



**Hussein Sifua & 52 others v Faith Wambua & another (Environment & Land Case 189 of 2021) [2022] KEELC 13384 (KLR) (3 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13384 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 189 OF 2021  
LL NAIKUNI, J  
OCTOBER 3, 2022**

**BETWEEN**

**BAKARI HUSSEIN SIFUA ..... 1<sup>ST</sup> PLAINTIFF  
OMAR JEFWA ..... 2<sup>ND</sup> PLAINTIFF  
CHARO JOSEPH KAHINDI ..... 3<sup>RD</sup> PLAINTIFF  
JACOB IGADWA ENYANDA ..... 4<sup>TH</sup> PLAINTIFF  
REUBEN BARAZA MWAKALE ..... 5<sup>TH</sup> PLAINTIFF  
ALI HASSAN DADA ..... 6<sup>TH</sup> PLAINTIFF  
KENNETH OWAKO ..... 7<sup>TH</sup> PLAINTIFF  
BAKARI HUSSEIN SIWA ..... 8<sup>TH</sup> PLAINTIFF  
FELIX MUTETHA KAMAKA ..... 9<sup>TH</sup> PLAINTIFF  
BETTY MONOO & 43 OTHERS ..... 10<sup>TH</sup> PLAINTIFF**

**AND**

**FAITH WAMBUA ..... 1<sup>ST</sup> DEFENDANT  
NAJMA AHMED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**I. Introduction**

1. Before the honorable court for its consideration and thus determination are two (2) notice of motion applications dated February 14, 2022 and May 4, 2022 both filed by the plaintiff/applicant. The initial application dated February 14, 2022 has been brought under the provisions of orders 5 rule 17, order



40 rules 1 & 2 & order 51 rules 1 and sections 1A, 1B, 3A and 63 (e), of Civil Procedure Rules 2010. The second application dated May 4, 2022 has been brought under the dint of order 11 rule 3 (h) and order 51 rules 1 of the Civil Procedure Rules, 2010 and sections 1A, 1B, 3A & 63 of the Civil Procedure Act, cap. 21 of the Laws of Kenya.

2. At the same time, the 2<sup>nd</sup> defendant has on June 8, 2022 filed a notice of preliminary objection dated June 9, 2022. It is on various grounds, and which the honorable court directed it be heard as a matter of precedence by way of written submissions.
3. The honorable court has decided to deal with all these three (3) pleadings concurrently, and simultaneously though separately for clarity sake.

### **III. The plaintiffs/applicant's case.**

4. As indicated above, the plaintiff has filed two (2) notice of motion application as follows:-

#### **A.The Notice of Motion application dated February 14, 2022.**

5. From this application the plaintiff/applicant seeks for the following orders:-
  - (a) Spend
  - (b) That this honorable court be pleased to issue temporary injunction restraining the defendants/respondents and/or their agents and/or employees and/or servants and/or relatives and/or any other person (s) acting on the defendants/respondents behalf from invading and/or trespassing and/or demolishing and/or selling and/or transferring the suit remises being Land Parcel No 399/I/MN. Including sub-division No 21898/I/MN CR No 76437, 21899/I/MN CR No 76437, 21900/I/MN, CR 76438, 2190/I.MN, CR 76439, 20910/I/MN, CR No 76440 and 20948/I/MN CR No 63882 situate at Bamburi – Utange within Mombasa county and/or dealing with the suit premises in any manner, whatsoever detriment to the rights and interest of the plaintiffs/applicants herein pending the hearing and determination of this application.
  - (c) That this honorable court be pleased to issue temporary injunction restraining the defendants/respondents and/or their agents and/or employees and/or servants and/or relatives and/or any other person (s) acting on the defendants/respondents behalf from invading and/or trespassing and/or demolishing and/or selling and/or transferring the suit remises being Land Parcel No 399/I/MN. Including sub-division No 21898/I/MN CR No 76437, 21899/I/MN CR No 76437, 21900/I/MN, CR 76438, 2190/I.MN, CR 76439, 20910/I/MN, CR No 76440 and 20948/I/MN CR No 63882 situate at Bamburi – Utange within Mombasa county and/or dealing with the suit premises in any manner, whatsoever detriment to the rights and interest of the plaintiffs/applicants herein pending the hearing and determination of this suit.
  - (d) That this honorable court be pleased to grant leave to have the originating summons dated and filed on September 13, 2021 and September 14, 2021 respectively be served by way of substituted service through one of the daily newspapers with a wide circulation.



- (e) That costs of this application be provided for.
6. The notice of motion application is based on the grounds, facts and averments founded in the 9 paragraphed supporting affidavit of Bakari Hussein Siwa sworn and dated February 14, 2022 one annexure marked as “BHS -1”. The deponent is the 1<sup>st</sup> plaintiff/applicant herein with the authority from the other plaintiffs/applicants to swear this affidavit on his own and their behalf. he deponed that the plaintiffs/applicants had filed this suit on September 14, 2021 vide an originating summons dated September 13, 2021 seeking for orders of land adverse possession against the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents in respect to the parcels of land known as Land Reference No Land Parcel No 399/I/MN. Including sub-division No 21898/I/MN CR No 76437, 21899/I/MN CR No 76437, 21900/I/MN, CR 76438, 2190/I.MN, CR 76439, 20910/I/MN, CR No 76440 and 20948/I/MN CR No 63882 situate at Bamburi – Utange within Mombasa county.
7. He indicated that efforts to serve the 1<sup>st</sup> defendant has been difficult and despite this some police officers claiming to be from Bamburi police station and alleging to be acting on behalf of the defendant/respondent herein came to the suit property on February 8, 2022 and threatened to demolish some of the plaintiffs/applicants houses thereon despite the pendency of this suit.
- He further stated that on February 10, 2022 another group of police officers allegedly from Bamburi police station came to the suit land and warned them and urged them to demolish their houses within seven (7) days from that date claiming to have been sent by the defendants/respondents.
8. He held that arising from these development, the plaintiffs/applicants were apprehensive that their houses on the suit land which provided them as the only evidence of their actual occupation and/or possession of the suit land, a main factor of ingredient in any case of land adverse possession would be eroded if their houses were demolished, rendering this suit nugatory.
9. He indicated that no prejudice would be suffered to the defendants/respondents if the orders sought were to be granted yet they would be the ones to suffer irreparable loss and damages if the orders sought was not to be granted.

### **B.The replying affidavit by the defendants**

10. None on record.
- C. The notice of motion application dated May 4, 2022 by the plaintiff/applicant
11. The plaintiffs/applicants have sought for the following orders:-
- (a) That this honorable court be pleased to consolidate this matter being ELC No 189 of 2021 (OS) with ELC No 204 (OS) for hearing and determination.
- (b) That the costs of this application be provided for.
- This application is premised on the averments and facts of the 5 paragraphed supporting affidavit of wiliam kenga and sworn on May 4, 2022 and two (2) annexures marked as “WCK 1 & 2” annexed herein. The deponent, an advocate of the high court of kenya practicing as such in the law firm of Messrs. “Kenga and Company Advocates” who are on record for the plaintiffs/applicants hence duly competent and authorized to swear this affidavit.
12. He held that this matter being ELC No 204 of 2020 (OS) was directly related to the instant case. He informed court the ELC No 204 of 2020 was already dated for hearing on June 21, 2022 in which



parties and the subject matter were the same, indeed he annexed copies of the pleadings and an order of February 18, 2022 in the ELC No 204 of 2020 (OS) confirming this position marked as “WCK-1”.

The learned counsel averred that he had conducted the advocate for the 2<sup>nd</sup> defendant the law firm of Messrs. Mulwa Nduya & Company advocates urging for the consolidation of the two matters. He conducted that for expediency and efficiency sake that the two matters were consolidated for hearing and determination, as no prejudice would be suffered if the orders were granted. He urged court to grant the orders as prayed.

#### **D.The notice of preliminary objection dated June 9, 2022**

14. On June 8, 2022, the learned counsel for the 2<sup>nd</sup> defendant/respondent the law firm of Messrs. Mulwa Nduya & Co Advocates filed a notice of preliminary objection under the following three (3) grounds of law:-

- (a) That the issues in regard to and/or limited to the property sub-division numbers 20948 section 1 mainland north and the 2<sup>nd</sup> defendant canvassed in support of the said application dated February 14, 2022 and the originating summons dated September 13, 2021 are “*res sub-judice* as the same are directly and substantially in issue between *inter alia*, the same plaintiffs and the 2<sup>nd</sup> defendant Najma Ali Ahmed in ELC No 204 of 2020 wherein the plaintiffs herein have sued Najma Ali Ahmed over ownership of the same suit property.
- (b) That the applicant and originating summons are fatally defective in substance and in form, incompetent lacks merit as it seeks to shift the burden of proof.
- (c) That the application and the suit are otherwise frivolous vexatious and an abuse of the court process.

#### **III.Submissions**

15. As indicated above on June 9, 2022 when the plaintiffs/applicants and the 2<sup>nd</sup> defendant’s advocates appeared before this court it was directed the two (2) and the preliminary objection be canvassed by way of written submissions and a ruling be rendered on June 20, 2022 taking cognizance of the already fixed hearing date of ELC No 204/2020 on June 21, 2022.

#### **A. The written submissions by the 2<sup>nd</sup> defendant on the notice of preliminary objection dated 9<sup>TH</sup> May, 2022**

16. On the June 14, 2022 the learned counsel for the 2<sup>nd</sup> defendant the law firm of Messrs. Mulwa Nduya & Company Advocates filed their written submission dated May 9, 2022. M/s Nabwana Advocate submitted that the 2<sup>nd</sup> defendant raised an objection against entire suit brought by originating summons dated September 13, 2021 and a notice of motion application dated February 14, 2022 to consolidate the suit herein with ELC No 204 of 2020 where the plaintiffs herein had sued the 2<sup>nd</sup> defendant on a claim of land adverse possession in respect to property number 20948/11/MN submitted.

She held that the defendant had raised a counter claim on ELC No 204 of 2020 dated March 4, 2020 against the Plaintiff which matter was heard on June 21, 2022 pursuant to a court order therein of March 2, 2022. She held that the plaintiffs in this matter are the same persons in ELC No 204 of 2020. The ELC No 189 of 2020 was obviously filed before ELC 204 of 2020. She argued that the plaintiffs action in filing two suits whose orders were for land adverse possession was in contravention with the



rules prohibiting litigants from litigating the same issues with the same persons in different fora of laws which were still pending.

17. She further submitted that the suit ELC No 189 of 2020 against the 2<sup>nd</sup> defendant was an abuse of the court process. She held that while the plaintiff was entitled on bringing a claim against the 1<sup>st</sup> defendant they held that the plaintiff was stopped by conduct in ELC No 204/2020 from pursuing this claim in ELC No 204 of 2020 from pursuing this claim in ELC No 189 of 2020 against the 2<sup>nd</sup> defendant and against Plot No 20948/2020.
18. In conclusion the counsel prayed to have the entire suit vide the originating summons of September 13, 2021 and the notice of motion application dated February 14, 2021 against the 2<sup>nd</sup> defendant be dismissed with costs. And that the Property No 20948/2020 be dismissed from the schedule of properties in this suit.

#### **B.The written submissions by the plaintiffs,**

19. On June 28, 2022, the learned counsel for the plaintiff the law firm of M/s Kenga & Company Advocates filed their written submissions dated June 27, 2022. Mr Kenga advocate submitted that the preliminary objection by the 2<sup>nd</sup> defendant be dismissed for being non-meritorious with costs. He provided the background of this case being that the plaintiffs filed this suit on September 14, 2021 vide their joint originating summons dated September 13, 2021. They sought for orders of land adverse possession against the defendant herein in respect of the six (6) parcels of Land No:
  - (a) 21898/1/MN; CR No 76436
  - (b) 21899/1/MN; CR No 76437
  - (c) 21900/1/MN; CR No 76438
  - (d) 21901/1/MN; CR No 76439
  - (e) 21902/1/MN; CR No 76440
  - (f) 20948/1/MN; CR No 763882 before subdivision all emanating from the original parcel known as 399/1/MN. With the 6<sup>th</sup> parcel being property for the 2<sup>nd</sup> defendant while the other five parcels belonging to the 1<sup>st</sup> defendant. The plaintiff filed a Notice of Motion application of the suit ELC No 189/2021 (OS) and the ELC No 204 of 2020 (Mombasa) as the matters were related – with similar history of origin the evidence in both filed would be the same. Thus to consolidate them would save resources – time, man hour and costs.
20. He held that the preliminary objection was premised on the provisions of section 6 of the *Civil Procedure Act* seeking to stay the proceedings of one suit while awaiting the outcome of the others not to contravene the doctrine of sub-judice. He argued rather taking that route and by invoking the oxygen rule, it would be better and for the sake of expediting the case, to have the suits consolidated. He argued the court had wider discretionary powers to consider consolidation of related matters and since the parcels of land forming the subject matter of the two suits, originating from the mother title plot No 399/L/MN which initially was owned jointly by Faith Wambua, the 1<sup>st</sup> defendant and Wilfred Wambua David the latter being the person who sold plot No 20948/1/MN CR 63882 the 6<sup>th</sup> suit property to the 2<sup>nd</sup> defendant herein the suit land therefore had a history of evidence which required consolidation to save both the limited judicious time and costs in litigation.
21. He further argued that the contentions for the 2<sup>nd</sup> defendant to have the plaintiffs claim against her proceed for hearing and determination in execution of the other claim against the 1<sup>st</sup> defendant



essentially meant that part of the claim in the suit would remain unaffected. He held that this approach and/or proposal would only be to overburden the courts with more suits as the plaintiffs would have to proceed with this suit in any event, separately hence creating a backlog of cases. He argued that the preliminary objection by the 2<sup>nd</sup> defendant essentially was not for the striking out the plaintiff's suit but one for the two suits not be consolidated and hence there has been no response filed for the notice of motion application for consolidation.

22. In conclusion, the counsel urged court to dismiss the preliminary objection with costs and allow the prayers sought from the two (2) notice of motion applications by the plaintiff.

#### **IV. Analysis and determination**

23. Having considered all the pleadings by the plaintiffs/applicants being the supporting affidavit to the two (2) application dated February 14, 2022 and May 4, 2022, the preliminary objection by the 2<sup>nd</sup> defendant and the replies and 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 objection by the 2<sup>nd</sup> defendant has met the threshold for a preliminary objection dated June 9, 2022.
- (b) Whether the notice of applications dated February 14, 2022 and May 4, 2022 by the plaintiffs/applicants seeking for:-
  - i). temporary injunction orders;
  - ii). the consolidation of the Civil Suit ELC No 204 of 2020 and ELC No 189 of 2021; and
  - iii). leave to serve the pleadings upon the 1<sup>st</sup> defendant/respondents by substituted way/means under order 5 rule 17 of Civil Procedure Rules 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 objection by the 2<sup>nd</sup> defendant has met the threshold for a preliminary objection dated June 9, 2022.**

24. As indicated above, the preliminary objection was filed by the 2<sup>nd</sup> respondent dated May 9, 2022. It raised an objection against the entire suit brought by originating summons dated September 13, 2021 and an application dated February 14, 2022 to consolidate this suit herein with that of ELC No 204 of 2020 where the plaintiffs herein sued the 2<sup>nd</sup> defendant on a claim of land adverse possession in respect of all that property known as plot No 20948/i/mn.

According to the Black Law Dictionary a preliminary objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made graphically clear in the now famous case of *Mukisa Biscuits Manufacturing Co Limited v West End Distributors Limited* [1969] EA



696. Where Lord Charles Newbold P held that a proper preliminary objection constitutes a pure point of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer it raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought in the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

25. I further wish to cite the case of “[Attorney General & Another v Andrew Mwaura Gitbinji & another](#) [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection *inter alia*:-

- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
- (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
- (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

26. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Certainly, the issues raised by the 2<sup>nd</sup> Respondent herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote. For these reasons, therefore, I find that the objection raised by the 2<sup>nd</sup> respondent were properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of *Mukisa Biscuits Manufacturing Co Limited* (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

Issue No (b) Whether the notice of application dated February 14, 2022 and May 4, 2022 by the plaintiffs/applicants seeking for:-

- i). temporary injunction orders;
- ii) for the consolidation of the Civil Suit ELC No 204 of 2020 and ELC No 189 of 2021; and
- iii). leave to serve the pleadings upon the 1<sup>st</sup> defendant/respondents by substituted way/means under order 5 rule 17 of [Civil Procedure Rules](#) should be granted.

### **Brief facts.**

27. Before proceeding with the analysis under this sub – heading, the court finds it significant to embark on the brief facts of the case first and foremost. From the filed pleadings, the Plaintiffs filed this suit on September 14, 2021 vide their joint originating summons dated September 13, 2021. They sought for orders of land adverse possession



against the defendant herein in respect of the six (6) parcels of land numbers:-

- (a) 21898/1/MN; CR No 76436
- (b) 21899/1/MN; CR No 76437
- (c) 21900/1/MN; CR No 76438
- (d) 21901/1/MN; CR No 76439
- (e) 21902/1/MN; CR No 76440
- (f) 20948/1/MN; CR No 763882 before subdivision all emanating from the original parcel known as 399/1/MN. With the 6<sup>th</sup> parcel being property for the 2<sup>nd</sup> Defendant while the other five parcels belonging to the 1<sup>st</sup> Defendant. The plaintiff filed a notice of motion application of the suit ELC No 189/2021 (OS) and the ELC No 204 of 2020 (Mombasa) as the matters were related – with similar history of origin the evidence in both filed would be the same. Thus to consolidate them would save resources – time and costs.

Subsequently, the 2<sup>nd</sup> defendant raised a preliminary objection dated May 9, 2022. The preliminary objection was premised on the provisions of section 6 of the Civil Procedure Act seeking to stay the proceedings of one suit while awaiting the outcome of the others not to contravene “the doctrine of *sub-judice*”. However, as a rejoinder to the raised objection, the plaintiff argued that rather than taking that route and by invoking the oxygen rule, it would be better and for the sake of expediting the case, to have the suits consolidated. His contention was that the court had wider discretionary powers to consider consolidation of related matters and since the parcels of land forming the subject matter of the two suits, originating from the mother title Plot No 399/L/MN which initially was owned jointly by one - Faith Wambua, the 1<sup>st</sup> defendant and Wilfred Wambua David the latter being the person who sold Plot No 20948/1/MN CR 63882 the 6<sup>th</sup> suit property to the 2<sup>nd</sup> defendant herein the suit land therefore had a history of evidence which required consolidation to save both the limited judicious time and costs in litigation. He further argued that the contentions by the 2<sup>nd</sup> defendant to have the plaintiffs claim against her proceed for hearing and determination in execution of the other claim against the 1<sup>st</sup> defendant essentially meant that part of the claim in the suit would remain unaffected. He held that this approach and/or proposal would only be to overburden the courts with more suits as the plaintiffs would have to proceed with this suit in any event, separately hence creating a backlog of cases.

He held that the preliminary objection by the 2<sup>nd</sup> defendant essentially was not for the striking out the plaintiff's suit but one for the two suits not to be consolidated. That is adequate on the brief facts of the case.

28. Now, having spelt out the brief facts of the case, turning to the analysis and the issues of 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?.

29. I will be considering these principles in depth hereinbelow. 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 SOK 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 [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

30. 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.

Having made these legal observations, 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 Bakari Hussein Siwas & 47 others and Faith Wambua & Najma Ali Ahmed.
- b. Both the suits involve and/or pertain to the same subject matter – being all that parcels of land known as Land Reference No the six (6) parcels of land numbers:-
  - i. 21898/1/MN; CR No 76436
  - ii. 21899/1/MN; CR No 76437
  - iii. 21900/1/MN; CR No 76438



- iv. 21901/1/MN; CR No 76439
- v. 21902/1/MN; CR No 76440
- vi. 20948/1/MN; CR No 763882 before subdivision all emanating from the original Parcel known as 399/1/MN. With the 6<sup>th</sup> Parcel being property for the 2<sup>nd</sup> defendant while the other five parcels belonging to the 1<sup>st</sup> defendant. These suits are still to be heard. They are fresh. Based on the guidance by the Civil Procedure Rules, these cases in my view are proper and typical ones to be considered for consolidation. 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.

31. 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.**

32. The plaintiff has through the two filed notice of motion application dated February 14, 2022 and May 4, 2022 respectively sought for injunction orders and for the consolidation of the two suits. instead of eliciting any responses the 2<sup>nd</sup> defendant onto the said applications filed a preliminary objection seeking to strike the entire suit. This court finds the issues raised and relief sought by the plaintiff to be plausible and persuasive in the interest of expeditious, just and reasonable resolution of the pending land dispute. The proposal for the consolidation of the two suits has full justification of both facts and the law as stated herein. further, on the other hand the 2<sup>nd</sup> defendant thought seeking to strike out the entire suit but by looking closely to the body of the preliminary objection which is premised under the provisions of section 6 of *Civil Procedure Act*, cap. 21 it seeks to stay one suit against another on



the ground that it would offend the doctrine of *sub - judice* if the two were to be allowed to be heard at the same time section 6 Provides:-

“No court shall proceed with the trial of any suit of proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between parties under whom they or any of them claim litigating under the same title, where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

33. The honorable court fully concurs with the counsel for the plaintiff to the effect to stay one suit for another instead of the option of consolidating the two and hearing them based on the oxygen rule of expeditious disposal of suits would be a waste of the judicial limited resources – time and money. Besides these suits have the same common historical background – the 6 suits having emanated from one land Plot No 399/1 before the sub-division. Therefore, the court is persuaded on the aspect of consolidating them.
34. 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 pendent*” 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 H.A. 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.**

35. 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.
36. In the instant case, the result of this process though the Preliminary objection by the 2<sup>nd</sup> defendant has failed the test provided for, this court feels based on the surrounding facts and inferences that its just fair and reasonable that all the parties bear their own costs thereof.

#### **V.Conclusion & Determination**

37. 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, of 2012*, sections 128 and 150 of the *Land Act of 2012*, I proceed to allow the prayers sought from the two notice of motion applications dated February 14, 2022 and May 4, 2022 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 preliminary objection dated June 9, 2022 raised by the 2nd defendant herein be and is hereby dismissed for lack of merit.
  - (b) That the notice of motion application dated February 14, 2022 and May 4, 2022 be and are hereby allowed to the following effect:-



i. The temporary injunction order sought under prayers number 3 of the notice of motion application dated February 14, 2021 be and is hereby granted.

ii. An order for consolidation of the two (2) suits – ELC No 204/2020 (OS) and ELC No 189/2021 being of the same subject matter and same parties and which have not yet been heard be and are hereby be allowed to one suit.

iii. The file on the suit ELC No 189 be the one where all the filings of pleadings will be done and the proceedings be recorded from henceforth.

(c) That the plaintiff be and is hereby granted leave to have the originating summons dated and filed September 13, 2021 and September 14, 2021 respectively be served by way of substituted service and/or means by publishing an advertisement in an English and Kiswahili edition local dailies of wide national circulations preferably “The Daily Nation” and “The Taifa Leo” in an conspicuous pages and with all the detailed suit land references and national identity card details of the defendants.

(d).That for the sake of expediency, this matter be fixed for mention on November 3, 2022 for purposes of taking direction on the originating summons under the provision of order 37 rules 16, 17 and 18 of the Civil Procedure Rules, 2010. All facts remaining constant, the consolidated suit be fixed for hearing on February 27, 2023 without failure.

(e)That the temporary injunction order granted on December 1, 2021 by this honorable court and on March 2, 2022in order to preserve the suit property pending the hearing and final determination of the suit be and is hereby extended and/or in the alternative to have an inhibition registered by the Land Registrar, Mombasa against all the suit properties in both the ELC No 204 of 2020 and 189 of 2021 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 Regulation) No 2017.

(f) That each party to bear its own costs.

It is ordered accordingly

**RULING DELIVERED, DATED, SIGNED AND AT MOMBASA THIS 3RD DAY OF OCTOBER 2022.**

**HON. JUSTICE L. L. NAIKUNI (JUDGE)**

**ENVIRONMENT AND LAND COURT**

**MOMBASA**

**In presence of:-**

**\*\*a. Ben Court Assistants.**

**b. Mr. Omwenga Advocate for the Plaintiff.**

**c. No Appearance for the Defendants**

