



Henry Musyoki Kilonzi Suing on behalf of the estate of Henry Musyoki Kilonzi – Deceased) v Makau; Makau & 10 others (Interested Parties) (Environment & Land Case 250 & 386 of 2017 (Consolidated)) [2022] KEELC 2185 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2185 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 250 & 386 OF 2017 (CONSOLIDATED)

CA OCHIENG, J

MAY 5, 2022

BETWEEN

HENRY MUSYOKI KILONZI SUING ON BEHALF OF THE ESTATE OF HENRY MUSYOKI KILONZI – DECEASED) PLAINTIFF

AND

GLADYS MUTHEU MAKAU DEFENDANT

AND

BENSON MAKULA MAKAU INTERESTED PARTY

BENJAMIN KILONZO INTERESTED PARTY

HADSON NYAMBARIGA INTERESTED PARTY

JOEL NTHEI MWANZIA INTERESTED PARTY

JOSEPH MBONGE KYATHE INTERESTED PARTY

KELLEN IGOKI MURITHI INTERESTED PARTY

ANDREW WAMBARI NGANGA INTERESTED PARTY

AMINA SHIDA ADAM INTERESTED PARTY

ANNE KERUBO SAMOKA INTERESTED PARTY

FRANCIS WANDHOGHO MWAITA INTERESTED PARTY

ONDITI OUMA INTERESTED PARTY



RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion application dated the 3rd November, 2021 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act including Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiff seeks the following orders:
 1. That this suit be marked as fully withdrawn.
 2. That costs be in the cause.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Meshack Musyoki where he deposes that he commenced this suit against the Defendant after she commenced constructing on part of the suit property without consent of the estate. He explains that during the pendency of this suit, the Defendant approached him for an out of court settlement and they engaged in negotiations which bore fruit culminating in fully settling the dispute. Further, that during negotiations, it emerged that the Defendant had purchased the suit property from Mbukoni Holdings Ltd who is not its proprietor. Further, that the Defendant purchased from the estate the portion of land that he had sought to construct his home after realizing he had been duped by Mbukoni Holdings Ltd. He insists the only claim herein is between the Plaintiff and Defendant since the Interested Parties have not filed any claim against the Plaintiff. Further, this suit has never been set down for hearing. He confirms that on 8th July, 2020, the Plaintiff filed a Notice of Withdrawal of Suit in this matter and hence there is nothing to go for trial. He contends that the consolidation of this matter with ELC 386 of 2017 did not affect each individual claim in the two separate suits. Further, the suit property comprises of five (5) acres of land wherein the Defendant and Interested Parties claim separate portions. He reiterates that the whole property is not occupied and each Interested Party bought their separate portions from Mbukoni Holdings Ltd. He avers that he is not interested in pursuing the claim against the Defendant and the Interested Parties will not be affected by the Withdrawal of this suit.
2. The application is opposed by the Interested Parties/ 2nd to 12 Defendants who filed a replying affidavit sworn by Anne Kerubo Samoka, the 2nd Defendant herein where she deposes that ELC 250 of 2017 does not exist on its own as it was consolidated with ELC No. 386 of 2017 by Justice Angote vide a Ruling dated the 5th June, 2020. She contends that the 2nd to 12th Defendants live on the suit property having purchased their respective plots from Mbukoni Holdings Ltd, that bought the entire parcel of land from the late Henry Musyoki Kilonzi, the father to the Plaintiff herein. She made reference to the contents of the Ruling dated the 5th June, 2020 and avers that the Plaintiff in the instant application failed to mention the existence of the impugned Ruling. She claims the Plaintiff seeks to withdraw this suit after realizing the impugned Ruling set aside the consent they had entered into, with the Defendant and also cancelled the subdivision. She contends that the 2nd to 12th Defendants' suit being ELC 386 of 2017 is against the Plaintiff herein as a Defendant and amounts to a counterclaim in this suit, therefore if at all its withdrawal is allowed, the Counterclaim stands unopposed allowing the 2nd to 12th Defendants to take over land known as 12715/179. Further, no leave was sought to withdraw this suit and the said withdrawal amounts to contempt of court. She reiterates that the instant application is frivolous and vexatious as well as an abuse of the court process. Further, they stand to suffer irreparable loss as the Plaintiff seeks to ignore the orders made on 5th June, 2020. She reaffirms that the estate of the late Henry Musyoki Kilonzi represented by the Plaintiff herein has no claim over the entire five (5) acres subject property since the same was sold by the deceased to Mbukoni Holdings Limited before he died and the Plaintiff's action is a desperate effort to walk out of a valid and enforceable agreements entered into by a property owner before his death.



3. The application was canvassed by way of written submissions but it is only the 2nd to 12th Defendants who filed theirs.

Analysis and Determination

4. Upon consideration of the Notice of Motion application dated the 3rd November, 2021 including the respective affidavits, annexures and submissions, the only issue for determination is whether this suit should be marked as fully withdrawn.
5. The 2nd to 12th Defendants in their submissions reiterated their averments as per the replying affidavit and insist this is the second time the Plaintiff is attempting to abuse the court process and he should not be allowed to benefit from his wrongdoing in withdrawing a consolidated suit in a bid to defeat the ends of justice. They insist the Plaintiff ought to first seek leave to withdraw this suit. To buttress their averments, they relied on the following decisions: Beijing *Industrial Designing & Research Vs Lagoon Development Ltd* (2015) eKLR cited with approval in *Kofinaf Company Limited & Another V Nahashon Ngige Nyagah & 20 Others* (2017) eKLR.
6. On withdrawal of a suit, Order 25 Rule 1 of the *Civil Procedure Rules* provides that: At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.’
7. In this instance the Plaintiff seeks to withdraw this suit as against the Defendant claiming the dispute has been settled. It emerged that this suit was consolidated with ELC 386 of 2017 vide a Ruling delivered on 5th June, 2020. I wish to reproduce an excerpt from the said Ruling hereunder:
 28. In one of her Supplementary Affidavit sworn on 19th September, 2017 in response to the Defendant’s Affidavit sworn on 24th August, 2017, the Plaintiff deponed that the Agreement that her late father entered into with Mbukoni Holdings Limited for the sale of the suit land to third parties was revoked in 1998 after the said Mbukoni Holdings Limited failed to pay the full purchase price.
 29. In the same Affidavit, the Plaintiff deponed that her late father had given to Mbukoni Holdings Limited, the original mother title and that the purported sale of a portion of the suit property to the Defendant was null and void.
 30. In the current Application, the Interested Parties’ case is that the Agreement that the Plaintiff’s late father entered into with Mbukoni Holdings Limited allowed Mbukoni to sub-divide the suit property into smaller plots and sell the plots to the members of the public; that they bought the said plots with the full knowledge of the deceased and that they have been in possession of their respective portions of land for over 20 years.
 31. The fact that the Plaintiff’s late father entered into an Agreement in respect to the suit property with Mbukoni Holdings Limited has been admitted by the Plaintiff in her Replying Affidavit sworn on 9th August, 2019. In the said Affidavit, the Plaintiff has deponed that the Agreement that her father entered into with Mbukoni Holdings was rescinded for non-payment of the purchase.
 32. That being the case, and without going into the merits of the Agreements that Mbukoni Holdings Limited entered into with the Plaintiff’s late father and the



Interested Parties, it is my findings that the Interested Parties, prima facie, have an interest in the outcome of this suit. The validity of the Agreements between the Plaintiff's late father, Mbukoni Holdings Limited and the Interested Parties will be determined at trial.

33. That being so, the Interested Parties ought to be joined in this suit to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. The said joinder can only be meaningful if the consent that the Plaintiff and the Defendant entered into is set aside.
34. Indeed, the effect of the consent order that the Plaintiff and the Defendant entered into was to have the suit property sub-divided and all the titles to be released to the Plaintiff. The order further provided that any all structures "encroaching" on the suit land should be removed.
35. The cumulative effect of the consent that was entered into between the Plaintiff and the Defendant was to have the titles arising out of the sub-division of the suit property to be out of reach of the Interested Parties, and to also evict those who are already in possession of the suit land property before hearing them. That, in my view, was an attempt by the Plaintiff to deny the Interested Parties the right to be heard, an attempt that this court frowns upon.
36. Considering that the Interested Parties have filed Machakos ELC No. 386 of 2017 claiming the suit property, and the Plaintiff herein having entered appearance and filed a Defence, and in view of the common questions of law and facts in the two suits, the interests of justice demands that the two suits be consolidated. This will enable the two suits to be disposed of at the same time.'

8. From the excerpt above, it is evident the two suits were consolidated as the suit property was one and the cause of action interlinked. In the case of [Margaret Wanja Mucuthi v Margaret Wanja Mucuthi & 2 others](#) [2014] eKLR, the Court held that:

"The effect of the withdrawal was that the other parties to the consolidated suit were left with a predicament as the withdrawal of SPMCC No.94 of 2010 appears to have left the parties without a basis. Though the consolidation was reached by consent of the parties when they allowed the application dated 7/10/2010, the withdrawal was done singularly by one party without notice to the other parties..... Consolidation is a process by which two or more suits or matters are by order of the court combined, united and treated as one suit or case. The main purpose for consolidation is to save on costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. It is meant to deal with cases efficiently and effectively. When considering consolidation, the court looks at the question of law and fact arising in the disputes, rights or relief claimed by the parties. Consolidation is a procedural action that can be undone where some parties choose to abandon their claims. Ultimately, the application is allowed *ex debito justitiae*, orders made on 17/11/2011 are hereby reviewed and the application dated 11/8/2011 is hereby reinstated for hearing on merit."

9. While in the case of [Beijing Industrial Designing & Research Institute vs. Lagoon Development Ltd](#) (2015) eKLR. the Court of Appeal while setting aside an order of the High Court where it allowed withdrawal of a suit, observed that this should not be done to defeat an order of court or to abuse court process. Further, the court has to set terms for the withdrawal.



10. In associating myself with these decisions while relying on the facts as presented including the legal provisions cited, I find that since the two suits were consolidated, they became one and all the parties therein ought to have been consulted at the point of withdrawal. Further, even if the suit had not been set down for hearing, it is my view that the Plaintiff ought to have sought for leave of court before filing the Notice of Withdrawal as this gave him undue advantage over the 2nd to 12th Defendants who had a stake in this suit. Further, his action amounted to an abuse of court process.
11. In the circumstance, I decline to allow the withdrawal of this suit and direct that this matter to be set down for hearing on its merits.
12. It is against the foregoing that I find the Notice of Motion application dated the 3rd November, 2021 unmerited and will dismiss it with costs.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5TH DAY OF MAY, 2022

CHRISTINE OCHIENG

JUDGE

