



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 319 OF 2017

PETER MUTHIANI KAVITA..... 1ST PLAINTIFF/RESPONDENT

MUSYOKA KAVITA.....2ND PLAINTIFF/RESPONDENT

MAINGI KAVITA.....3RD PLAINTIFF/RESPONDENT

VERSUS

JAMES MUVIU MWILU.....1ST DEFENDANT/APPLICANT

WILLIAM KAVITA..... 2ND DEFENDANT/RESPONDENT

RULING

1. The application coming up for ruling is the one dated 11th December, 2019 and filed in court on 13th December, 2019 by the counsel for the 1st Defendant/Applicant under certificate of urgency. It seeks the following orders: -

i. Spent.

ii. Spent.

iii. That the honourable court be pleased to order a consolidation of this suit with ELC No. 90 of 2019, Makueni for the purposes of hearing, determination and judgement and subject to such directions as to hearing and disposal as the Honourable court may deem fit.

iv. That costs of this application in the cause.

2. The application which is expressed to be brought under Sections 39(1) and (2) of the Environment and Land Court Act, 2011, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, 2010, Article 159 and 162 of the Constitution of Kenya, 2010 and all other enabling provisions of the law is also predicated on the grounds on its face and is further supported by the affidavit of James Nzuki Muvuu, the 1st Defendant/Applicant herein.

3. It is opposed by the Plaintiffs/Respondents through the replying affidavit of Peter Muthiani Kavita, the 1st Plaintiff/Respondent sworn at Nairobi on 16th November, 2020 on his own behalf and with the authority of the 2nd and 3rd Plaintiffs/Respondents.

4. The Plaintiffs/Applicants further filed grounds of opposition dated 13th December 2019 wherein they state that: -

i) The application is misconceived, bad in law and prayers sought therein are NOT capable of being granted.

ii) The application is scandalous, frivolous, vexatious and an outright abuse of the court process.

iii) The application is misconceived and bad in law.

iv) The application has no basis in law and should be dismissed with costs.

5. The application was canvassed by way of written submissions.

6. The 1st Defendant/Applicant has deposed *inter alia* that the suit herein relates to his right of ownership, occupancy and consequently transfer of a portion of the 2nd Defendant's/Respondent's land measuring 13 acres and subject of a series of agreements for sale entered into between himself and the 1st Defendant/Respondent, that the suit awaits determination by way of submissions on matters of law directions whereof have been given and the same is slated for mention to confirm filing of submissions on 16th December, 2019, that the gist of the suit by the Plaintiff's/Respondents against himself and him against the 1st Defendant is whether or not he is entitled to the land purchased from the 1st Defendant/Respondent in the year 2005, that he has since taken out an Originating Summons in case No. ELC 90 of 2019, Makueni the gist whereof is that he is entitled to the ownership of the land since the 1st Defendant's/Respondent's interest in the land has been extinguished by adverse possession, that it must be efficient and expeditious if the two suits are consolidated, heard and determined together to save on costs, time and avoid conflicts in the implementation of the outcome and that the application is not meant to confer any undue benefit and no prejudice will be occasioned on the parties to the suit.

7. On the other hand, the 1st Plaintiff/Respondent has deposed that they are opposed to the request to consolidate the two suits, that ELC 319 of 2017 was filed in court on 27th July, 2017 and that submissions for the same have been made. That the matter is awaiting judgement date, that the application lacks merit in that the 1st Defendant/Applicant has not remained in the suit property uninterrupted as he is purporting, that the request is misconceived, bad in law and prayers sought are not capable of being granted and that the court should treat each suit separately.

8. The counsel for the 1st Defendant/Applicant cited the case of Nyati Guards & Security Ltd -Vs- Mombasa Municipal Council [2004] eKLR where Maraga J. (as he then was) laid down the principles for consolidating cases as follows: -

“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. for some other reason it is desirable to make an order for consolidating them.***

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.”

9. The counsel submitted that in ELC No. 319/17, the 1st, 2nd and 3rd Plaintiffs/Respondents claim that the 2nd Defendant who is their father, sold to the 1st Defendant/Applicant, a 13 acre parcel of land in Kanzokea Location, Yinthungu Sub-location, Kathonziweni Sub-county without their consent and therefore seek to have the sale between the parties nullified. The counsel went on to submit that the 1st Defendant/Applicant in his defence dated 30th August, 2017 maintains that the agreement for sale is binding and therefore the 2nd Defendant should be compelled to transfer the property to him. The counsel pointed out that the 1st Defendant/Applicant took out a notice of claim against the 2nd Defendant dated 2nd September, 2017 seeking for an order of specific performance and in the alternative a refund of the purchase price with interest and compensation for loss of use of the property.

10. Arising from the above, the counsel submitted that, it is discernible from the two suits that: -

- i) The suit property is the same in both suits that is 13 acres of land situated in Kanzokea Location, Yinthungu Sub-location, Kathonziweni Sub-county, Makueni County, the subject of a 2005 agreement for sale between the Applicant and the 2nd Defendant and which property has been in the possession of the Applicant.**
- ii) The parties in ELC No. 319 of 2017 are the same parties in ELC No. 90 of 2019. The Plaintiffs in ELC 319 of 2017 are the interested parties in ELC No. 90 of 2019. The Applicant who is 1st Defendant in ELC No. 319 of 2017 is the Plaintiff in ELC No. 90 of 2019. The 2nd Defendant in ELC No. 319 of 2017 is the Defendant in ELC No. 90 of 2019.**
- iii) The reliefs claimed in both suits arise from the same transaction being the sale of the suit property by the 2nd Defendant to the Applicant in the year 2005 and the subsequent occupation of the property by the Applicant.**
- iv) Common issues arise for determination in both suits that is who between the Applicant and the 2nd Defendant is entitled to ownership of the suit property.**

11. The counsel further cited the case of Chimweli Jangaa Mangale & 3 Others -Vs- Hamusi Mohamed Mwawasaa & 15 Others [2016] eKLR where the Court of Appeal stated thus: -

“Clearly the purpose of consolidating suits is to expedite their hearing and disposal, cut on costs and expenses, save judicial time and ultimately to ensure that justice is administered without undue delay as demanded by Article 159 (2) (b) of the Constitution.”

12. The Court of Appeal in the above case went on to state that;

“In addition, the overriding objective found in virtually all the legislation regulating the procedure of the High Court, the ELC and even this court stipulates that the objective for the legislation is to facilitate the just, expeditious, proportionate and affordable resolution of disputes and requires all the courts to give effect to that objective, so as to achieve the just determination of the proceedings, the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources, and the timely disposal of the proceedings at a costs affordable by the parties.”

13. The counsel also relied on the case of **Benson G. Mutahi Vs Raphael Gichovi Munene Kabutu & 4 Others [2014] eKLR** and urged the court to allow the application.

14. On the other hand, the counsel for the Plaintiffs/Respondents also relied on the Nyati Security Guards Case (**Supra**) and submitted that the task before this court is one of comparing the suits sought to be consolidated so as to determine whether the same involved common questions of law or fact, whether the reliefs claimed arise out of the same transaction or whether it is convenient and efficient to pursue the same in a consolidated suit. The counsel further relied on the case of **Law Society of Kenya -Vs- Center for Human Rights and Democracy & 12 Others [2014] eKLR** where The Supreme Court observed thus;

“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.”

15. Arising from the above, the counsel urged that the Plaintiffs/Respondents stand to suffer if the two suits are consolidated because;

a) This instant suit (ELC No. 319 of 2017) was coming up for judgement on 16/12/2019 the day the Applicant sought consolidation with ELC No. 90 of 2019. Submissions have been submitted by both parties and they were only waiting for this Honorable Court to give judgement. On other hand, ELC 90 of 2019 is at infancy stage. The Applicant is seeking to start the process which has already been completed. For this reason, it is not desirable to consolidate the two suits at this stage and the main intention of consolidation will fail.

b) The reliefs sought by the Applicant are different in the two suits. In the ELC No. 319 of 2017 the Applicant is claiming land ownership through sale agreement he entered with the 2nd Defendant while on ELC 90 of 2019 the same Applicant claims the same suit land through adverse possession. The relief sought in ELC 90 of 2019 by the Applicant is an afterthought after sensing that he does not have a strong case and he stands to lose once judgement is granted.

c) The parties involved in the two suits are the same though in the ELC 90 of 2019 the Plaintiffs come in as interested parties.

16. The counsel urged the court to dismiss the application with costs to the Plaintiffs/Respondents.

17. Having read the application together with the replying affidavit as well as the rival submissions by the counsel on record for the parties herein, I do note that it is common ground that the principles for consolidating suits are as set out in the case of **Nyati Security Guards & Services Ltd -Vs- Municipal Council of Mombas [2004] eKLR**. In the circumstances therefore, the issue is whether ELC Number 319 of 2017 and ELC Number 90 of 2019 should be consolidated. Whereas it would be appropriate to consolidate the two suits since the parties and the subject matter in dispute in the two suits are the same, I would agree with the Plaintiffs/Respondents’ counsel that consolidation at this stage would be prejudicial to the Plaintiffs/Respondents the reason being that in ELC Number 319 of 2017 the matter is awaiting judgement while ELC No. 90/2019 is yet to commence hearing. No application has been made to set aside the consent that the parties herein recorded on 2nd October, 2019 whereby they agreed to make submissions on three (3) issues that they identified therein. I need not emphasize the fact that a consent judgement or order can only be set aside on the same grounds which would justify the setting aside of a contract; (*See Flora N. Wasike -Vs- Destimo Wamboko [1988] eKLR*). I hold that consolidation would prejudice the Plaintiffs/Respondents.

18. The upshot of the foregoing is that the application has no merits and I hereby proceed to dismiss it. Costs shall abide the outcome of the judgement in ELC 319 OF 2017.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 2ND DAY OF SEPTEMBER, 2021.

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MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi