



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 105 OF 2016(O.S)**

**IN THE MATTER OF: LAND PARCEL NOS. 284/III/MN (CR. 7172) 3725/III/MN, 7936/III/MN, 7937/III/MN, 7938/III/MN, 7939/III/MN, 7940/III/MN, 7941/III/MN, 7942/III/MN, 7943/III/MN, 7944/III/MN (ANY OTHER SUBDIVISIONS CREATED FROM 284/III/MN, THE MOTHER TITLE)**

**IN THE MATTER OF: AN APPLICATION FOR DECLARATION THAT THE PLAINTIFFS HAVE OBTAINED OWNERSHIP OF 1590 ACRES OF THE ABOVE PARCELS OF LAND BY WAY OF ADVERSE POSSESSION.**

**BETWEEN**

ALI MHALA SWALEH.....1<sup>ST</sup> PLAINTIFF  
MACHEMBA MWAMBURA KADZINGA.....2<sup>ND</sup> PLAINTIFF  
GILBERT KATANA MKARE.....3<sup>RD</sup> PLAINTIFF  
MATANO MWAMODZU.....4<sup>TH</sup> PLAINTIFF  
CHARLES KAINGU CHIGULU.....5<sup>TH</sup> PLAINTIFF

(All suing on behalf of themselves and other members of Tuamkeni Self Help Group)

**VERSUS**

1. MOHAMED M. SHEIKH ALI.....DEFENDANT  
2. THE PUBLIC TRUSTEES IN TRUST FOR MOHAMED M.  
MOHAMED KHATOR (DECEASED).....DEFENDANT  
3. KHATOR MOHAMED KHATOR (DECEASED).....DEFENDANT  
4. ZAINAB MOHAMED KHATOR.....DEFENDANT  
5. HAFSA MOHAMED KHATOR.....DEFENDANT  
6. MARIAM MOHAMED KHATOR.....DEFENDANT  
7. AMINA MOHAMED KHATOR.....DEFENDANT  
8. BAZEE BIN HERO MARCO (DECEASED).....DEFENDANT  
9. BWANA BINHERO MARO (DECEASED).....DEFENDANT  
10. KIBWANA ABDALLA.....DEFENDANT

11. THE COUNTY COMMISSIONER, KILIFI COUNTY.....DEFENDANT

12. THE CHAIRMAN, LAND COMMISSION FOR KENYA.....DEFENDANT

13. THE ATTORNEY GENERAL.....DEFENDANT

### RULING

1. By this Notice of Motion dated 15<sup>th</sup> April 2019, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants pray that the Court be pleased to set aside the consolidation order made herein on 19<sup>th</sup> September 2017. The Applicants further urge that this suit be dismissed for want of prosecution.

2. The application which is supported by an affidavit sworn jointly by the five (5) Defendants is premised on the grounds that:-

*i) the Plaintiffs have not taken any step(s) for over a year in the prosecution of the suit;*

*ii) The Plaintiffs are guilty of inordinate delay; and*

*iii) The Applicants cannot take any steps in this matter or Mombasa ELC Case No. 211 of 2014 before the Plaintiffs comply with the order of 19<sup>th</sup> September 2017.*

3. The Plaintiffs are opposed to the application. In a Replying Affidavit sworn on their behalf by the 5<sup>th</sup> Plaintiff- Charles Kaingu Chigulu, and filed herein on 31<sup>st</sup> May 2019, the Plaintiffs aver that the orders sought are not helpful in the resolution of the dispute between the parties.

4. While admitting that they are aware of the Orders made for the disposal of the matter on the said 19<sup>th</sup> day of September 2017, they aver that they were aggrieved with the said decision and have since appealed against the same. The Plaintiffs assert that no further steps ought to be taken in the prosecution of this matter pending the said Appeal.

5. I have perused the said application and the response thereto. I have equally perused the oral submissions made before me by the Learned Counsels for the Parties.

6. On 19<sup>th</sup> September 2017 this Court made a Ruling in regard to two applications- one filed by the Plaintiffs and the other by the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants/Applicants herein. In the said Ruling, orders were made inter alia that this suit be consolidated with **Mombasa ELC No. 211 of 2014** and that the parties do appear before the Honourable Deputy Registrar of this Court within 45 days from the date of the order for pre-trial directions.

7. It would appear that those directions are yet to be complied with and by the present application before me, the Applicants now urge the Court to de-consolidate the matters and to dismiss the Plaintiffs suit for want of prosecution. On the other hand, the Plaintiffs/Respondents contend that they have not taken any steps herein as they were dissatisfied with the said Orders and have since lodged an appeal against the same.

8. As it were the basis of the orders for the consolidation of the two suits arose from this Court's conviction that the two suits involve the same issues and that they refer to the same subject matter. As the Supreme Court stated in Law Society of Kenya –vs- **Centre for Human Rights (SPK Petition No. 14 of 2013)**:-

“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 advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

9. Accordingly consolidation of suits is done for the purpose of achieving the overriding objectives enumerated under the Civil Procedure Act and are therefore meant for the expeditious and proportionate disposal of civil disputes. The purpose is to save on costs, time and effort, and to make the conduct of several actions more convenient. Unless otherwise there is a good reason, this Court would in the premises be very reluctant to set aside the orders of consolidation.

10. The prayer for the setting aside of the Consolidation Orders evidently arises from the Defendants/Applicants frustrations arising from the failure on the part of the Plaintiff to take steps to prosecute the matter and hence their desire to have the suit dismissed for want of prosecution.

11. As it were, the test applied by the Courts in an application such as this is to consider whether the delay is prolonged and inexcusable, and if is, whether justice can be done despite the delay. In the matter before me, it is evident that the Plaintiffs were dissatisfied with the orders of this Court made on 19<sup>th</sup> September 2017 and appealed the same. That Appeal was lodged on 8<sup>th</sup> January 2018 and from a Certificate of Delay on record herein, the typed proceedings and Judgment were not ready until the 21<sup>st</sup> day of March 2018.

12. While the application before me was indeed filed a year after the proceedings were ready, this Court takes Judicial notice of the nature of

the business before the Court of Appeal and is in the circumstances not persuaded that the delay is inordinate.

13. In any event, and as noted herein-above, both parties had a duty to make efforts to appear before the Honourable Deputy Registrar of this Court within 45 days of the impugned Ruling for purposes of pre-trial directions. Nothing was placed before me to demonstrate that the Defendants/Applicants had tried to do so and/or that there were any impediments blocking them towards moving the matter forward.

14. Accordingly, I did not find any sufficient reason to warrant the de-consolidation of the suits and subsequently to allow the dismissal of the Plaintiffs' suit.

15. It goes without saying however that the existence of the Appeal is not tantamount to an order of stay of execution. The Plaintiffs are accordingly required to expeditiously move to comply with the requirements of the law with respect to discovery and to proceed to fix the matter for hearing.

16. I make no order as to costs.

**Dated, signed and delivered at Malindi this 27<sup>th</sup> day of May, 2020.**

**J.O. OLOLA**

**JUDGE**