



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 52 OF 2011

ABDUL MUTHEE MULAMA.....1ST PLAINTIFF

ERNEST SIKUKU.....2ND PLAINTIFF

VERSUS

EGLYN CHEPCHIRCHIR CHOGE.....1ST DEFENDANT

BENJAMIN KICHWEN.....2ND DEFENDANT

CHRISTIAN CHOGE.....3RD DEFENDANT

JOSEPH ANG'ANG'A.....4TH DEFENDANT

R U L I N G

1. By a Notice of Motion dated **8/5/2019** and filed in court on **9/5/2019** brought under **Order 3 Rule 5, Order 11 Rule 3(h)** and **Order 51 Rule 1** of the **Civil Procure Rules** and **Section 1A, 1B, 3 and 3A** of the **Civil Procedure Act** the 1st and 4th defendants/applicants seek the following orders:

(1) That suit Kitale ELC No. 52 of 2011 Abdul Muthee Mulama & Another -vs- Eglyne Choge & 3 Others in this court be consolidated with Eldoret ELC No. 306 of 2016 Eglyne Choge & 3 Others -vs- Sirikwa Co-operative Society & 3 Others at this (sic) Court for trial and disposal of both cases.

(2) That both cases [Kitale ELC No. 52 of 2011 and Eldoret ELC No. 306 of 2016] be heard together with Kitale and on the file Kitale ELC No. 52 of 2011, Abdul Muthee Mulama & Another -vs- Eglyne Chepchirchir Choge & 3 Others.

(3) That this honourable court be pleased to give directions as it may deem fit, just and necessary for the conduct of the said consolidated action.

(4) That costs of the suits including the costs of and incidental to this application be costs in the cause.

2. The grounds upon which the application is made are contained in the affidavit of the 1st defendant sworn on **8/5/2019** and at the foot of the application. In brief they are that this suit **Kitale ELC No. 52 of 2011 Abdul Muthee Mulama & Another -vs- Eglyne Choge & 3 Others** in this court should be consolidated with **Eldoret ELC No. 306 of 2016 Eglyne Choge & 3 Others -vs- Sirikwa Co-operative Society & 3 Others** at this court for trial and disposal of both cases; that the two suits involve the same subject matter that is the parcel of land namely **LR No. 8915** situated in **Pembeni Farm Uasin Gishu County** and **LR No. 2187** situated in **Trans-Nzoia County** and both parcels are "a block" separated by a boundary; that the parties are litigants in both **Eldoret ELC No. 306 of 2016** and **Kitale ELC No. 52 of 2011**; that there are similar questions of law and fact which are involved in the two suits and which are both pending in this court (I have confirmed the Eldoret case has not been transferred to this court); that both parcels are to subject of succession cause, **Kitale High Court Probate and Administration Succession Cause No. 259 of 2014**; that the rights and reliefs claimed in both cases are the same and are adverse to each other in a triangular way pitting (i) the estate against (ii) Pembeni Squatters **Kitale ELC No. 52 of 2011** and against (iii) Sirikwa Mumbai Multipurpose Co-operative Limited **Eldoret ELC No. 306 of 2016**; that it would therefore be just, convenient and expedient for all the parties involved if the above mentioned suits are consolidated and heard as one; that the plaintiffs shall not suffer any loss nor prejudice should this application be allowed; that the application has been made in good faith and without undue delay and that the application shall rely on the documents filed in court in both cases list of members previous cases including **Kakamega High Court No. 4357 of 1988, Court of Appeal C.A. No. 133 of 1989** and **Grant in Kitale High Court Succession Cause No. 259 of 2014**.

3. The application is unopposed and none of the parties filed any submissions for or against it.

4. I have noted that the application is brought under **Order 3 rule 5** of the Civil Procedure Rules. **Order 3 Rule 5(1)** provides that a plaintiff may unite in the same suit several cause of action against the same defendant or the same defendants jointly and any plaintiff having causes of actions in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

5. In my view the provisions of **Order 3 rule 5** are applicable under the commencement of a suit and do not apply in the current scenario where a suit is impliedly being sought to be transferred and consolidated with another.

6. The main flaw to be found in the application dated 8/5/2019 is that **Eldoret ELC No. 306 of 2016 Eglyne Choge & 3 Others -vs- Sirikwa Co-operative Society & 3 Others** is still lodged at Eldoret and has not been transferred to this court.

7. This court must refer to provisions of **Section 17** and **18** of the Civil Procedure Act on the transfer of suits and I note that the same do not provide for any power on the part of this court to withdraw a suit which has been filed before another court of parallel jurisdiction and transfer it to itself for trial and final determination.

8. I do not also consider **Section 1A, 1B 3** and **3A** of the Civil Procedure Act to be helpful to the parties or the court in this application for the reason that the issue of transfer of a suit to another court should be dealt with by the court before which the suit has been filed. Any intervention in that regard by this court might lead to administrative disorganization at the station of filing whose records this court is not in possession of. The application herein is therefore premature. In my view it should have followed a successful application for transfer made in the Eldoret court in the suit impliedly sought to be transferred vide the application dated 8/5/2019, that is **Eldoret ELC No. 306 of 2016 Eglyne Choge & 3 Others -vs- Sirikwa Co-operative Society & 3 Others**.

9. In my conclusion the application cannot be granted for the foregoing reasons as the court is being urged to give directions on the consolidation of this suit with a suit that is not pending before it.

10. For the above reason I find that the application is incompetent and I therefore dismiss it with costs to the respondents.

Dated, signed and delivered at Kitale on this 8th day of July, 2019.

MWANGI NJOROGE

JUDGE

8/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Ifedha holding brief for Katwa for Applicant

Mr. Atudo for Respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

8/7/2019