



REPUBLIC OF KENYA



**KENYA LAW**  
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**Abdalla v Hassan & 15 others (Civil Suit 210 of 2021)  
[2022] KEELC 13582 (KLR) (5 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13582 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 210 OF 2021  
LL NAIKUNI, J  
OCTOBER 5, 2022**

**BETWEEN**

**HUSSEIN TAREQ ABDALLA ..... PLAINTIFF**

**AND**

**DALAL JUMA HASSAN & 15 OTHERS ..... DEFENDANT**

**RULING**

**I. Introduction**

1. The Notice of Motion application before the honorable court for its determination is the one dated December 17, 2021. The application was filed by the plaintiff/applicant herein in ELC No 210 of 2021. It was brought under the provision of order 11 rule 3, order 51 rule 1 of the *Civil Procedure Rules, 2010*, sections 1A, 1B and 3A of the *Civil Procedure Act*, cap 21 and article 159 (2) of the *Constitution of Kenya, 2010*.

**II. The Plaintiff/Applicant's case**

2. Vide the said application, the Plaintiff/Applicant sought for the following orders:-
  - a) That an order does issue consolidating the instant suit with “ELC (Mombasa) Case No 183 of 2019 Nurdin Akasha Abdalla v Nargis Akasha Abdalla & 2 others”.
  - b) That the Honorable court does make such other and further orders as it may deem fit, necessary and expedient in the interest of justice; and
  - c) That the costs of this application be provided for.
3. The application is grounded on the testimonial facts and averments made out under the 17 Paragraphed Supporting Affidavit of Hussein Tareq Abdalla, the Plaintiff/Applicant herein and the annexures annexed herein. The Plaintiff/Applicant informed Court that sometimes in the year 2019,



the 1<sup>st</sup> to 15<sup>th</sup> Respondents herein through the estates of their respective deceased fathers being Kamaldin Akasha Abdalla and Atiyat Akasha Abdalla filed a suit being ELC (Mombasa) No 183 of 2019 herein against the 16<sup>th</sup> Defendant/Respondent seeking for orders compelling him to release the Certificates of title of land Reference Numbers CR 6289 (Original No. 6037/22) and CR – 6290 (Original No 6037/23). He deponed that the said suit – ELC Case No. 183 of 2019 currently subsists between Nurdin Akasha Abdalla as the Plaintiff and the 16<sup>th</sup> Defendant/Respondent and the Chief Land Registrar as the 1<sup>st</sup> to 15<sup>th</sup> Respondent withdrew their suits against the 16<sup>th</sup> Respondent and the Chief Land Registrar. Immediately thereafter the said withdrawal of the suit against the 16<sup>th</sup> Respondent in ELC 183 of 2019, on October 19, 2021 the Deponent lodged this suit – ELC No 210 of 2021 against the 16<sup>th</sup> Defendant/Respondent herein seeking a declaration that the 1<sup>st</sup> to 15<sup>th</sup> Respondents were in breach of their sale agreements in respect of the suit properties and an order compelling the 16<sup>th</sup> Respondent to release the certificate of titles in respect of the suit properties.

4. Therefore, based on these facts, he averred that both suits being ELC No 183 of 2019 and 210 of 2021 respectively were founded and based on the same subject matter being all that parcels of land known as Land Reference Number CR 6289 (Original No 6037/22) and CR 6290 (Original No 6037/23) whose title documents are said to be held by and in possession of the 16<sup>th</sup> Defendant/Respondent herein. He stated that the filing of this case was necessitated by the withdrawal of the 1<sup>st</sup> to 15<sup>th</sup> Repondents suit against the 16<sup>th</sup> Respondent which they had lodged for his benefit and in bid to secure the certificate of title for the transfer of the suit properties to him and which were being held by the 16<sup>th</sup> Respondent herein.
5. The deponent argued that the main purpose for both of these civil suits pending in this Court were founded on the same suit properties, which he had proprietary interest in, and whose title were being held illegally by the 16<sup>th</sup> Defendant/Respondent herein. Further, he was seeking for remedies to compel him to transfer the same into his name thereof. From the advise sought from his Advocate on record, the question of law and fact was said to be the same in both suit, therefore the orders that would be granted would be the same as well as affecting the same parties in both suits. It was argued that the consolidation of the two suits was to facilitate efficient and expeditious disposal of issues as well as save court's time and provide a framework for fair and impartial dispensation of justice. According to him, this was within the legal mandate of this Honorable Court as provided by the principle of overriding objective and the provision under order 11 rule 3 (a) of the *Civil Procedure Rules, 2010*.

### III. The Proceedings of the Court

6. From the Court's records, on December 9, 2021, the Honorable Court guided through a direction that the Plaintiff/Applicant makes a formal application seeking for orders for the for consolidation of these two Civil suits. Indeed, that is exactly what the Plaintiff/Applicant has effectively done. The court further granted leave to parties with specific timelines to respond to the application, as well as to the applicant to file supplementary affidavit if need arose. The court also directed parties to dispose off the application by way of written submissions.
7. However, when the application came up for further directions on February 9, 2022, the following was established by court;
  - a) That Mr Muchiri Advocate, the Counsel for the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 12<sup>th</sup> Defendants informed court that he had not been given firm instruction to continue acting for them ., In the circumstances, he would be moving Court appropriately to cease acting in 7 days time from then. Todate, no such formal application has been made so far.



- b) That Mr Kariuki Kiarie Advocate, the Counsel for the 1<sup>st</sup> Defendant/Respondent informed court that the 1<sup>st</sup> Defendant/Respondent opposed the application on the consolidation of the matters and had filed grounds of opposition to that effect. Unfortunately, the said grounds are not found on court record. He sought time to file his written submissions.
- c) That Mr Obara Advocate, the Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 9<sup>th</sup>, 11<sup>th</sup>, 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Defendants/Respondents informed court that he supported the application

#### IV. Submissions

##### A. The written Submissions by the 16th Defendant/Respondent

8. On July 8, 2022 the Learned Counsel for the 16<sup>th</sup> Defendant/Respondent herein, the Law firm of Messrs. Kiarie Kariuki & Company advocates, filed their written submissions dated July 5, 2022 in opposing the application. Mr Kiarie Kariuki Advocate submitted that the consolidation of the two suits - ELC No 183 of 2019 and ELC No 210 of 2021 respectively was undesirable as the parties were different with different advocates on record acting for them. Indeed, he argued that they arose from different cause of action and questions of law and facts. He averred that in the present suit, the court was to determine whether there was any breach of agreement for the sale of the parcels of land known as Land reference Number CR 6289 (Original No 6037/23) and CR 6290 (Original No 6037/23) while in the suit - ELC No 183 of 2019 the court was called upon to oversee the transfer of shares held in trust over all that parcel of land known as Land Reference Numbers CR 20639 and CR 22404.
9. Thus, the Learned Counsel argued that the question of law arising from the two cases were distinct and different and the court could conflict when making a determination. To buttress his point, the Learned Counsel relied on the case of "[\*Selecta Kenya GMBH & Co KG v Chace Bank Kenya Limited & 2 others\*](#) [2018] eKLR, where the court relied on the case of "[\*Stumberg & Anor v Potgeiter\*](#) 1970 EA 323". The Counsel submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the civil suit ELC No 183 of 2019 withdrew their case against the Defendants vide a Notice of Withdrawal of Suit dated September 29, 2021, and court ordered that the suit instituted by the 1<sup>st</sup> Plaintiff proceeds on as it was. Accordingly, the Counsel submitted that the consequences of an act of withdrawal was that the Plaintiff ceased being a Plaintiff before the court. Therefore, the Counsel held that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs ceased to be parties to the suit and the court had no jurisdiction to reinstate it.
10. The Counsel submitted by stressing that the reliefs sought arose from different transactions, therefore the cause of action and reliefs sought in the two suits were different. He argued that withdrawal of a suit takes effect is complete as soon as the Notice of Withdrawal is served upon the Defendants and in any case when the Court is informed of it. In that case, he argued, there was no suit pending against the Defendants by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs. To buttress on this point the Learned Counsel relied on the case of "[\*Priscilla Nyambura Njue v Geovhem Middle East Limited & Kenya Bureau of Standards\*](#) [2021] eKLR" on the effect of withdrawal of a suit against a party. The Counsel further contented that the Civil Suit ELC No. 183 of 2019, was instituted by way of Originating Summons dated October 16, 2019 while the present suit by way of Plaint. Additionally, Counsel argued that that the matter herein was not between the same parties and their consolidation would confuse issues and prolong the determination of the issues in dispute. On this point the Counsel relied on the case of "[\*County Council of Nakuru v Simon Ole Kiminta & 3 others\*](#) [2007] eKLR", where the court held that:-

"if the two suits are consolidated, it is obvious that it is not convenient for the determination of issues as one suit challenges the ownership of the property while the other suit challenges the exercise of the power of the transfer. The suits are not also between the same parties



and consolidation would confuse the issues and prolong the resolution of the matters in dispute."

11. The Counsel insisted that the principle of consolidation would only to imply where there was a similarity of identity of the matter in issue in different suits between the same parties which should be decided by the court once and for all. The Counsel opposed the consolidation, as he held it would prejudice the 16<sup>th</sup> Defendant/Respondent's case to the advantage of the Plaintiff. The Counsel argued that in granting this orders the 16<sup>th</sup> Defendant/Respondent's right to fair trial and access to justice would be compromised as the issues if merged would be too complicated for litigation. The court was urged to find that civil case ELC No. 183 of 2019 had been partly withdrawn and could not be consolidated as such. He therefore urged Court to dismiss the application.

## V. Analysis and Determination

12. Having considered all the pleadings by the Plaintiff/Applicant herein being the Supporting Affidavit, the responses and the submissions thereof, the envision of the [Constitution of Kenya 2010](#) and the relevant provisions of law, I do frame the following issues for consideration.
  - (a) Whether the Notice of Applications dated December 17, 2021 by the Plaintiff/Applicant herein seeking for the consolidation of the Civil Suit ELC (Mombasa) No 183 of 2019 and ELC (Mombasa) No 210 of 2021 should be granted.
  - (c). Whether the parties are entitled to the reliefs sought herein.
  - (d) Who will bear the costs.

### **Issue No (a) Whether the Notice of Applications dated December 17, 2021 by the Plaintiff/Applicant herein seeking for the consolidation of the Civil Suit ELC (Mombasa) No. 183 of 2019 and ELC (Mombasa) No 210 of 2021 should be granted.**

13. Under this sub – heading, the main issue for consideration is on the consolidation of these two suits as pleaded per excellence. Accordingly, the law governing the consolidation of files is founded under section 80 (h) of the [Civil Procedure Act](#), cap 21. The [Civil Procedure Rules](#) mandates courts are to consider consolidations of suit. In so doing, courts to be guided by the following three (3) legal parameters. These are:-
  - a) Do the same question of law or fact arise in both cases?
  - b) Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions?.
  - c) Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?.

14. I will be considering these principles indepth herein below. In the meantime, I have taken judicial notice of the myriad of court cases and the underlying guidelines enshrined thereof on the issue of consolidation of cases. These include in the case of "[Law Society of Kenya v The Centre for Human Rights & Democracy](#), Supreme Court of Kenya Petition No 14 of 2013 the SCOK held 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 it intended to occasion any disadvantage towards the party that opposes it”

While Maraga, J, as he then was, held in “*Municipal Council of Mombasa v Municipal Council of Mombasa* [2004] eKLR that:-

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. 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 situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

1. Some common question of law or fact arises in both or all of them; or
2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. For some other reason it is desirable to make an order for consolidating them.

15. On this legal ratio, I fully concur with the learned counsel for the 16<sup>th</sup> defendant herein while appropriately citing of: “*Stumberg & Anor v Potgeiter* 1970 EA 323”, where the court stated thus,

“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. ...the object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”

16. The present case was instituted by the Plaintiff/Applicant vide a Plaint dated 19<sup>th</sup> October 2021, the suit property in question are LR No CR 6289 (Original No 6037/23) and CR 6290 (Original No 6037/23). The Plaintiff/Applicant is praying to court to declare that the 1<sup>st</sup> to 15<sup>th</sup> Defendants/ Respondents herein breached their agreement for sale of their respective shares in the above names suit properties. The Plaintiff/Applicant is also seeking a mandatory injunction compelling the 16<sup>th</sup> Defendant/Respondent to surrender to him the original Certificate of title and other relevant documents to LR No 6289 and LR 6290 to enable the him effectively transfer of the shares held by the 1<sup>st</sup> to 15<sup>th</sup> Defendants/Respondents herein to himself. Whilst the Civil suit ELC No 183 of 2019 is instituted by the Plaintiff and the estates of Kamaldin Akasha Abdalla and Atiyat Akasha Abdalla on the one hand against the Nargis Akasha Abdalla and the Land Registrar Mombasa as the Defendants thereof. The Civil case ELC No 183 of 2019 was instituted through an Originating Summons and the issue before court for determination was on all the properties known of Original Certificate for title CR 20693 and CR 22404.

17. Whereas, from the face value the suit properties in these two suits appear different in the Plaint and originating summons, when the court conducted a dipper dive on them it has been relieved to court, they are one and the same thing. Upon perusal of the Affidavit of Nurdin Akasha Abdalla in support of the Originating Summons in the suit ELC No. 183 of 2019, the Court came across, an annexure marked as “NAA -1” being a Certificate of Postal Search dated May 11, 2018, which shows that the Plot No 6289/1/MN, which also has the Title No CR 20639 is registered in the names of Nargis Akasha Abdalla as Trustees of Karima Akasha Abdalla, Kamaldin Akasha Abdalla, Nurdin Akasha Abdalla, Atiyat Akasha Abdalla and Hassan Akasha Abdalla as tenants in equal undivided shares. The same



- annexure marked as “NAA – 1”, there is a Certificate of Postal Search dated May 10, 2018, which shows that Plot No. 6290/1/MN, which also has the Title No CR 22404 is registered in the names of Nargis Akasha Abdalla as Trustees of Karima Akasha Abdalla, Kamaldin Akasha Abdalla, Nurdin Akasha Abdalla, Atiyat Akasha Abdalla and Hassan Akasha Abdalla as tenants in equal undivided shares.
18. When the Court retrieved back to the present suit, from the filed List of Documents by the Plaintiff filed on October 19, 2021, it is found a copy of a sale agreement dated October 1, 2018 duly entered between Nargis Akasha Abdalla as Trustees of Karima Akasha Abdalla, Kamaldin Akasha Abdalla, Nurdin Akasha Abdalla, Atiyat Akasha Abdalla and Hassan Akasha Abdalla as Vendors and Hussein Tareq Abdalla (the Plaintiff/Applicant herein) as the Purchaser. The parcels of land being sold are CR 6289 (Original No 6037/22) of Section 1 Mainland North and CR 6290 (Original No 6037/23) of Section 1 Mainland North.
  19. From the evidence presented and surrounding facts and inferences in both suits, it is graphically clear that the suit properties are the same. For these reasons alone, the Court find it rather wrongful, unfair and unreasonable to say the very least for the Counsel of the 16<sup>th</sup> Defendant/Respondent to willfully mislead this Court while submitting that the reliefs sought arise from different transactions of that the suit and it was not between the same parties. In all fairness, it is clear to court that the only single issue that is different between the parties is how they identify the suit properties, since the certificate of title shows that both parcels have title number and plot number which are both different. Therefore, the Court finds that where the suit lands are similar in both suits, the orders that will be issued will affect them equally and it is only logical that the same were consolidated. In my view, I do not agree with the Learned Counsel for the 16<sup>th</sup> Defendant/Respondent that consolidation of these two suits would lead to confusion of issues and prolong the resolution of issues in dispute. On the contrary, I find that consolidation would save court’s time and resources which are limited.
  20. Both suits arise from actions relating to the sale of shares relating to CR 6289 (Original No 6037/22) of Section 1 Mainland North and CR 6290 (Original No 6037/23) of Section 1 Mainland North, and the transfer of the shares thereafter. The same parties participated in the transaction and despite the withdrawal of the suit by the 1<sup>st</sup> to 15<sup>th</sup> Defendants/Respondents herein against the 16<sup>th</sup> Defendant/Respondent in the civil case ELC No 183 of 2019, the issue has not been determined on merits by court. The majority of the Defendants/Respondents do not oppose to the consolidation of the suits, an indication that the said consolidation of the suits would save time and meet the overriding objective of ensuring the just, expeditious, proportionate and affordable resolution of civil dispute as enshrined under the provision sections 1A and 1B of the *Civil Procedure Act*, cap 21, sections 3 and 13 of the Environment & *Land Act*, No 19 of 2011, sections 101 of the *Land Registration Act*, No 3 of 2012, section 150 of the *Land Act*, No 6 of 2012 and articles 159 (1) & (2) of the *Constitution of Kenya, 2010*.
  21. In my view, the court is called to determine the same questions of law and facts on similar suit lands between the same parties, most importantly the documents that will be relied on, during trial are likely to be the same. The 16<sup>th</sup> respondent has not established to court the prejudice he stands to suffer if the suits are consolidated, moreover no prejudice that has been established that cannot be adequately be compensated by an award of costs. This is a ripe case for consolidation and this court has broad discretion to order for consolidation of suits, where the issues, witnesses and evidence to be presented are found to be similar and proceed to determine the rights of all parties together.
  22. From these cases and precedents, the legal ratio and holdings are that, the essence of consolidation essentially are:-
    - a). to facilitate the efficient and expeditious disposal of disputes and



- b). to provide a framework for a fair and impartial dispensation of justice to the parties. At all costs and as a matter of principles, consolidation of cases should never be meant to confer any undue advantage upon the party nor should it be intended to occasion any disadvantage towards the party that opposes it.
23. Having made these legal observation, I now proceed to apply them to this case. From the pleadings filed by the Plaintiff/Applicant and the Respondent in the two (2) suits and the facts already expounded herein above there is no doubt that the following issues sprout out:-
- a) Both the suits involve the same parties being the Plaintiff/Applicant and some of the Defendants/Respondents herein.
- b) Both the suits involve and/or pertain to the same subject matter being all that parcels of land known as Land reference Numbers CR – 6289 (Original 6037/22) and CR – 6290 (Original 6037/23) respectively.

Based on the guidance by the *Civil Procedure Rules*, these cases in my view are proper and typical ones to be considered for consolidation.

24. As regards the issue of the withdrawal of the suit. Before indulging on the facts of the case herein, I strong feel it imperative to critically look at the provisions of the law on withdrawal of cases in as far as the whole or partial discontinuance or withdrawal of the suit is concerned and the consequences thereafter on matters of subsequent defences, action and costs. These are founded under order 25 rules, 1, 2 and 3 of the *Civil Procedure Rules, 2010*. They provided as follows:-
- (1) “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.
- (3) Upon request in writing by any Defendant the Registrar shall sign Judgement for the costs of a suit which has been wholly discontinued may apply at the hearing for the costs of any part of the claim against him which has been withdrawn”
25. In the instant case, there has been an argument to the effect the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff herein in the ELC (Mombasa) No 183 of 2019 on September 29, 2021 filed a Notice of Withdrawal of the Suit against the Defendants herein and hence based on the decision of “*Priscilla Nyambura Njue v Geovhem Middle East Limited* (supra) relied on by the Counsel for the 16<sup>th</sup> Respondent herein is that the suit abates automatically. Indeed that there is no suit at all. While this Court fully concurs on the rightful, wise and legal reasoning from this case to the extent that

“.....the consequences of act of withdrawal is that the Plaintiff ceases to be a Plaintiff before the Court. If he is the only Plaintiff and withdraws the whole of the suit, the suit comes to an end and nothing remains pending before the Court. If he withdraws only a part of the suit that part goes out of the jurisdiction of the Court and it is left with any the other part. This is a natural consequence of the act; a further consequences imposed by sub Rule 3 is that he cannot institute a fresh suit in respect of the subject matter. He becomes a subject to this bar as soon as he withdraws the suit. It follows as a corollary that he cannot revoke or withdraw the act of withdrawal. If he is absolutely barred from instituting a fresh suit, it means that he is absolutely barred from reviving his status as a Plaintiff before the court.....”



26. For clarity sake and as stated above, on September 29, 2021, the Law firm of “Prime Lawyers LLP Advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs filed in ELC No 183 of 2019 a Notice of Change of Advocates taking over from the previous Advocates Messrs. Mulwa Nduya & Company Advocates. Strictly speaking, the 1<sup>st</sup> Plaintiff herein still continues being represented by the said Law firm of Messrs. Mulwa Nduya & Company Advocates. On the same date, the newly appointed advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs in the ELC No 183 of 2019 filed this Notice of Withdrawal of Suit reproduced herein verbatim:-

“take Notice that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs herein withdraws the case against the Defendants wholly”

27. Clearly, from the above filed Notice of Withdrawal of suit and the admission by all the parties including the Learned Counsel for the 16<sup>th</sup> Respondent from his filed submission that indeed this was a partial withdrawal of the suit by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff wholly against the Defendants. Certainly, the suit still subsists between the 1<sup>st</sup> Plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> Defendants and the Interested party herein. Therefore, that does not mean that the suit ELC No. 183 of 2019 which the court seeks to consolidate with the ELC No. 210 of 2021 has ceased from existing. The suit still exists. That is the underlying fact.

28. Finally, I wish to deliberate on one more sticky issue that arose from the parties in this proceedings. This is whether the cause of action as stated is one that arises from the cause of action of trespass in one of the cases from an illegal occupation and an injunction orders to restraining the Plaintiffs and on the other hand orders seeking claim of land title by way of land adverse possession is immaterial at the moment. Suffice it to say, there is nothing to stop the supposedly registered proprietor of the land in dispute to seek for the eviction orders of a party claiming to have become owner of the suit land through land adverse possession. As far as I am concerned, both the relief of eviction and land adverse possession claim can be consolidated at any stage of the proceedings. It will only depend on the direction taken by court.

By the end of the day, I reiterate that what the parties should be pre – occupied with is the main crystal ball – the suit effectively and completely being heard and determination to its logical conclusion on the ownership of the suit land. Luckily, this court is willing and ready to hear the case which is still fresh. I wish to strongly emphasise that it will not be an efficient use of the available judicial and administrative resources – money, time and man hours – for this court to be hearing and finally making a determination of that issue of land ownership differently – in this case and another court to do so differently in other case. The nature of how these suits were commenced or instituted may appear different one being by Plaint while the other through an Originating Summons. However, legally speaking, I hold the reasoning that once directions are taken under the provisions of order 37 rules 16, 17, 18 and 19 of the *Civil Procedure Rules* on ELC No 22 of 2020 the Originating Summons will be converted into a Plaint and the Replying Affidavit will be Defence and/or Counter Claim. In that event, no party will be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party. Certainly, this is the legal position and this court holds on it.

#### **Issue No d). Whether the parties hereon are entitled to the Prayers sought**

29. Under this Sub heading and based on all the surrounding facts and inferences herein, I find that in view of the fact that the parties herein are the same and the transaction that gave rise to the two claims herein arose from the same circumstances, the sale of CR 6289 (Original No 6037/22) of Section 1 Mainland North and CR 6290 (Original No 6037/23) of Section 1 Mainland North; and in the interest of justice and to expeditiously dispose of the case in a cost effective manner.



In order to sustain the principle of natural justice where no one is condemned unheard, all the parties should be served through substituted means under the provision of order 5 rule 17 of Civil Procedure Rules. Additionally, based on the Principles of “*lis pendens*” anchored under the provision of section 52 (1) of the Indian Transfer of Property Act and the decisions of “George Kadenge v Azzuri Limited (Malindi ELC No.....) and Mawji – v United States International University (USIU) by HA Madan, JA there will be need to preserve the suit properties by registration of an inhibition by the Land Registrar, Mombasa under the provisions of section 68(1) & (2) and 69 (1) of the Land Registration Act, No 3 of 2012 and Section 79 of the Land (General Regulation) No 2017.

#### **Issue No (c) Who will bear the costs?**

30. The issue of Costs in any suit is at the discretion of the Court. Costs means the award that is given to a party upon the conclusion of any legal action, process or litigation. The provisions of section 27 of the Civil Procedure Act, cap 21 provides that costs follows the events. By events it means the result of such stated legal action, process or litigation.

In the instant case, the result of this process is that the application by the Plaintiff/Applicant to have the two suits consolidated and heard as one has been allowed. Thus, this the matter is still proceeding for full trial and determination let the costs to be in the cause.

#### **VI.Conclusion & Disposition**

31. Ultimately, the upshot of this indepth and elaborate analysis and based on the inherent powers vested in me under the provisions of sections 1, 1A, 3, 3A of the Civil Procedure Act, section 3 of Environment and Land Court Act, No 19 of 2011, section 101 of the Land Registration Act of 2012, sections 128 and 150 of the Land Act of 2012, I proceed to allow the prayers sought from the notice of motion applications dated December 17, 2021 filed by the plaintiff/applicant herein as the same is meritorious and has sound legal basis. For avoidance of doubts, I further proceed to make the following orders/ directions:-

- a. That the notice of motion application dated December 17, 2021 by the plaintiff/applicant be and are hereby allowed.
- b. That an order for consolidation of the two (2) suits – ELC No 183 of 2019 and ELC No 210 of 2021 being of the same subject matter and same parties be and are hereby be allowed to one suit.
- c. That the file on the suit ELC No 183 of 2019 be the lead file where all the filings of pleadings will be done and the proceedings be recorded from henceforth.
- d. That for expediency sake the matter to be mention on November 2, 2022 for taking elaborate and further directions with regard to the originating summons in ELC (Mombasa) No 183 of 2019 under the provision of section 37 rules 16, 17, 18 and 19 of the Civil Procedure Rules, 2010 and fixing of a hearing date which should be at least within the next 180 days from this date hereof.
- e. That an order be and is hereby made directing the Land Registrar, Mombasa to register an inhibition against all the suit properties known as land Reference Numbers CR – 6289 (Original 6037/22) of Section 1 Mainland North and CR – 6290 (Original 6037/23) of section 1 mainland north respectively under the provision of section 68(1) & (2) and 69 (1) of the Land Registration Act, No 3 of 2012 and section 79 of the Land (General Regulations) No



2017 pending the hearing and final determination of the consolidated suit in order to preserve the said suit properties thereof. Parties to bear this costs.

f. That the costs of the application to be in cause.

It is so ordered accordingly.

**RULING, DELIVERED, SIGNED AND DATED AT MOMBASA THIS 5<sup>TH</sup> DAY OF OCTOBER 2022.**

**HON MR JUSTICE LL NAIKUNI, JUDGE,  
ENVIRONMENT & LAND COURT AT MOMBASA**

**In the presence of:-**

- a. M/s Yumna & Mr Omar, Court Assistant.
- b. Mr. Kiplangat Advocate for the Plaintiff/Applicant in ELC NO 210 of 2021.
- c. Mr Musyimi Advocate for the 1<sup>st</sup> Plaintiff in the ELC No 183 of 2019
- d. No appearance for the 1<sup>st</sup> to 15<sup>th</sup> Defendants/Respondents
- e. Mr Kiarie Kariuki Advocate for the 16<sup>th</sup> Defendants/Respondents in 183 of 2019.

