



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MIGORI

ELC CASE NO. 239 OF 2017

(Formerly Kisii ELC case No. 353 of 2016 (OS))

MAKABWA MWITA.....1ST PLAINTIFF
MAGABE MWITA.....2ND PLAINTIFF
EMMANUEL MAKABWA.....3RD PLAINTIFF
PAUL WANSATO MWITA.....4TH PLAINTIFF
NYAMBARI MWITA.....5TH PLAINTIFF
CHACHA MWITA.....6TH PLAINTIFF
BASKWI MWITA.....7TH PLAINTIFF
JOSEPH MAKABWA.....8TH PLAINTIFF
MWITA MAKABWA.....9TH PLAINTIFF
MONGOSI MAKABWA.....10TH PLAINTIFF
JOHN MAKABWA.....11TH PLAINTIFF
FRANCIS GIBAL.....12TH PLAINTIFF
WILLIAM MAKABWA.....13TH PLAINTIFF
ANDREW MAKABWA.....14TH PLAINTIFF
JAMES WANSATO.....15TH PLAINTIFF
JOHN WANSATO.....16TH PLAINTIFF

VERSUS

JOSEPH MARWA MASWI.....DEFENDANT/RESPONDENT

RULING

1. By a Notice of motion dated 9th September 2019, filed on the even date pursuant to section 18 of the Civil Procedure Act in the instant suit, the plaintiffs (The applicants herein) through learned counsel, Mr. Omonde Kisera are seeking the following principal order:-

a. Spent

b. This Honorable court be pleased to withdraw Kehancha PMCC (ELC) No. 6 of 2015 (Joseph Marwa Maswi –vs- Magabe Mwita Wambura and 5 others and thereafter try or dispose of the same after consolidation with instant suit.

c. Spent

2. The application is anchored on grounds (a) to (d) set out its face. The grounds include that the issues in Kehancha PMCC ELC No. 6 of 2015 (Kehancha PMs suit) are similar to the issues in the instant suit and concern the same parties. That the applicants' claim touches on adverse possession which by its nature can only be handled by this court.

3. The application is supported, to by a 10-paragraphed affidavit sworn on even date by the 1st applicant, Makabwa Mwita. A copy of a plaint in Kehancha PMCC No. 6 of 2015 (MW1) is annexed to his affidavit. He deposed inter alia, that the suit land Nyabasi/Bomerani/448 is registered in the name of the defendant Joseph Marwa Maswi (the respondent herein) and that the applicants' claim is anchored on adverse possession. Essentially, the deponent reiterated the grounds on the face of the application.

4. In his 13-paragraphed replying affidavit sworn on 20th September 2019 and filed on 23rd September 2019, the respondent through Abisai and Company Advocates, opposed the application and sought its dismissal with costs. He deposed in part that he is the registered proprietor of the suit land as per a copy of title deed marked as "JMM-1" attached to the said affidavit. That in the year 2015, the applicants trespassed onto the suit land prompting him to file Kehancha PMs suit which should take priority for hearing and determination.

5. The respondent further deposed that the present suit was filed to defeat the ends of justice and to defile the trite procedure of the law. That the application is geared towards delaying determination of the dispute, brought in bad faith and highly prejudicial to the respondent.

6. On 26th September, 2019, this court directed that the application be argued by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010 as read with Practice Direction number 33 (a) and (b) of the Environment and Land Court Practice Directions, 2014.**

7. In his submission dated 8th January 2020 and filed on 9th January 2020, learned counsel for the applicants urged this court to find in favour of the applicants in the best of interest of justice for the parties. He relied on the case of **Benson G. Mutahi –vs- Raphael Gichovi Munene Kabutu and 4 others (2014) eKLR** which cited the decision in **Stumberg and another –vs- Potgeiter (1970) 323** on the principles of consolidation of suits.

8. On the other hand, learned counsel for the respondent, identified and analysed in his submissions, subjudice doctrine and that the application is not merited in the circumstances. He relied upon inter alia, **section 6 of the Civil Procedure Act (Cap 21) Gulam Mariam Noordin –vs- Julius Charo Karisa (2015) eKLR and Thibu Mini Hydro Company Limited –vs- Joseph Karu Ndwiga (2013) eKLR**, to buttress his submissions.

9. I have anxiously studied the entire application, the replying affidavit and the rival submissions in the instant suit. Thus, is the application merited in the obtaining circumstances?

10. Notably, the application is mounted pursuant to **section 18 (supra)** which provides for withdraw and transfer of cases instituted in subordinate courts. I am conscious of the mandate of this court further to **Article 162 (2) (b) of the Constitution of Kenya, 2010** and the Court of Appeal decision in **Republic –vs- Karisa Chengo and 2 others (2017) eKLR**.

11. The claim in Kehancha PMs suit for inter alia, a permanent injunction for trespass was originated by way of a plaint dated 13th February 2015 (MW1). The same was brought in consonant with **sections 5 and 11 of the Civil Procedure Act (Cap 21) as well as Order 3 Rule 1 of the Civil Procedure Rules 2010** regarding the trial, institution and commencement of suits respectively.

12. The instant suit was commenced on 1st November, 2016 by way of an originating summons for adverse possession under **Order 37 Rule 7 (supra)** of the **Civil Procedure Rules, 2010**, among other provisions of the law; see also the decision in **Gulam Miriam Noordin case (supra)** and **Salim –vs- Boyd (1971) EA 550**.

13. It is important to note that in Kehancha PM's suit, the 1st, 2nd, 3rd, 4th, 5th, and 6th defendants therein are the 2nd, 5th, 1st, 7th, 11th, and 12th plaintiffs herein respectively. The plaintiff in that suit is the defendant in the instant suit. The suit land is same in both suits.

14. The Black's Law Dictionary 10th Edition defines the term "**Subjudice**" thus:-

"Before the court or Judge for determination."

15. I take into account **section 6 and Thibu case (supra)** concerning determination of subjudice principle. So, does the same principle apply herein? The answer is not in the affirmative in view of the application yearning for determination.

16. Section 13 (1) of the Environment and Land Court Act, 2015 (2011) provide for the original and appellante jurisdiction of this court. **Section 26 (4)** of the same Act stipulates that appeals from the designated Magistrates lie to this court.

17. Admittedly, the order sought in the application is for the transfer of Kehancha PMs suit to this court for consolidation with the instant

suit. Both suits are yet to be heard.

18. It is trite law that even a part heard case can still be consolidated with a fresh case. That in such instance, parties who had testified can be recalled or the case can continue from the evidence earlier recorded; see **Ngumbao –vs- Mwatate and 2 others (1986) KLR 549**.

19. In the instant scenario, I do not lose sight of the character of the applicants' claim for adverse possession over the suit land, **Section 3 of the Environment and Land Court Act 2015 (2011) and sections 1A and 3A of the Civil Procedure Act (supra)** and the overriding objective and inherent powers of this court aligned to **Article 159 (2) (b) of the Constitution** that justice shall not be delayed. I find that the principal order sought in the application is merited to meet the ends of justice in both suits.

20. A fortiori, I direct and order that Kehancha PMCC (ELC) No. 6 of 2015 **Joseph Maroa Maswi –vs- Magabe Mwita Wambura and 5 others** be withdrawn and transferred forthwith to this court for consolidation with the instant suit.

21. Mention to confirm compliance and for directions on **3rd March 2020**.

DATED, SIGNED and DELIVERED at MIGORI this 28th day of JANUARY 2020.

G.M.A. ONGONDO

JUDGE

In presence of :-

Ms. Okota learned counsel for the defendant/respondent

Court Assistant – Tom Maurice