



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 118 OF 2018
(Formerly Nairobi ELC Case No. 1481 of 2013)

ADRIAN NYAGA MURITHI.....1ST PLAINTIFF

JOHN GITAU KIOI.....2ND PLAINTIFF

VERSUS

MOSES CLEMENT MUHIA NJOROGE.....1ST DEFENDANT

JACINTA NYAMBURA MBURU.....2ND DEFENDANT

JAMES NDUNGU KINYANJUI.....3RD DEFENDANT

JANE WAITHERA LESALOI.....4TH DEFENDANT

MR. JULIUS KIBUBA DISTRICT SURVEYOR,

KAJIADO CENTRAL.....5TH DEFENDANT

GRACE W. MUMO THE DEPUTY DISTRICT LAND

REGISTRAR, KAJIADO NORTH.....6TH DEFENDANT

THE ATTORNEY GENERAL.....7TH DEFENDANT

RULING

What is before Court for determination is the 1st Plaintiff's Notice of Motion application dated the 1st April, 2019 brought pursuant to section 1A, 1B and 3A of the Civil Procedure Act and Order 11 Rule 3(b) of the Civil Procedure Rules. The Applicant seeks the following orders:

1. That this suit be consolidated with **ELC Case No. 681 of 2017** (Formerly ELC Case No. 519 of 2016 Nairobi) Joshua Maitho Ndangui and Grace Nyawira Maitho V Joseph Gathagu, Adrian Murithi and John Gitau Kioi **and ELC Case No. 743 of 2017** (Formerly ELC Case No. 514 of 2013 Nairobi) Moses Clement Muhia Njoroge, Jacinta Nyambura Mburu and James Ndungu Kinyanjui V Jane Waithera Lesaloi, Joseph Gathagu Kagika, Andrian Murithi, John Gitau Kioi.

The District Land Surveyor, Kajiado, the District Land Registrar, Kajiado and Lepaso Ole Kikarde.

2. The costs of this application be provided for.

The application is premised on the summarized grounds that the 1st and 2nd Plaintiffs in ELC Case No. 118 of 2018 are the 3rd and 4th Defendants in ELC Case No. 743 of 2017 and the 3rd and 4th Defendants in ELC Case No. 681 of 2017. Further, the 1st and 2nd Defendants in ELC Case No. 118 of 2018 are the Plaintiffs in ELC Case No. 743 of 2017. Jane Waithera Lesaloi is the vendor of all parcels of land in question and the subject matter in the three suits emanated from land title number Ngong/ Ngong/ 48197 which she subdivided into thirty three (33) parcels that gave rise to Ngong/ Ngong/ 59340 – 59372. Further, the said subdivisions are the subject matter in the three suits. The thirty three (33) plots were issued with title numbers, which resulted in conflict as some of the title numbers had already been issued to different parties. There is a pending criminal case touching on subdivision of Ngong/ Ngong/ 48197 and on the unlawful process which was used to obtain the resultant titles. The consolidation of the suits would be in the interest of justice and avoid multiplicity of suits. Further, no party will suffer prejudice or be disadvantaged if the Court orders for consolidation. He contends that the same question of law and fact arise from the three suits. Further, the rights and reliefs claimed in the three suits arise out of the same transaction. It would be a waste of court's time and judicial resources to litigate the cases separately.

The application is supported by the affidavit of the 1st Plaintiff ADRIAN MURITHI where he deposes that together with the 2nd Plaintiff, they purchased parcels of land from JOB OLE KANGO who passed on, after which the family agreed that the 4th Defendant would transfer to them the parcels of land after she acquired the title. He claims in August 2010, he learnt that the 4th Defendant had acquired the title in her name and was involved in secret disposal of the land to third parties but on seeking clarity from her, she denied. He explains that on 17th February, 2010, they discovered the 4th Defendant had obtained titles in her own name and proceeded to lodge complaints against her at the Land Disputes Tribunal Vide TC /214/9/2010 as well as TC/215/9/2010. They also placed cautions on the said titles. Further, the Tribunal delivered awards in their favour which the 4th Defendant appealed against but was not successful. He contends that the Awards were adopted by the Kajiado Senior Resident Magistrates Court vide Land Tribunal Application Nos 77 and 78 of 2010 respectively with the participation of the Defendant and Decrees issued to that effect. He narrates the challenges they faced while trying to obtain registration of the parcels of land in their names and insists the 4th and 5th Defendants failed to inform them that the suit land had been subdivided. Further, after having a survey done, they proceeded to take occupation of their lands and put up fences as well as houses thereon, but as they went to collect mutation forms, they realized the land had already been subdivided into thirty three (33) title numbers. They have conducted various searches and realized certain parcels are in the names of third parties. He reiterates that the restriction they had placed together with the 2nd Plaintiff had been removed using an alleged Court Order in ELC Case No. 514 of 2013 which matter is pending in this Court as ELC Case No. 743 of 2017. Further, that the alleged Court Order did not emanate from Court. The said alleged Court Order in ELC Case No. 514 of 2013 is the subject matter in the pending Criminal Case No. 194 of 2016 in the Magistrate's Court at Ngong.

The 1st, 2nd and 3rd Defendants opposed the application and filed a replying affidavit sworn by the 1st Defendant MOSES CLEMENT MUHIA NJOROGE where he deposes that the application is misconceived and has no legal as well as factual basis. He explains that the causes of action, prayers sought and subject matters in all the suits are different as evident by the various pleadings filed. Further, that ELC Case No. 743 of 2017 is concerned with title number Ngong/ Ngong/ 59355, Ngong/ Ngong/ 59372 and Ngong/ Ngong/ 59356 all derived from Ngong/ Ngong/ 48197. He states that ELC Case No. 118 of 2018 (Formerly Nairobi ELC 1481 of 2013) is concerned with parcel number Ngong/ Ngong/ 59355, Ngong/ Ngong/ 5937 and Ngong/ Ngong/ 59372. He confirms that an order was issued by the High Court in Nairobi ELC 514 of 2013 (now 743 of 2017) lifting a restriction on parcel number Ngong/ Ngong/ 48197 which resulted in the issuance of title deeds. He further confirms the existence of the pending criminal case on the subject matter Ngong/ Ngong/ 48197. He insists the parties in the three cases sought to be consolidated are different, the cases are at different stages of the trial process and the

Court had issued directions on the hearing of the cases separately. Further, that all parties have filed pleadings, affidavits and submissions to interlocutory applications in the said matters. He contends that the affidavit in support of the application for consolidation contains several disputed matters that are irrelevant for purposes of supporting the application at hand. He reiterates that the determination of the suits separately will not prejudice any party or cause any embarrassment to the cause of justice. He concludes that the instant application is intended to delay justice.

The Plaintiff filed a further affidavit where he annexed the judgment in the Kibera CM Cr. Case No. 2361 of 2014 and reiterated that the Court Order used to lift the restriction on the parcels of land was not genuine and the seller did not have capacity to pass a good title. Further, that subdivision of the two parcels of land originated from Ngong/ Ngong/ 48197, which is the subject matter in ELC Case No. 118 of 2018, and ELC Case No. 681 of 2017 respectively.

The Plaintiffs as well as the 1st, 2nd and 3rd Defendants filed their respective submissions which were highlighted in Court.

Analysis and Determination

Upon consideration of the Notice of Motion Application dated 1st April, 2019, including the parties' affidavits plus annexures therein and the submissions, I find that the only issue for determination is: whether this suit should be consolidated with ELC Case No. 681 of 2017 and ELC Case No. 743 of 2017 respectively.

The Applicants submitted that these suits should be consolidated and relied on the cases of **Nyati Security Guards and Services Ltd Vs Municipal Council of Mombasa (1994) eKLR; Benson G. Mutahi Vs Raphael Gichovi Munene Kabutu & 4 others (2014) eKLR; Brij Kishore V Bir Singh & Others at the High Court of Punjab and Haryana (LR 5922 of 2013); Ngumbao V Mwatate & 2 Others (1988) KLR 549; Law Society of Kenya V the Centre for Human Rights Petition No. 14 of 2013** to support their arguments above.

The 1st, 2nd and 3rd Defendants opposed the consolidation and relied on the cases of **Nyati Security Guards and Services Ltd Vs Municipal Council of Mombasa (1994) eKLR; Benson G. Mutahi Vs Raphael Gichovi Munene Kabutu & 4 others (2014) eKLR** and **Law Society of Kenya V the Centre for Human Rights Petition No. 14 of 2013** to buttress their arguments.

Order 11 Rule 3 (1) (h) of the Civil Procedure Rules provides that:'

- (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—**
- (h) consider consolidation of suits;'**

In the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** the learned Judge explicitly stated the criteria for consolidation of suits as follows:' **The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-**

- 1. Do the same question of law or fact arise in both cases?**
- 2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction**
- 3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage**

to the other party.

Further in the said case while quoting the case of **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

“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”

From a perusal of the pleadings, I note the dispute in ELC Case No. 743 of 2017 revolves around title number Ngong/ Ngong/ 59355, Ngong/ Ngong/ 59372 and Ngong/ Ngong/ 59356 all derived from Ngong/ Ngong/ 48197 while in ELC Case No. 118 of 2018 the subject matter relates to its parcel numbers Ngong/ Ngong/ 59355, Ngong/ Ngong/ 5937 and Ngong/ Ngong/ 59372 respectively. From the three Court records, the three cases sought to be consolidated are different and seeking varied reliefs, the cases are at different stages of the trial process and the Court had issued various directions on the hearing of the cases separately.

Based on my analysis above and in relying on the abovementioned judicial authorities as well as the legal provisions cited above, I hold that the three suits sought to be consolidated are seeking varied reliefs and insofar as I concur with the Applicants that consolidation would be convenient, it is not that simple since there are various disputes involved, which are pending at different stages in court. I disagree with the Applicant that the disputes in the three cases relate to one transaction as I note several parties purchased resultant subdivisions of the main parcel of land. At this juncture, I opine that consolidation would delay the matters instead of expediting their determination, and this might disadvantage or prejudice a party. I am of the view that the three suits should proceed separately but simultaneously.

It is against the foregoing that I find the application dated 1st April, 2019 unmerited and will disallow it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 4th day of November, 2019

CHRISTINE OCHIENG

JUDGE