



REPUBLIC OF KENYA
ENVIRONMENT & LAND COURT
AT MILIMANI
ELC CIVIL SUIT NO. 280 OF 2015

HON. DAVID K SIFUNA.....PLAINTIFF/RESPONDENT

-VERSUS-

EMILEY KIVALI MULAYA.....1ST DEFENDANT/1ST RESPONDENT

NELSON MUTURI DUMBEIYA2ND DEFENDANT/2ND APPLICANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated **19th September 2016**, in which the interested party/applicant **Edgar Chilande Wanyama** seeks the following relief's:-

a) Spent

b) That the interested party/applicant be joined as an interested party in this matter.

c) That this suit and all applications be transferred for hearing and determination at the Environment and Land Court at Kitale .

d) That this suit be consolidated with Kitale ELC case No. 120 of 2014 for hearing and determination.

e) That the costs of this application be provided for.

2. The applicant is the *administrator ad litem* of the Estate of his late father **Henry Wanyama Khaemba**(deceased). The deceased was the husband of the first Defendant/Respondent. The deceased was the registered owner of **LR No.Trans-Nzoai/Kapomboi/193**.

3. The first Defendant/Respondent offered to sell the deceased's land to the Plaintiff/Respondent on the basis of a power of attorney donated to her by the deceased. The title to the property of the deceased had been deposited with the second Defendant/Respondent who is a lawyer as security or lien for un paid legal fees amounting to **Kshs.5,500,000/=** owed by the first Defendant/Respondent.

4. As the sale between the Plaintiff/ Respondent and the first defendant/ Respondent could not progress without the title document, the Plaintiff/Respondent offered to give his title for a property known as subdivision **No.9967**, original **No.9690/7** Section 1 Malindi North (Mombasa property) to be held by the second Defendant/Respondent in place of the title to the deceased's property which he held as a lien for

unpaid legal fees.

5. The transaction between the Plaintiff/Respondent and the first Defendant/Respondent did not go well as the power of attorney which had allegedly been donated to the first Defendant/Respondent by the deceased was revoked upon complaint by the deceased who claimed that title to his property had been illegally taken away by the first Defendant/Respondent who used the power of attorney to transfer the property to the Plaintiff/Respondent.

6. The sale by the first Defendant/Respondent of the deceased's property to the Plaintiff/Respondent became a subject of criminal charges filed against the first Defendant/Respondent in Kitale Chief Magistrates Court –Criminal case no. **3836 of 2014**. The same transaction also led to the deceased filing Kitale **ELC No.120 of 2014** against the Plaintiff/Respondent and the first Defendant /Respondent in which he contended that his property was transferred illegally to the Plaintiff/Respondent in collusion with the first Defendant/Respondent . The civil suit in Kitale has now been taken up by the interested party /applicant.

APPLICANT'S CONTENTION.

7. The applicant now contends that he should be allowed to be enjoined in this suit and that this case be consolidated with the Kitale case and an order be made transferring the file to Kitale ELC Court where the property of the deceased is located. The applicant argues that it will save judicial time if the two case are heard together.

8. The applicant's contention is supported by the second Defendant/ Respondent who contends that the issue of the deceased's property and the Mombasa property cannot be separated and that whereas he disapproves certain allegation by the interested party against the first Defendant/Respondent , he nevertheless supports his application for joinder, consolidation and transfer of this suit.

PLAINTIFF/RESPONDENT AND FIRST DEFENDANT/RESPONDENT'S CONTENTION.

9. The Plaintiff and first Defendant/Respondents contend that the Mombasa property and the deceased's property which has since been transferred to the Plaintiff/Respondent have no connection. That there is no need of enjoining the applicant in this case as he has no interest in this case and further that there is no point to consolidating the two cases which have no common issues to be addressed. That it will be a waste of judicial resources to consolidate and enjoin the applicant in this suit as that will be a delaying tactic in the Kitale case. The Plaintiff is offering to deposit title for the Kitale property in Court pending its outcome and that this gesture will make the joinder of the applicant in this case unnecessary.

ANALYSIS

10. I have gone through the applicant's application, the opposition thereto by the Plaintiff /Respondent and the first Defendant /Respondent as well as the support to the application by the second Defendant/ Respondent. I have also considered the submissions filed by the parties herein. There are three issues to be addressed in this application. The first one is the issue of joinder, the second one is on consolidation and the last one is on transfer of this case to Kitale .

ISSUE OF JOINDER TO THE SUIT.

11. The relevant provision relating to joinder of parties to a suit *is Order 1 Rule 10 (2) of the Civil Procedure Rules* which states as follows:-

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to

adjudicate upon and settle all questions involved in the suit, be added”.

12. The issue for determination under this prayer is whether the applicant has demonstrated that he is a necessary party as to be allowed to join this suit. The background to the filing of this suit has been given. The issue in the present suit is mainly between the Plaintiff and the second defendant over title for the Mombasa property. The first defendant was brought into this suit just for showing the history of how title to the Malindi property came to be in possession of the second defendant. The title to the deceased's property which had been held by the second defendant was released upon deposit of title to the Mombasa property. The deceased's property has since been transferred to the Plaintiff in this case.

13. The issue of whether the transfer of the deceased's property to the plaintiff was proper or not is subject of the Kitale case. That issue is not subject of this case which purely relates to the Mombasa property. The applicant therefore will not be a necessary party. He has no interest in the Mombasa property at all. The issue of him seeking to join this suit does not therefore arise. In **Nairobi High Court Constitutional No. 518 of 2013 Judicial Service Commission Vs Speaker of the National Assembly & 8 Others (20140 eKLR** , an interested Party was defined as

“ a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”.

14. In **Nairobi HCCC No. 2263 of 1998 Werrot & Co.Ltd & others Vs Andrew Douglas Gregory & others , Justice Ringera** as he then was held as follows;-

“For determining the question whom is a necessary party there are two tests.

i. There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and

ii. It should not be possible to pass an effective decree in the absence of such a party”.

15. Applying the test as set out in the **Werrot & Co Ltd (Supra)** and the definition in the Judicial Service Commission case (supra), I do not find the applicant to be a necessary party in this suit. The applicant has no legal interest or stake in the litigation in this suit. He has absolutely no interest in title to the Mombasa property which is the subject of the present suit.

ISSUE OF CONSOLIDATION OF THIS SUIT WITH KITALE ELC NO.120 OF 2014.

16. Consolidation of suits is allowed where there are common issues for determination. The rationale behind consolidation of such suits is that they save time and ensure that disputes are heard and resolved expeditiously by utilizing resources available. As I have stated herein above, the issues in the two cases are quite different and have no common issue to be determined. Some parties may be the same but the issues in the two cases are quite different.

17. In the present case, the issue is on title to the Mombasa property and the main parties are the plaintiff and the second defendant. The history of how the title came to be in possession of the second defendant has been stated herein above and there is no point of repeating the same here. The issue in Kitale case centers on the legality or otherwise of the transfer. The first defendant was sued in the case for purposes of completeness of pleadings .Otherwise any decree which will result from the suit will mainly touch on the second defendant. Whatever happened between the first Defendant and the second Defendant resulting in the title for the deceased's property being kept by the second defendant as security or lien has nothing to do with the issues in the Kitale case. The title for the Kitale property was released and the property has since been transferred to the Plaintiff in this case. There is therefore no purpose which will be served if consolidation of the two case were to be ordered. The two cases are distinct and can be heard separately as there is no common issue to be addressed.

18. In the English case of **Horwood Vs Statesman Publishing Co.ltd & Others (19290 ALL ER 554.**

Sankey L.J held that

“ an order to consolidate may be made when two or more actions are pending.

i. Between the same plaintiff and the same defendant

ii. Between the same Plaintiff and different defendants

iii. Between different plaintiff and the same defendants

iv. Between different plaintiffs and different defendants but there must be some common measure of fact in the two or more cases which it is desired to consolidate”.

19.19. In the case of **Stumberg & another Vs Potgieter (1970) EA 323 Kneller J** held that;-

“Consolidation of suits should be ordered where there are common questions of law or fact 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 not be ordered where there are deep differences between the claims and differences in each action”.

20. The applicant attached an amended claim in the Kitale case. A look at the claim as compared with the claim in the present case shows that there is nothing common between the two. The Kitale case relates to the question of how the property was transferred to the Plaintiff. On the other hand the present case relates to the Plaintiff's claim to protect the Malindi property by having his title released to him. This has nothing to do with how the Kitale property was acquired. There is clearly no common question of law or fact which will necessitate a consolidation.

ISSUE OF TRANSFER OF THE PRESENT CASE TO KITALE

21. I have already demonstrated that the applicant is not a necessary party in this suit. I have also found that there is no order of consolidation which should be made. It does not matter whether the plaintiff had written to the second defendant letters in which he had intimated that it was desirable to have this case transferred to Kitale.

22. The Kitale case is dealing with a property which is situated in Trans-Nzoia within the jurisdiction of Kitale ELC Court. The present case relates to a property which is in Mombasa. Though the case was initially filed in Nairobi, it was later transferred to Mombasa ELC Court but was re-transferred back to Nairobi ELC Court because of the convenience of the parties and the advocates involved.

CONCLUSION

23. Based on the above analysis, I do find that the applicant's application lacks merit. The same is hereby dismissed with costs to the Plaintiff and the first Defendant/Respondents.

It is so ordered.

Dated, Signed and Delivered this at **Nairobi** this **6th** day of **March 2017**

E.O .OBAGA

JUDGE

Court.

At 2.40 pm. No appearance of advocates who were aware of time and date

for delivery of Ruling.

E.O .OBAGA

JUDGE