



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC PETITION NO. 2 OF 2019

IN THE MATTER OF

BREACH OF THE CONSTITUTION AND ESPECIALLY ARTICLES

**1 (1) (B), 1 (4) (B) 2,3,6,10,12,19,20,21,22,23,23,27,28,40,47,48,50,60,61,64,66,68,73,75,
77,174,175,185 AND 197 OF THE CONSTITUTION OF KENYA 2010**

AND

IN THE MATTER OF

**SECTION 24, 25 AND 78, 79 OF THE LAND REGISTRATION ACT AND IN THE
MATTER OF ARTICLES 2,3,4,7,13 AND 19 OF THE AFRICAN CHARTER FOR
HUMAN AND PEOPLES RIGHTS AND OTHER PROVISIONS THEREOF**

AND

IN THE MATTER OF

THE LAND REGISTRATION ACT AND LAND ACT

AND

IN THE MATTER OF

**THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013 SECTION 4**

BETWEEN

MACCU MOTORS 1ST CROSS PETITIONER

TOMAS MURUGU M'TWARUCHIU 2ND CROSS PETITIONER

JOPSHAT THIANE IBURI 3RD CROSS PETITIONER

FABIAN MURUGU 4TH CROSS PETITIONER

TIMOTHY KIMATI DAVID 5TH CROSS PETITIONER

FREDRICK K. MBURUGU 6TH CROSS PETITIONER

ROBERT MUTHAURA GITONGA..... 7TH CROSS PETITIONER

EPHANTUS MAJAU NCHANI 8TH CROSS PETITIONER

VERSUS

DAVID KIRIMI MWITHIMBU 1ST RESPONDENT IN CROSS PETITION

LARSEN & TOURBO LTD2ND RESPONDENT IN CROSS PETITION

THE LAND REGISTRAR MERU CENTRAL DISTRICT 3RD RESPONDENT

THE ADJUDICATION OFFICER, RUIRI/RWARERA

ADJUDICATION SECTION4TH RESPONDENT

THE HONOURABLE ATTORNEY GENERAL..... 5TH RESPONDENT

RULING

1. Through an oral application made on 8.11.2021 counsel for the petitioner Miss Kiome sought **Petition No. 3 of 2021** be heard together with **Petition No. 2 of 2019** and **Petition No. 1 of 2021** based on **Article 159 (1) & 2 (b)** of the Constitution.
2. The basis for the application is that the common denominator in the two petitions is **Parcel No. 815** and hence it would avoid duplication of evidence, the court will be appraised of all issues in both petitions and hence avoid conflicting judgments.
3. Further counsel submitted there will be no prejudice if the matters are heard together.
4. Mr. Gichunge Muthuri for the cross-petitioners submitted though not served with the **Petition No. 3**, was not opposed to the consolidation but urged the matters be heard through written submissions.
5. Mr. Muchomba advocate for 4th – 11th respondents in the main petition opposed the consolidation and or joinder on the basis that the main petition had oved too far in the two files. Parties had filed and exchanged documents and the application was being made too late in the day and that his clients who are elderly stood to be prejudiced if there was consolidation.
6. On the part of Mr. Kieti for the 2nd respondent in the cross-petition, while agreeing the petitions can be disposed of by way of written submissions, confirmed **Parcel No. 815** was mentioned in both petitions but was of the view that counsel ought to have filed a formal request for consolidation since mention of a property alone was not enough to justify the application. Further he submitted a connection has to be shown.
7. As regards **Petition No. 2 of 2015**, counsel submitted a lot had occurred including two scene visits so as to narrow down issues which are now evident in **Petition No. 2** as compared to **Petition No. 3 of 2021** which is still at a preliminary stage.
8. Additionally counsel submitted the effect of petition No. 2 of 2015 being determined one way or the other will not prejudice petition No. 3 which is a latter one. Similarly counsel submitted there was no likelihood of any conflicting judgment and urged **Petition No. 2 of 2019** be disposed of at the earliest opportunity in which case the petitioners in **Petition No. 3 of 2021** will be at liberty to adopt the findings in **Petition No. 3 of 2021**.
9. Miss Kiuki advocate for the 2nd respondent in the cross-petition submitted she was not opposed to the application for consolidation.
10. Mr. Muchomba for the 4th interested party who is equally the plaintiff in **ELC No. 1 of 2021** adopted his earlier submissions opposing the application.
11. In response Miss Kiome still urged the court on the need to conduct viva voce evidence since claims raised for special damages may not be proved through affidavits and that there was need to hear the matter in open court.
12. Further counsel submitted there was no legal requirements to file a formal application for consolidation and or for joinder of parties.
13. Lastly counsel submitted it was in the interest of justice and proper use of judicial resources for the matters to be heard together since neither of the parties would be prejudiced.

BACKGROUND

14. By a petition dated 18.2.2019 David Kirimi filed on 18.2.2019 regarding **Parcel No. Meru Central/Ruiri Rwarera/815** against the Land Registrar Meru Central District, Adjudication Officer Ruiri Rwarera Adjudication Section and Hon. Attorney General for misplacing

him from his rightful physical location and placing the interested parties **Jenaro Nkumbi, Rosalia Mukiri, Cicilia Kambura Mukindia and Charles Rugoji** owners of **Parcel No's 724, 5088, 5089 and 802** on his location. He sought the translocation be reverted to restore him to his correct location in the cadastral maps.

15. He sought for orders of mandamus, a declaration that he is an absolute owner, he be restored to his land, he remains in suit land and permanent orders of injunction issue restraining the respondents and interested parties from interfering with his possession and occupation of the suit land.

16. Interim orders of injunction were issued interpartes on 5.3.2019. The petition was subsequently amended on 6.3.2019 on the basis that the acreage had been reduced from 11.20 acres.

17. By an application dated 4.3.2019, more interested parties sought and were enjoined as purchasers for value of Parcels No's 5088, 5089 and 724 namely:

- **Maccu Motors Ltd,**
- **Tomas Murugu M'Itwruchiu**
- **Fabian Murugu**
- **Timothy Kimathi David**
- **Fredrick K. Mburugu**
- **Robert Muthaura Gitonga and**
- **Ephantus Majau Nchani as 4th to 11th respondents**

18. They eventually filed a replying affidavit sworn by the 5th respondent on 10.5.2019 while the 4th respondent filed a reply sworn on 10.5.2019.

19. With leave of court they brought a cross-petition dated 10.5.2019 wherein the 1st cross petitioner claims he had purchased Parcels No. 5088 and 5089 from the 2nd interested party in the main petition, while 2-8th cross petitioners had bought Parcel No. 724 from the 3rd interested party in the main petition which bordered Parcel No. 818 registered in the name of David Kirimi the 1st respondent in the cross-petition and the petitioner in the main petition and averred the 2nd respondent in the cross petition had trespassed into it allegedly after David Kirimi leased the 2nd respondent their land in total disregard of their rights.

20. They sought the court to declare David Kirimi's acts as illegal and a declaration that they are the rightful owner of Parcels No's 5088, 5089 and 724, permanent injunction, eviction orders, mesne profits and costs as against the 1st and 2nd respondents to the cross petition.

21. David Kirimi put in a further supporting affidavit sworn on 27.7.2019 claiming he was not a trespasser. The 2nd respondent to the cross petitioner filed a replying affidavit to the cross petition sworn by Dothi Srinivas on 5.9.2019.

22. Similarly on 29.10.2019 the 2nd respondent filed a response through an affidavit sworn by Mr. Justus M. Levu to both petition and the cross-petition affirming Parcel No. 815 belongs to David Kirimi and borders Parcels No's 724, 5088, 5089 and 802, that David Kirimi on the ground was not occupying the right position for Parcel No. 815, as there was no translocation of it as alleged and that the allegations of original acres of 11.20 acres was because he had encroached on the two acres of Parcel No. 724, 5088 and 5089.

23. Further Mr. Levu alleged Parcel No. 724 had been subdivided to cater for **Thomas Murugu, Josphat Thiaine Iburi, Fabian Murugu, Timothy Kimathi David, Fredrick Mburugu and Robert Muthaura Gitonga** but the new numbers were not yet out and that **Parcel No's 5088 and 5089** had not been transferred to Maccu Motors Ltd.

24. Additionally Mr. Levu stated David Kirimi had filed an objection regarding Parcel No. 815, over map amendment which was determined.

25. He averred when the objection was being heard David Kirimi took the adjudication officer where he was occupying but Parcels No's 724, 5088 and 5089 had not been objected to meaning the non-inclusion meant the aforesaid parcels were subsumed and translocated, which was erroneous, an oversight, a misapprehension of interest and hence implementation of the objection decision is impractical.

26. On 13.2.2020 the firm of Charles Kariuki & Kiome Advocates filed a notice of change to appear for David Kirimi in place of Mbogo & Muriuki Advocates and immediately sought for a site visit. At the same time the firm of Gichunge Muthuri & Co. Advocates came on record for the 1st cross petitioner Maccu Motors Ltd on 15.5.2020.

27. The application for a scene visit was allowed and an order issued on 27.5.2021 leading to a scene visit report filed on 22.7.2021 in the presence of counsels for 4 – 11 respondents in the main petition, Miss Koinyangi for 1st cross petitioner, Miss Gikundi for petitioner in main petition and 1st respondent in the cross petition, Miss Kiyuki for 2nd respondent in the cross petition Mr. Kieti for 1st and 3rd respondents in the main petition and 3rd and 4th respondents in the cross petition, the **County Surveyor, DLASO, the petitioner Mr. David Kirimi,**

Thomas Murugu M'twaruchiu, Joshat Iburi, Gabian Murugu, Timothy Kimathi, Fredrick K. Mburugu, Ephatus Majau and Jenaro Nkumbi.

28. Similarly the Land Adjudication and Settlement Officer filed his report dated 5.7.2021.

29. That on 25.5.2021 Miss Kiome advocate for the petitioner brought to the attention of court that there was petition 2 of 2-021 by different parties where her client was a respondent in respect of the same land and urged the three matters be heard together. It does not appear if any directions was made over the request since parties by consent agreed for a scene visit.

30. Turning to petition 3 of 2020, **Stanley Kailutha, Kanyili Francis, Benard Kimathi, Geoffrey Aburuki and Joseph Mugambi** brought a petition dated 9.3.2020 against the Land Adjudication officer Ruiru Rwarera adjudication section, Land Registrar Meru Central and the Attorney General and Interested Parties **Justus M'Ikiao M'Muthuri, Robert M'Wongo Itaali, M'Minyori Kiriamemba and Wilson Kinyua Mutua** claiming to be owners of **Parcel No's 750, 752, 815, 831, 2447, 2969, 3999, 5670, 5997 and 6266 Ruiru/Rwarea adjudication section** and in which they state they were in **Nairobi Court of Appeal application No. 129 of 2005 Alfred Mworira Kirima & 110 Others -vs- Republic & 12 Others** to which a consent was adopted on 24.10.2014 in which it was stated they were already settled and genuinely in occupation of the land.

31. They pleaded they had recently discovered their portions had been subdivided in favour of other persons and given the aforesaid numbers so the only way forward was to lodge objection proceedings. They lodged them, attended the objection proceedings only to be told the objected parcel numbers were wrong and that their physical location were far away from the land they actually occupy. The objections were dismissed.

32. They alleged there was fraud, misrepresentation and efforts to disentitle them hence pray for declaratory orders the land belongs to them, mandamus to compel the Director of Land Adjudication and Settlement to adhere to the consent dated 24.10.2014 and prohibition against the District Land Adjudication & Settlement officer Ruiru Rwarea Adjudication Section implementing any of their decision that is contrary to the said consent.

33. The petition was amended on 8.1.2021 to bring on board 1st – 10th interested parties who are represented by M/s Mutuma Gichuru & Associates Advocates which firm brought a notice of preliminary objection dated 27.4.2021 on the ground that the amended petition does not raise constitutional issues and is brought to circumvent the import and procedures set out under the **Land Adjudication Act Cap 283**, discloses no cause of action and hence bad in law and substance.

34. The 7th interested party entered appearance through M/s Charles Kariuki & Kiome Associates on 22.4.2021 who filed an answer to amended petition claiming though holding a title deed and being on the ground since 1988 his Parcel No. 815 had allegedly been displaced or placed to another physical location and interested parties allegedly placed in the position of his land on the cadastral map, raised an objection No. 5075/2018 allowed and or restored to which was rightful position leaving the land officers to go and amend the area map/cadastral map to reflect the outcome of the objection proceedings.

35. Following filing of preliminary objection, parties have with leave put in written submissions dated 3.11.2020 and 3.5.2021 for petitioners and 5th – 14th interested parties respectively.

36. Turning to **ELC No. 1 of 2021** formerly **Meru CMCC No. 15 of 2019**, Charles Gitonga Rugoji brought a claim against David Kirimi Mwithimu & Larsen Taubro Ltd claiming to be registered owner of L.R No. Ruiru/Rwarera/802 measuring approximately 0.88 Ha since 1982 and a title deed issued on 5.12.2017 but on visiting the land in 2019 found the 1st defendant in occupation and established the 1st defendant had in 2016 leased the land to the 2nd defendant hence sought vacant possession, permanent injunction, mesne profits, general damages, special damages, costs and interests.

37. At the same time the plaintiff sought for a temporary injunction vide application dated 15.2.2019.

38. The 2nd defendant entered appearance and filed a defence dated 25.2.2019 while the 1st defendant entered appearance on 26.2.2019, filed a replying affidavit sworn on 18.3.2019 raising the issue of the existing High Court petition No. 2 of 2019. The suit was subsequently transferred to the ELC court by an order issued on 23.2.2021 to be heard simultaneously with ELC Petition No. 2 of 2019.

39. Having set the particulars in the three matters herein, the issue for my determination is whether the three matters can be consolidated based on the grounds raised by Miss Kiome Advocate and opposed by some of the respondents in this matter.

40. The grounds set out are:-

a) The matters involve Parcel No. 815.

b) The parties are more or less the same.

c) Consolidation will avoid inconsistencies when determining the three matters.

d) Consolidation will enable disposal of the matters without parties who are more or less the same duplicating their evidence in three files.

41. For those opposed to the consolidation, it is submitted:-

- a) One suit is brought by way of a plaint while the two other matters are petitions.
- b) Petition No. 3 of 2020 is at an advanced level
- c) Some parties are not in the other suits
- d) The application is made too late.
- e) Parties are not the same and the cause of action is not the same
- f) Consolidation will delay the matters.

42. From the pleadings above, the following issues are evident:-

- a) The common denominator in all the matters is Parcel No. 815 and David Kirimi Mwithimbu the petitioner in the main petition vis a vis the role of District Land Adjudication & Settlement officer.
- b) Parcel No. 815 is alleged to be superimposed on Parcels No's 724, 5088 and 5089.
- c) The physical locality of the aforesaid parcels vis a vis the placements in the cadastral maps is in question.
- d) The manner in which the District Land Adjudication and Settlement officer undertook the adjudication leading to the recording and the names of the recorded owners of Parcels No's 815, 724, 5088 and 5089 and the subsequent subdivisions after the sale and transfer of the initial numbers is at issue.
- e) Whether the court has jurisdiction to entertain the suit given the parcels fall under the Land Adjudication Act 284.
- f) If any of the parties has trespassed into the adjoining parcels of land and the boundaries thereof.
- g) None of the files has commenced any hearing and no directions have given on the mode of hearing save for the filing of submissions over the preliminary objections in petition No 3 of 2020

PRINCIPLES OF CONSOLIDATION

43. In *Stumberg & Another –vs- Potgieter [1990] C.A 323* the court held:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of matters should be disposed of at the same time, consolidation should be ordered.”

44. Consolidation therefore is a process by which two or more matters or causes are combined or united and treated as one cause or matter. The main purpose is to save costs, time, effort and to make the disposal of several actions more convenient by treating them as one.

45. **Order 11 Rule 3 of Civil Procedure Rules** allow consolidation of suits for expeditious disposal and for proper case management.

46. It has been said the application has been brought late when one of the files is at an advanced stage. In *Ngumbao –vs- Mwatate & 2 Others [1988] KLR 549*, a part heard case was consolidated with a fresh case and parties who had testified recalled. The Supreme Court of Kenya in *Law Society of Kenya –vs- Centre for Human Rights & Democracy [2013] eKLR*, the court stated consolidation is to facilitate efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties and that it was never intended to confer any undue advantage or occasion a disadvantage to a party that opposes it.

47. As stated above, the three files raise similar or substantially similar questions of fact and law. Secondly the parcels of land adjoin each other and are neighbours or overlapping each other.

48. Third, except in **ELC No. 1 of 2021**, the District Land Adjudication Officer Ruiiri/Rwarera is appearing in all the matters and his evidence shall be crucial in answering the questions of facts and law on the manner of execution of his mandate on the parcel numbers and their physical location on the ground.

49. Forth, it would be cost effective and proper use of judicial resources to hear the matters in a harmonized manner and call for evidence in one file in line with **Article 159**.

50. The 2nd issue raised by the parties is the manner of disposing of the matter once consolidated.

51. **Rule 20** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Rules 2013** has a hierarchy of how a petition should be disposed of by way of affidavits, written submissions or oral evidence. **Rule 20 (3)** allows the court upon application or on its own motion to direct that the petition or any part of it be heard through oral evidence.

52. Miss Kiome submits her clients are seeking mesne profits and special damages among other prayers which require cross-examination and production of documents which may not be ideal through written submissions but through cross-examination. See *Ahad –vs- CJE [2019] eKLR.*

53. In the premises my findings are that the application for consolidation is merited. The same is allowed and the following directions and orders issued .

54. (1) The lead file shall be file No. 2 of 2019.

(2) All pleading henceforth shall be filed in the lead file with the titular heading reflecting all the files and parties in the order of age of filing as appropriate.

(3) Parties to file their paginated bundles including all list of witness, witness statements, list of documents and case summaries in line with case management check list under **Order 11** clearly referenced within 45 days from the date hereof for the petitioners and cross-petitioner deadline being 31st January, 2022 and 45 days for the respondents and interested party's deadline being 30th February, 2022.

(4) Parties to choose and agree on one lead witness where possible.

(5) Parties to agree on the documents to be produced without necessarily calling their makers.

(6)The respondents to file and supply within 45 days from the date hereof all original and or certified maps, adjudication register records, notes and or files relating to the subject parcels of land to the petitioners, cross-petitioners and parties be at liberty to attend the offices of the District Land & Settlement officer Ruiru Rwarera for discovery upon prior written notice of 14 days.

(7) Given the foregoing directions and considering the issues and factual evidence required, the preliminary objection dated 27.4.2021 is hereby dismissed as raising no pure point of law with no order as to costs.

(8) Matter be mentioned on 3.3.2022 to take a mutually convenient date for hearing.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 8TH DAY OF DECEMBER, 2021

In presence of:

Kieti for 1st, 2nd and 3rd respondents in main petition and 2nd, 3rd and 4th respondents in cross-petition

Muchomba for 4th – 11th respondents in main petition, 4th interested party in main petition

Miss Gikundi for petitioner

Miss Kiuki for 2nd respondent in cross-examination

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE