



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 22 OF 2020 (O.S.)**

**SOPHIA MWAMGHUNDA.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**ABDULAHI ALI NASSIR.....DEFENDANT/RESPONDENT**

**RULING**

**I. PRELIMINARIES**

1. Before this Honorable Court is the Notice of Motion application dated 8<sup>th</sup> October, 2020 by the Plaintiff/Applicant. It is brought under the Provisions of Sections 1A, 1B & 3A of the Civil Procedure Act Cap. 21 and Order 51 Rule 1 of the Civil Procedure Rules 2010.

**II. THE PLAINTIFF/APPLICANT'S CASE**

2. The Plaintiff/Applicant seek for the following orders:-

*a) That the suit ELC Civil Suit No. 22 of 2020 (O.S.) be*

*Consolidated with ELC No. 15 of 2015.*

*b) That the Costs of this application be in the cause.*

3. The said application is founded on the grounds, testimonies and the averments of the 6 Paragraphed Supporting Affidavit of BONIFACE OTIENO sworn and dated on 8<sup>th</sup> October, 2020 and one annexure marked as "BO-1" annexed thereto.

4. The Deponent has deposed that he is an Advocate of the High Court of Kenya practicing as such in the name and style of Messrs. OTIENO B.N. & ASSOCIATES ADVOCATES – who has the conduct of this matter on behalf of the Plaintiff/Applicant and hence duly authorized and competent to swear this affidavit on his behalf. The Learned Counsel deposed that the subject matter in ELC Civil Suit No. 22 of 2020 (O.S.) and ELC Suit No. 152 of 2015 was the same and the parties in these two (2) matters were claiming ownership of the same property namely PLOT No. 12519 Section I Mainland North.

5. Therefore, in view of the foregoing, the deponent held that it was just and fair that these two (2) suits be consolidated in order to be effectively, completely adjudicated and settled all the questions over the ownership of the said parcel of land.

6. He deposed that while considering this request court would apply the principles of overriding objectives as envisaged under Sections 1A and 1B of the Civil Procedure Act, Cap. 21. In the final analysis, he urged court to grant the prayers as sought accordingly.

**II. THE RESPONDENT'S CASE**

7. On 10<sup>th</sup> February, 2021, while opposing the said application, the Defendant/Respondent filed its 10 paragraphed Replying Affidavit sworn by CHARLOTTE NALIAKA & dated on 8<sup>th</sup> February, 2021. She deposed that she was a High Court Advocate of the High Court practicing as such with the law firm of Messrs. SHERMAN NYONGESA MUTUBIA ADVOCATES who had the conduct of this case on behalf of the Defendant and therefore duly authorized and competent to swear this affidavit on his behalf.

8. She deposed that the said affidavit and application were misconceived, unmeritorious, frivolous, vexatious, bad in law and amounted to a gross abuse of the court process. She argued that the issues in the two (2) suits were fundamentally different and could not be conveniently

be tried together since they never constituted a common question of law and fact, in both suits. She argued that, while the ELC Civil Suit No. 152/2015 was based on wrongs arising from the alleged trespass and sought orders of evictions, the ELC. No. 22 of 2020 (O.S.) was on a claim for land adverse possession and therefore these were two (2) distinct causes of action which could not be consolidated whatsoever.

9. The Learned Counsel held that consolidation of the two suits would embarrass, prejudice and delay the determination of the suit to the detriment of the Defendant/Respondent herein. She stated so in the given fact there was no interlocutory injunction orders in place against the Plaintiff/Applicant who continued to erect structures on the said parcel of land. Hence, she averred that this gave an undue advantage to the Plaintiff/Applicants. Indeed, she contended that the Plaintiffs/Applicants suit was an afterthought as the same had been brought with an aim of derailing the hearing of the suit - ELC No. 152 of 2015. In short terms, the deponent stated that from the pleadings and the reliefs sought and the cause of action in both suits never arose from the same transactions as the Plaintiff/Applicant was a trespasser in the former suit. The learned Counsel urged Court to have the said the application and the prayers sought be dismissed thereof.

### **III. SUBMISSIONS**

10. On 11<sup>th</sup> February, 2021, when all the parties appeared before this Honorable court, directions were provided to the effect that the Notice of Motion Application dated 8<sup>th</sup> October, 2020 by the Plaintiff/Applicant be canvassed by way of written submissions. Pursuant to that, on 7<sup>th</sup> October, 2021, all the parties fully complied and court reserved the 8<sup>th</sup> December, 2021 to deliver its ruling accordingly.

#### **A. THE PLAINTIFF/APPLICANT SUBMISSIONS.**

11. On 26<sup>th</sup> July 2021, the Advocates for the Plaintiff/Applicant the law firm of Messrs. Otieno B.N. Associates Advocates filed their written submissions in support of their aforementioned application. The Learned Counsel submitted that the epicenter of these two (2) suits namely - ELC. No. 22/2020 (OS) and ELC No. 152/2015 respectively revolved around the same parcel of land – the suit land and the same parties. Further, they submitted that from the two suits the main bore of contention was on ownership of the suit land. They averred that in the case of the ELC 152 of 2015 where the Plaintiff/Applicant is a Defendant has raised a defence of Land Adverse possession such that his evidence in the ELC No. 22 of 2020 was similar to what he would give in the suit - ELC No. 152 of 2015. Hence, the counsels argued that there would be need to save on the judicial time by causing the consolidation of the two (2) cases. To buttress On this point he relied on the cases of *Supreme Court Petition No. 14 of 2013 Law Society of Kenya – Versus - The Centre for Human Rights and Democracy* and of *Benson G. Mutahi – Versus - Raphael Gichovi Munene Kabutu & 4 Others* [2014] eKLR respectively.

In conclusion, the Learned Counsel contended that no party stood to be disadvantaged, prejudiced or have the consolidation confer undue advantage to any of the parties herein. They urged court to grant the prayers as sought from their filed application with costs.

#### **B. THE DEFENDANT’S/RESPONDENT’S SUBMISSIONS**

12. On 22<sup>nd</sup> June, 2021 the Advocates for the Defendant/Respondent the law firm of Messrs. Sherman, Nyongesa and Mutubia Advocates filed their written submissions dated 18<sup>th</sup> June, 2021. They submitted that the substratum of the application was brought in bad faith as the Plaintiff/Applicant was already aware of the existence of the suit - ELC No. 52 of 2015 and yet still proceeded to file this subsequent suit whatsoever. Furthermore, despite of filing of the said suit, the Plaintiff/Applicant soon thereafter proceeded to ostensibly seek for the consolidations of the said suits. Clearly, the ELC No. 152 of 2015 was filed earlier by the Defendant/Respondent. They argued the two cases had different and distinct cause of actions where one sought for orders of evictions against a trespassing party while in the suit ELC No. 22/2020 (O.S.) was filed much later by the Plaintiff/Applicant herein for a claim of land adverse possession. Hence, the Learned Counsel argued that by consolidation of the two suits would be disadvantaging and prejudicing the Defendant/Respondent. They argued that the intended consolidation would ultimately confer undue advantage to the Plaintiff/Applicant herein. They reiterated that the Defendant/Respondent filed the suit in bad faith being aware of the existence of the pending suit. Thus, to them, this was an affront being misrepresentation and non disclosure of material facts. It was a case of seeking to steal a match against the Defendant. To buttress on these points, the Learned Counsels relied on the case of *“Fabian Esemai & Another – Versus - Pricilla Jeserek Telienu [2021]eKLR* and its ratio thereof.

Finally, the Learned Counsel stressed on the point that the reliefs sought in the two (2) suits that the Plaintiff/Applicant intended to be consolidated were not the same and never arose from the same transaction in that ELC No. 152 of 2015 was initiated by way of Plaintiff seeking for injunction against the Defendant’s for trespass, erecting illegal structures damages for trespass and on order of eviction while ELC No. 22 of 2020 (OS) was instituted by way of Originating Summons sought for land adverse possession. On point, they cited the cases of *Ntoyian Ole Sironka & 130 Others – Versus - Japet Ole Murre & 4 others [2017] eKLR* and *Young Traders (Tigoni) Ltd. – Versus - Julius Njoroje Kamau & Daniel kimani Chege [2016] eKLR*

In a nut shell, they urged this court to disallow the application with costs.

### **IV. ANALYSIS & DETERMINATION**

13. I have read and fully considered all the filed pleadings, the well articulated written submissions, the myriad of authorities cited hereof by the parties herein and the relevant provisions of law with regard to the application by the Plaintiff/Applicant dated 8.10.2020. In order to arrive at an informed, fair and just decision, I have framed the following two (2) salient issues for consideration. These are:-

a) *Whether the two (2) suits namely ELC No. 152 of 2015 and ELC No. 22 of 2020 (OS) should be consolidated or not?*

b) *Who will bear the costs of the Notice of Motion application?*

**Issue No. (a) Whether the two (2) suits namely ELC No. 152 of 2015 and ELC No. 22 of 2020 (OS) should be consolidated or not?**

14. Before embarking on a detailed analysis of this matter, I wish to provide brief facts regarding it. From the pleadings, what is the main issue in dispute is the ownership to the suit land situated at Nyali within the County of Mombasa. While on the one hand, Sophie Mwamghunda, the Applicant herein claims the suit property belonged to one Mzee N.A. Mwalunda, she took possession of it in the year 2000 where she had been running her grocery business since then to date. Therefore, she claimed to have continuously and un-interruptedly in physical possession of the suit land for a period of over eighteen (18) years. She is claiming for legal title of land through land adverse possession.

On the other hand, Mr. Abdullahi Ali Nasser – the Respondent herein claims to be the absolute and legal registered owner of the suit land. He alleged that the Applicant trespassed on the land and illegally erected structures without his permission. It is for these reasons that he instituted a suit seeking for an order of injunction to restrain her from remaining on it and further construction and/or fencing it or in any other way interfering with or alienating the suit property or a portion of it.

Indeed, at the initial stages, the Applicant having failed to enter appearance, the matter ELC 152 of 2015 proceeded to full trial. Eventually, on 14<sup>th</sup> June, 2017 judgment was entered in favour of the Defendant. However, on 21<sup>st</sup> June, 2019, the Applicant managed to set aside the aforesaid judgment whereby this Honourable court directed that the suit be heard afresh.

15. Now, having spelt out the facts, may I turn to the analysis and the issues of the consolidation of these two suits as pleaded per excellence. Accordingly, 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?.***

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. 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 two (2) same parties being Sophia Mwamghunda and Abdullahi Ali Nassir.

b) Both the suits involve and/or pertain to the same subject matter – being all that parcels of land known as Land Reference No. – PLOT No. 12519 Section I Mainland North.

c) Although indeed the ELC No. 152 of 2015 was heard and judgment entered in default the Plaintiff/Applicant having failed to enter appearance but it was later on set aside and court directed that the matter be heard afresh upon participation of all the parties. In the given circumstances, therefore, it would be sound and correct to state that none of the fixed cases have been finally heard, considered and determined. Based on the guidance by the Civil Procedure Rules, this case in my view is a proper and typical one to be considered for consolidation. Whether the cause of action as stated is one that arises from the cause of action of trespass by Sophia 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 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.

16. 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.

17. In as much as I fully agree with the Learned Counsel for the Respondent that indeed the Applicant filed this suit much later while she likely knew very well of the existence of the other case. She was likely to be guilty of misrepresentation of material facts and wanting to disadvantage and prejudice the Defendant by stealing a march against him as the legal owner of the suit land. But the above notwithstanding, 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.

18. An argument has been ably and vehemently advanced by the Learned Counsel for the Defendant to the effect that the application fails to meet the threshold for consolidation in that ELC No. 152 of 2015 was filed by way of Complaint while ELC No. 22 of 2020 was commenced by way of Originating Summons. I totally beg to differ. Legally speaking, I do not think that argument or submissions to be a bar to consolidation at all. In saying so, 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 Complaint 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.

## **V. DETERMINATION**

19. 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, Section 128 and 150 of the Land Act of 2012, I proceed to allow the prayers sought from the Notice of Motion application dated 8<sup>th</sup> October, 2020 by the Plaintiff/Applicant 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 two (2) cases namely ELC No. 152 of 2015 and ELC No. 22/2020 (OS) be and hereby ordered to be consolidated for purposes of being heard and determined together.**

**b) THAT the hearing of the consolidated case shall be on the basis of the already filed pleadings in the two (2) suits subject to any subsequent amendments.**

**c) THAT the suit ELC No. 152 of 2015 being the earlier one to be filed shall be the lead file for purposes of filing any further pleadings and recording of the proceedings in this matter.**

**d) THAT for expediency sake in disposing this matter the following action points and time frame to be adhered with strictly as follows:-**

**(i) The matter to be mentioned on 17<sup>th</sup> February, 2022 for purposes of case management and holding of a pre-trial conference session under the provisions of Order 11 of the Civil Procedure Rules, 2010.**

**(ii) Taking of directions on the Originating Summons under the Provisions of Order 37 Rules 16, 17, 18 and 19 of the Civil Procedure Rules.**

**(iii) Setting down the Consolidated suit for a full trial within the next ninety (90) days from this date hereof.**

**e) THAT costs shall be in the cause.**

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 15TH DAY OF DECEMBER, 2021.**

**HON. JUSTICE L.L. NAIKUNI**

**JUDGE**

**(ELC- MOMBASA)**

***In the presence of:-***

*M/s. Yumna Hassan – the Court Assistant*

*Mr. Otieno Advocate for the Plaintiff/Applicant*

*Mr. Onduso Asewe Advocate for the Defendant/Respondent*