



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ORIGINATING SUMMONS NO. 10 OF 2015

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21 OF THE LAWS OF KENYA

AND

IN THE MATTER OF LAND PARCEL NO. SOUTH MUGIRANGO/BOSINANGE/438

CHARLES ONSERIO OBIRI.....PLAINTIFF/ RESPONDENT

VERSUS

MAKORI SAMUEL.....DEFENDANT/ APPLICANT

RULING

INTRODUCTION

1. The Ruling is in respect of the amended application dated 15th June, 2021 filed by the Defendant/Applicant herein seeking the following orders.
 - a) THAT the court file for the suit KISII CMC ELC NO.145 of 2019 be transferred to and/or be placed before this court for hearing and determination together with the instant suit.
 - b) Costs of this Application be provided for.
2. The application is supported by the grounds outlined on the face of the application and the Applicant's Supporting Affidavit sworn on the 15th June, 2021 wherein he averred that there is a case pending before the Chief Magistrate's Court case no. KISII CMC ELC NO. 145 of 2019 in which he is sued by the Applicant herein.
3. He deponed that the said case KISII ELC NO.145 of 2019 relates to parcel numbers **L.R SOUTH MUGIRANGO/BOSINANGE/6037, 6038, 6050 & 6051** which are all subdivisions of parcel **L.R No. SOUTH MUGIRANGO/BOSINANGE/438**, which parcel is the subject matter of the instant case.
4. It is his averment that since the orders issued by this court on 28th January, 2021 affect the subject matter in KISII CMC ELC NO.145 of 2019, it is in the interest of justice to have KISII CMC ELC NO.145 of 2019 heard together with this suit to avoid conflicting decisions and so that the matter can be put to rest once and for all.
5. The Respondent opposed the application vide the Grounds of Opposition dated 19th July, 2021 wherein he argued that the cause of action in the two suits are different and that it will be cumbersome to deal with the issues in controversy if the two suits are consolidated.
6. The court directed that this application be disposed of by way of written submissions. The Applicant filed his written submissions on 27th October, 2021 while the Respondent filed his written submissions on 1st November, 2021.

ISSUES FOR DETERMINATION

7. Having carefully considered the application, the Grounds of Opposition filed by the Respondent and the written submissions filed by both parties, the only issue for determination is *whether the application for transfer of KISII CMELC Case No. 145 of 2019 to this court is warranted.*

ANALYSIS AND DETERMINATION

8. **Section 18 of the Civil Procedure Act empowers this court Court to withdraw and transfer a case instituted in a subordinate court on application of any of the parties or on its own motion and thereafter try or dispose of the same or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same provided the party applying for such transfer or withdrawal provides sufficient reasons as to why the transfer is merited.** This power has been discussed in **Aberdare Investments v Bernard Wachira & 5 others** where it was held:

“It is clear from these provisions (section 17 and 18) of the Civil Procedure Act, 2010 that the Court with the jurisdiction to transfer a suit from or to a sub-ordinate court is the High Court or courts with similar status.”

9. **In this instant case the Applicant is seeking the transfer of KISII CM ELC NO. 145 of 2019 in pending determination in the lower court for purposes of it being consolidated with this file. The question therefore is whether the Applicant has met the requirements for consolidation.**

10. The principle of consolidation of suits was re-stated in **Stumberg and another vs Potgeiter 1970 E.A. 323** as follows:-

“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 the matters should be disposed of at the same time, consolidation should be ordered”

11. These requirements were made more clear in the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** where the court held that;

*“...As stated earlier in this ruling, the issue here is whether this suit is amenable to consolidation with **Kerugoya Elc Case No. 809 of 2013 (O.S)**. 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?*

Considering all the above, it is my view that this is a proper case for consolidation. Ultimately the main issue will be the ownership of land parcel No. MBEERE/KIRIMA/3184 and it will not be an efficient use of available judicial and administrative resources for one Court to determine that issue differently in this case and another Court to determine it differently in the other case. It has also been submitted that since KERUGOYA ELC Case No. 809 of 2013 (OS) is commenced by Originating Summons, it cannot be consolidated with this case which is commenced by way of a plaint. I do not think that can be a bar to consolidation at all because once directions are taken in KERUGOYA ELC Case No. 809 of 2013 (OS), the Originating Summons will be converted into a plaint and the replying affidavit will be the defense. It can also not be correct as submitted by Mr. Muyodi that a case for adverse possession cannot be consolidated with that of eviction. There is nothing to stop the registered proprietor of the land in dispute to seek the eviction of the party claiming to have become owner of the same through adverse possession. And with regard to the issue of how the parties will be designated upon consolidation that is a matter on which directions can be taken by the trial Court once consolidation is done.”

12. The same observation was made in the case of **Director of Public Prosecution v Mbuvi Gideon Sonko; Ethics and Anti-Corruption Commission & 4 others (Interested Parties) [2021] eKLR** where the court stated that;

“..... the law on consolidation of suits is now well settled in Kenya. What the Court ought to consider while exercising the discretion to order for the same are the following:

- a) *whether the suits involve a common question of law or fact.*
- b) *whether the reliefs sought or claimed arise out of the same transaction.*
- c) *whether it is convenient and efficient to pursue the same in a consolidated suit in filling of the overriding objectives.*
- d) *whether consolidation would cause the plaintiff an undue advantage or prejudice.*

13. In this instant application, judging from the documents presented before me, the subject matter in **KISII CMC ELC 145/2019** is parcel No. **SOUTH MUGIRANGO/BOSINANGE/6050** registered in the name of the Respondent herein and which is a subdivision of **SOUTH**

MUGIRANGO/BOSINANGE/438, the subject matter in this suit. I further note that the parties in both suits are the same save that in the Counterclaim filed by the Applicant in response to the plaint filed in **KISII CMC ELC NO. 145/19**, the Defendant has introduced Arori Mogoi, Bonareri Keuya and James Obare Ongaga who are occupants of the subdivisions of the suit property in this suit.

14. From the above observation it goes without saying that the main question of fact and law in the two suits revolves around the ownership of parcel No. **SOUTH MUGIRANGO/BOSINANGE/438** which has since been sub-divided as a result of the ex-parte judgment of this court which was set aside by an order of this court dated 28th January, 2021.

15. Further from my perusal of the documents relating to the two cases, it is also clear that the reliefs sought by the Plaintiff as against the Defendant who is the Applicant in this suit revolve around the ownership and occupation of portions of **SOUTH MUGIRANGO/BOSINANGE/438** which is the subject matter of this suit. For instance, in the suit **KISII CMC ELC NO. 145/19**, the Respondent seeks an eviction of the Applicant from land parcel No. **SOUTH MUGIRANGO/BOSINANGE/6050** which is a subdivision of **SOUTH MUGIRANGO/BOSINANGE/438**. In this suit the Applicant is seeking to be declared as the owner of portions forming part of **SOUTH MUGIRANGO/BOSINANGE/438** by way of adverse possession as he claims to have occupied the same since 1970. It cannot be said that the remedies sought in the two suits are based on a different transaction since all of them revolve around a claim in parcel No. **SOUTH MUGIRANGO/BOSINANGE/438** or portions thereof.

16. There is equally no demonstration on the part of the Respondents that the transfer of **KISII CMC ELC NO. 145/19** to this court will in any way prejudice him and any other occupants of the suit property.

17. Ultimately therefore, having considered the application dated 3rd September, 2014 and the pleadings in both cases as well as the rival submissions and the relevant law, I grant the application and make the following orders: -

- a) The court file for **KISII CMC ELC NO.145 OF 2019** be transferred to this court for hearing and determination together with the instant suit.
- b) This file shall be the lead file for purposes of filing any further pleadings and recording of proceedings.
- c) Regarding the issue of how the parties will be designated upon consolidation, the same shall be subject of the directions taken by this Court once consolidation is done.
- d) Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF DECEMBER, 2021.

.....

J.M ONYANGO

JUDGE