th September, 2023 and filed in court on 18th September, 2023 through the firm of Ngunjiri Michael & Co. Advocates. It is their submissions that the appellant having filed this appeal without leave of court, the appeal is incompetent and must fail. Learned counsel for the respondent and 2nd, 3rd and 4th interested parties submitted that the appeal is on an order emanating from the Order 11 Rule 3 on consolidation of suits and that under the said provisions, and Order 43 Rule 2, an appeal can only lie with leave of court and not otherwise. They relied on the case of *Stepehn Omondi Juma v Sprocer Awuor Rabote* [2022] eKLR and submitted that there is no competent appeal capable of determination by this court as the present one was filed without leave of court. That the appellant cannot purport to invoke the jurisdiction of this court to hear this appeal and urged the court to dismiss it with costs.
15. On whether there was good cause for consolidation of suits, it was submitted that there was. They also relied on *Law Society of Kenya v Center for Human Rights and Democracy & 12 others* (*supra*) and submitted that 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 court was urged to note that the two suits arise from either alleged occupation, ownership, possession and/or use of the two suit properties between siblings. It was submitted that the trial court did not err while ordering the consolidation and that there is no harm on any party that will be occasioned by the hearing of the two suits as consolidated. They relied on the case of *Selecta Kenya GMBH & Co. Kg v Chase Bank Kenya Limited & 2 others* [2018] eKLR. It was also pointed out that the parties in the two suits have engaged the same counsels and submitted that the overriding objective of the court would be best achieved if the two suits are consolidated for hearing.
16. It was further submitted that directions on which of the two files would be the lead file would have been given during pre-trial and therefore the court was not obligated to issue such orders on its ruling. The court was urged to dismiss the appeal with costs.
17. I have consolidated the record of appeal, submissions of the parties and the relevant law. It is my view that the issues that call for determination are whether the appeal as filed is competently before this court, and depending on the determination of this issue, whether there was good cause for the consolidation of the two suits by the trial court.
18. In this case, counsel for the respondent, and the 2nd, 3rd and 4th interested parties submitted that there is no competent appeal capable of determination as the present one was filed without leave of court. Learned counsel cited the provisions of order 43 Rule 1 and 2 which provide that the provisions of Order 42 shall apply in regards to appeal from orders in the same manner as if it is an appeal from a judgment. Further, Order 43 Rule 1 provides that an appeal shall lie as of right from orders and rules under the provisions of section 75 (1) (h) of the *Civil Procedure Act*.
19. I have looked at the provisions of Order 43 Rule 1. The same states that an appeal shall lie as of right from Orders and Rules under Section 75 (1) (h) of the Act. The orders and Rules listed are Orders 1,2,3, Order 4 Rule 9, Order 7, Rule 12, Order 8, Order 10, Rule 11, Order 12 Rule 7, Order 15 Rules 10, 12 and 18, Order 19, Order 22 Rules 25, 57, 61(3) and 73, order 23 Rule 7, Order 24, Rules 5,6 and 7 Order 25 Rule 5, Order 26 Rules 1 and 5(2) Order 27 Rules 3 and 10 Order 28, Rule 4, Order 34, Order 36, Rules 5,7 and 10, Order 39, Rules 2,4 and 6, Order 40, Rules 1,2,3,7 and 11 Order 41, Rule 1 and 4, Order 42, Rules 3, 14,21, 23 and 35, Order 45, Rule 3, Order 50, Rule 6, Order 52, Rules 4,5,6 and 7 and Order 53.
20. In this case, the appellant seeks to appeal against and order emanating from Order 11 Rule 3 of the *Civil Procedure Rules* on consolidation of suits. Order 11 rule 3 deals with case management whose purpose includes the determination of any matter relating to inter alia, the hearing or disposal of cases.



In my view, this includes orders for consolidation. Rule 3 of Order 11 and indeed the entire provisions of Order 11 are not among those listed under Order 43 Rule 1 whose orders can be appealed as of right. The presumption is that where a particular order is not listed, the law requires that an appeal shall only lie with the leave of court and not otherwise. The provisions of Section 75 and Order 43 are clear and stipulated in no uncertain terms the decrees or orders that can be appealed from as a matter of right and does not include orders emanating from order 11 of the [Civil Procedure Rules](#).

21. I have perused the court record herein and I have not seen any application whether oral or in writing for leave to appeal against the impugned orders of consolidation made on 18th May 2022 by the trial court. In my view, the appellant ought to have sought and obtained leave to appeal against the impugned order. In the absence of leave to appeal, the appeal herein as rightly submitted by the respondent's counsel, is no doubt incompetent and must fail.
22. As was stated in [Nyutu Agrovat Ltd v Airtel Networks Ltd](#) [2015] eKLR a right of appeal only lies where the law specifically provides for such right to accrue and where no such right is automatic it follows that a party seeking to appeal must first obtain leave of court. The right of appeal is conferred by statute and cannot be inferred. A party can only invoke the provisions of Section 75 of the [Civil Procedure Act](#) and Order 43 of the [Civil Procedure Rules](#) to seek and obtain leave from the lower court to appeal to this court.
23. In the case of [Micro-House Technologies Ltd, v Cooperative College of Kenya](#) [2017] eKLR, the Court of Appeal proceeded to strike out an appeal upon finding that the court had no jurisdiction to entertain the appeal before it. Where leave to appeal is a prerequisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently, no competent appeal is before this court.
24. In the result, I find that this court has no jurisdiction to entertain the appeal herein which is incompetent. The appeal is hereby struck out with costs to the respondent and the interested parties.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF OCTOBER, 2023

In The Presence Of

Court Assistant – V. Kiragu/Lenah M

Kaba holding brief for Maranya for 1st interested party

M/s Asuma holding brief for Mutembei for appellant

Njindo for respondent & 2nd, 3rd & 4th interested parties.

C.K YANO

JUDGE

