



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCC No. 178 OF 2016

BONIFACE ONYANGO..... PLAINTIFF

VERSUS

WANJALA MAKANYANGA.....1ST DEFENDANT

JOSEPH SIMIYU.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 28th July 2021, the first defendant herein seeks the following orders:

1. *THAT an order do issue consolidating the instant suit with Land Case No. E06 of 2021 (OS) Makanyaka Wanjala vs Bonface Onyango.*
2. *THAT this Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice.*
3. *THAT costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the first defendant. His reasons for seeking the orders are that parties are the same in both cases with the plaintiff in this suit being the respondent in Land Case No. E06 of 2021 (OS) and the 1st defendant in this suit being the applicant in Land Case No. E06 of 2021 (OS). He further contends that the subject matter in both cases is land parcel number Kakamega/Chekalini/29, that both suits raise similar questions of law and fact thereby making it desirable that all the issues be disposed of at the same time. Finally, he takes the view that the outcome in this suit will affect the outcome in Land Case No. E06 of 2021(OS) and vice-versa.

3. Although directions for disposal of the application were given in the presence of all parties, the plaintiff neither filed a response nor submissions.

4. On his part, the second defendant filed a replying affidavit in which he deposed that a cause of action based on adverse possession is distinct and cannot be mixed with this suit. He added that the first defendant filed a defence in this suit in which he raised issues of ownership by way of prescriptive rights. He went on to state that the first defendant unfairly wants to ride on this suit and that the application is aimed at delaying the fair disposal of the suit.

5. Although directions were given that parties file written submissions, none was filed. Ultimately, parties opted to rely entirely on the material on record.

6. I have considered the application and the affidavits. The principles applicable when considering an application for consolidation were stated in **Mombasa in HCC No. 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa** as follows:

The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

- (a) Some common question of law or fact arises in both or all of them: or***
- (b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or***
- (c) For some other reason it is desirable to make an order for consolidating them.***

7. The Supreme Court added its voice to the subject when it stated in **Law Society of Kenya vs Center for Human Rights and Democracy and 12 others [2014] eKLR** thus:

[39] 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. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.

8. I have perused the pleadings in both cases which are pending before this court. Land Case No. E06 of 2021 was commenced by way of Originating Summons. Land Case No. E06 of 2021 (OS) has only two parties: the applicant herein as plaintiff and plaintiff herein as defendant. The plaintiff in Land Case No. E06 of 2021 (OS) claims that the defendant's title to land parcel number Kakamega/Chekalini/29 has become extinguished by adverse possession.

9. A perusal of the plaint in ELCC No. 178 of 2016 shows that the suit property is land parcel number Kakamega/Chekalini/29 and that the plaintiff herein seeks eviction of the defendants who he claims trespassed into the property. As correctly pointed out by the second defendant in ELCC No. 178 of 2016, the first defendant in this case filed a defence in this suit in which he claimed ownership of the suit property by way of prescriptive rights.

10. From the foregoing summary of the respective claims, it is apparent the suit property is the same in both cases. The parties are equally common in both cases and the dispute revolves around ownership and possession of the suit property. Thus, common questions of law or fact arises in both matters and it is therefore efficient and tidy that the two suits be heard together and be determined simultaneously. Needless to state, each party will ultimately have to prove his case at trial.

11. In the circumstances, Notice of Motion dated 28th July 2021 has merit. I therefore make the following orders:

a) ELCC No. 178 of 2016 Boniface Onyango vs Wanjala Makanyanga & Joseph Simiyu is hereby consolidated with Land Case No. E06 of 2021 (OS) Makanyaka Wanjala vs Bonface Onyango.

b) ELCC No. 178 of 2016 Boniface Onyango vs Wanjala Makanyanga & Joseph Simiyu shall be the lead file.

c) Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 14TH DAY OF DECEMBER 2021.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiff

1st Defendant present

Mr Amasakha for the 2nd Defendant

Court Assistant: E. Juma