



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E006 OF 2021

JOSECK SIMIYU PRICHANI.....APPLICANT

VERSUS

VICTOR HONORARY NALIANYA1ST RESPONDENT

ELGON RELIGIOUS SOCIETY OF FRIENDS.....2ND RESPONDENT

EDWARD WANYAMA WANYONYI.....3RD RESPONDENT

JOSEPH MASIKA WANYONYI..... 4TH RESPONDENT

EVANS BARASA WANYONYI.....5TH RESPONDENT

AND

IN THE MATTER OF BUNGOMA HIGH COURT ELC NO. 124 OF 2014

BETWEEN

VICTOR HONORARY NALIANYA.....1ST PLAINTIFF

ELGON RELIGIOUS SOCIETY OF FRIENDS.....2ND PLAINTIFF

AND

JOSECK SIMIYU PRICHANI.....DEFENDANT

AND

IN THE MATTER OF KIMILILI PRINCIPAL MAGISTRATE'S COURT ELC NO 33 OF 2019

BETWEEN

ELGON SOCIETY OF FRIEND..... PLAINTIFF

AND

EDWARD WANYAMA WANYONYI.....1ST DEFENDANT

JOSEPH MASIKA WANYONYI.....2ND DEFENDANT

EVANS BARASA WANYONYI.....3RD DEFENDANT

AND

JOSECK SIMIYU PRICHANI.....INTERESTED PARTY/APPLICANT

AND

JOSECK SIMIYU PRICHANIAPPLICANT

VERSUS

VICTOR HONORARY NALIANYA 1ST RESPONDENT

ELGON RELIGIOUS SOCIETY OF FRIENDS.....2ND RESPONDENT

EDWARD WANYAMA WANYONYI.....3RD RESPONDENT

JOSEPH MASIKA WANYONYI..... 4TH RESPONDENT

EVANS BARASA WANYONYI..... 5TH RESPONDENT

R U L I N G

I have before me for my determination the applications dated 3rd August 2021 and 9th August 2021 by JOSECK SIMIYU PRICHANI (the Applicant herein) in which he seeks the following orders: -

1. Spent

2. Spent

3. The Court be pleased to order the withdrawal and transfer of KIMILILI SENIOR PRINCIPAL MAGISTRATE COURT ELC CASE No 33 of 2019 to BUNGOMA ENVIRONMENT AND LAND COURT or BUNGOMA LAND AND ENVIRONMENT CASE No 124 of 2014 be withdrawn and transferred to KIMILILI SENIOR PRINCIPAL MAGISTRATE ENVIRONMENT AND LAND COURT.

4. The Court be pleased to order the consolidation of KIMILILI SENIOR PRINCIPAL MAGISTRATE ENVIRONMENT AND LAND CASE No 33 of 2019 and BUNGOMA ENVIRONMENT AND LAND COURT CASE No 124 of 2014 for hearing and final disposal.

5. Spent

6. The Court be pleased to grant a temporary injunction restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the properly title NO KIMILILI/ KAMUKUYWA/2268 and KIMILILI/KAMUKUYWA/2269 pending the hearing and determination of the substantive suit.

7. The Officer Commanding KIMILILI POLICE STATION do enforce compliance of the orders above.

8. The costs of this application be provided for.

9. The Honourable Court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

The application which is predicated on the provisions of Sections 1A, 1B, 6, 8, 17 and 18 of the Civil Procedure Act, Articles 165(6) and (7) of the Constitution and Orders 40 and 51 of the Civil Procedure Rules is premised on the grounds set out therein and is also supported by the Applicant's affidavit.

The gravamen of the application is that in both BUNGOMA ELC CASE No 124 of 2014 and KIMILILI SPMC ELC CASE No 33 of 2019, the subject matter is the land parcels NO KIMILILI/KAMUKUYWA/2268 and 2269. That in BUNGOMA ELC CASE No 124 of 2014, the ELGON RELIGIOUS SOCIETY OF FRIENDS is the 2nd plaintiff and is also the plaintiff in KIMILILI SPMCC ELC CASE NO 33 OF 2019. That the Applicant herein is also the defendant in BUNGOMA ELC CASE No 124 of 2014 where he has filed a defence and Counter – Claim. The Applicant herein has also applied to be joined as a party in KIMILILI SPMC ELC CASE No 33 of 2019 where the defendants are the sons of the original owner of the land which was sold to the Applicant.

The Applicant's application to be enjoined in KIMILILI SPMC ELC CASE No 33 of 2019 is still pending and BUNGOMA ELC CASE No 214 of 2014 is also pending and meanwhile, the Respondents in KIMILILI SPMC ELC CASE No 33 of 2019 have started working on the land parcels NO KIMILILI/ KAMUKUYWA/2268 and 2269 by drilling water on the parcel NO KIMILILI/ KAMUKUYWA/2269 which is next to the Applicant's home for the last 38 years. That drilling is a capital investment which should be stopped until the substantive suit is heard and determined.

In opposing the application, **EDWARD WANYAMA WANYONYI, JOSEPH MASIKA WANYONYI and EVANS BARASA WANYONYI** (the 3rd, 4th and 5th Respondents) filed a Preliminary Objection dated 17th August 2021 raising the following grounds: -

- 1: That the application is defective, scandalous, incompetent, bad in law frivolous and an abuse of the Court process.**
- 2: That the Applicant is not a party in KIMILILI SPMC ELC CASE No 33 of 2019 and the KIMILILI COURT IS FUNCTUS OFFICIO as the matter is now the subject of ELC APPEAL No 3 of 2021.**
- 3: That the application is res – judicata and sub – judice and as the subject NO KIMILILI/KAMUKUYWA/2268 and 2269 were dealt with in (the case is not clearly identified as part of the pleading is cut off leaving only the year 2018). That defect is however not fatal for reasons which will be clear later in this ruling.**

The application has been canvassed by way of written submissions. These have been filed by the firm of **B S ADVOCATES LLP** for the Applicant and by the firm of **G. M. MAENGWE & COMPANY ADVOCATES** for the 3rd, 4th and 5th Respondents. The 1st and 2nd Respondents did not file any responses to the application.

I have considered the application, the supporting affidavit, the Preliminary Objection as well as the submissions by Counsel.

I shall first consider the Preliminary Objection because if I uphold it, then there will be no need to consider the application.

A Preliminary Objection, as **LAW J.A** stated in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD .V. WEST END DISTRIBUTORS LTD 1969 EA 699**: -

“..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the same to arbitration.”
Emphasis added.

In the same case, **NEW BOLD J.A** defined it as follows: -

“A Preliminary Objection is in the nature of what used to be a demurrer. 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 is the exercise of judicial discretion.” Emphasis added.

Out of the items raised by the 3rd, 4th and 5th Respondents as the basis of the Preliminary Objection, the only point of law is that this application is res - judicata and sub – judice because this matter has been dealt with in the Subordinate Court. Res – judicata under **Section 7** of the **Civil Procedure Act** refers to an issue which **“has been heard and finally decided”** while sub – judice under **Section 6** of the same Act refers to an issue which **“is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”** What is before me in this application is an order to withdraw and transfer **KIMILILI SPMC ELC CASE No 33 of 2019** to this Court and to consolidate it with **BUNGOMA ELC CASE NO 124 of 2014** or to have both cases heard in the Subordinate Court. There is also a prayer for a temporary injunction to restrain the Respondents whether by themselves, their agents and/or servants from trespassing or dealing with the land parcels **NO KIMILILI/KAMUKUYWA/2268 and 2269** pending the hearing and determination of the substantive suit.

With regard to the prayers for transfer and consolidation of **KIMILILI SPMCC ELC CASE No 33 of 2019** and **BUNGOMA ELC CASE No 124 of 2014**, those issues were not and could not be canvassed in the Subordinate Court. This is because, the jurisdiction to transfer a suit from the Subordinate Court to the superior Court and vice – versa is the preserve of this Court. **Section 18** of the **Civil Procedure Act** is clear that only the High Court (and since 30th August 2011, the Environment and Land Court) can exercise such powers of transfer of a suit from the Subordinate Court to itself and vice versa. There is no evidence placed before this Court to suggest that any application for the transfer of **KIMILILI SPMC ELC CASE No 33 of 2019** was made and canvassed in that Court. And if it was, any subsequent orders made would not apply as res – judicata because they will have been made out of jurisdiction and cannot therefore sustain a plea of res – judicata. There is also no evidence to suggest that an application for transfer is pending in **KIMILILI SPMC ELC CASE No 33 of 2019** and therefore, the plea of sub – judice cannot also be sustained. There is therefore a proper application for transfer and consolidation of suits before me. The plea of res – judicata and sub – judice is unfounded and rejected.

As regards the Court’s power to consolidate suits, it is clear under **Order 11 Rule 3(h)** of the **Civil Procedure Rules** that among the issues which the Court considers during the pre – trial process is the **“consolidation of suits.”** In the case of **STUMBERG AND ANOTHER .V. POTGEITER 1970 EA 323**, it was held as follows: -

“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.”

Therefore, the main benefit of consolidating suits is that two or more cases raising common issues of fact or law are combined, heard and determined as one case. This saves time both for the parties and Court as well as on costs. It will not be a prudent utilization of judicial resources to have two cases heard in different Courts when they raise the same issues. Indeed, it is clear from the case of **NGUMBAO .V. MWATATE AND OTHERS 1988 KLR 549** that even a part heard case can still be consolidated with a fresh case. This also ensures that Courts do not give conflicting decisions in similar disputes.

I have looked at the pleadings in **KIMILILI SPM ELC CASE No 33 of 2019** and **BUNGOMA ELC CASE No 124 of 2014**. Both of them involve the land parcels **NO KIMILILI KAMUKUYWA/2268** and **2269**. **THE ELGON RELIGIOUS SOCIETY OF FRIENDS** which is the 2nd plaintiff in **BUNGOMA ELC CASE No 124 of 2014** is also the plaintiff in **KIMILILI SPMC ELC CASE No 33 of 2019**. **JOSECK SIMIYU PRICHANI**, the Applicant herein, is the defendant in **BUNGOMA ELC CASE No 124 of 2014** and has also applied to be joined in **KIMILILI SPMC ELC CASE No 33 of 2019** as an Interested Party. The 3rd, 4th and 5th Applicants herein are also the 1st, 2nd and 3rd defendants respectively in **KIMILILI SPMCC ELC CASE No 33 of 2019** and their late father **HENRY WANYONYI WEKESA** was the proprietor of the land parcel **NO KIMILILI/ KAMUKUYWA/337** which has been sub – divided to create other parcels of land including the land parcels **NO KIMILILI/KAMUKUYWA/2268** and **2269**. There is merit in the application to have the two cases consolidated.

Counsel for the 3rd, 4th and 5th Respondents has submitted that this application is **“ambiguous and over stretch the muscles of this Honourable Court as the Applicant was not a party in the matter vide KIMILILI ELC No 33 of 2019 but is just a stranger and a stranger cannot seek to withdraw and transfer somebody’s case to another Court.”** The Applicant may not be a party in **KIMILILI ELC CASE No 33 of 2019**. However, unlike the principles of sub – judice and res – judicata, the consolidation of suits does not depend on the parties in the different suits being the same or litigating in the same capacity. It only requires that the same or similar questions of law or facts are being litigated in the two or more suits to be consolidated – **KIMANI WAWERU & 28 OTHERS .V. LAW SOCIETY OF KENYA & 12 OTHERS 2014 eKLR**. It is also instructive to note that the Applicant has infact already filed in **KIMILILI SPMC ELC CASE No 33 of 2019** an application dated 19th March 2021 seeking to be joined in that suit. That application is still pending. It is instructive to note that in paragraph 13 of his affidavit in support of that application, the Applicant avers as follows: -

“That the plaintiff herein jointly with the aforesaid VICTOR HONORARY NALIANYA filed BUNGOMA ELC No 124 of 2014 against me praying for a permanent injunction from possession and use of parcel registration Nos KIMILILI/ KAMUKUYWA/2268 and KIMILILI/KAMUKUYWA/2269. See copies of pleadings marked JSP 1(a) amended plaint, 1(b) verifying affidavit, 1(c) statement of defence and Counter – Claim.”

That is a clear indication that **KIMILILI SPMC ELC CASE No 33 of 2019** and **BUNGOMA ELC CASE No 124 of 2014** involve the same subject matter and there is need to have the two cases consolidated. Further, and is now clear, the Applicant herein is also a party in **BUNGOMA ELC CASE No 124 of 2014** where the subject matter in dispute is also alive and being litigated in **KIMILILI SPMC ELC CASE No 33 of 2019**. And since he has an interest in the matter under litigation in **KIMILILI SPMC ELC CASE No 33 of 2019**, he cannot be described as **“a stranger.”** And as to whether **KIMILILI SPMCE ELC CASE No 33 of 2019** should be transferred to this Court to be consolidated with **BUNGOMA ELC CASE No 124 of 2014** or vice versa, I notice that the case in **BUNGOMA ELC CASE No 124 of 2014** was filed earlier. I direct that **KIMILILI ELC CASE No 33 of 2019** be transferred from the Subordinate Court to be consolidated with **BUNGOMA ELC CASE No 124 of 2014**. Further directions shall be made as to how the two cases shall proceed following the consolidation.

The Applicant also seeks orders that a temporary injunction be issued restraining the Respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the titles **NO KIMILILI/KAMUKUYWA/2268** and **2269** pending the hearing and determination of the substantive suit. I take the view that the order for temporary injunction cannot issue in the matter now before me because at present, I am not handling any of the two suits sought to be consolidated. Right now, I am seized of a **MISCELLANEOUS APPLICATION No E006 of 2021** in which the main order sought is a consolidation of two cases. **Order 40 Rule 1** of the **Civil Procedure Rules** which donates the power to grant orders of temporary injunctions and Interlocutory orders states: -

“Where in any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree;

or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording a reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the Court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the Court thinks fit until the disposal of the suit or until further orders.” Emphasis added

As I have already stated above, I am not seized of any suit at the moment in which the order of temporary injunction can issue. And certainly no such order can be issued in this application. That prayer is declined.

Ultimately therefore and having considered the Applicant’s Notice of motion dated 9th March 2021, I make the following orders: -

- 1. KIMILILI SPMC ELC CASE No 33 of 2019 be and is hereby transferred to this Court to be consolidated with BUNGOMA ELC CASE No 124 of 2014 for hearing and final disposal.**
- 2. The prayer for temporary injunction is declined.**
- 3. KIMILILI SPMC ELC CASE No 33 of 2019 and BUNGOMA ELC CASE No 124 of 2014 shall both be mentioned on 8th November 2021 for further directions as to their disposal.**

4. Each party shall meet their own costs.

BOAZ N. OLAO.

J U D G E

2ND NOVEMBER 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2ND DAY OF NOVEMBER 2021 by way of electronic mail in keeping with the COVID – 19 pandemic guidelines.

BOAZ N. OLAO.

J U D G E

2ND NOVEMBER 2021.

Explanatory notes: -

This ruling was due for delivery on 18th October 2021. However, I was unwell and out of the station.

The delay is regretted.

BOAZ N. OLAO.

J U D G E

2ND NOVEMBER 2021.