



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO 8 OF 2018 (O.S)

LUCY WAMUGO NJERU.....PLAINTIFF

VERSUS

AMOS MUCEMI KIBOI.....DEFENDANT

RULING

1. By a notice of motion dated 18th April 2018 brought under the provisions of **Order 11 Rules 1 & 2 of the Civil Procedure Rules, section 3A of the Civil Procedure Act (Cap 21)** and all **other enabling provisions of the law**, the Plaintiff sought the following orders;

a. That this honourable court be pleased to order a consolidation of this suit with Embu CMCC No. 34 of 2014 between Amos Mucemi Kiboi and Lucy Wamugo Njeri (sued as next of kin of Augustino Njeru Ndwiga – deceased).

b. That further proceedings in suit Embu CMCC No. 34 of 2014 be stayed until further orders.

c. That costs of this application be provided for.

2. The said application was based upon the ground that the two suits involved the same subject matter being *Title No. Evurore/Nguthi/2255* (hereinafter called the *suit property*). It was supported by an affidavit sworn by the Plaintiff's advocate on record on 18th April 2018.

3. The Plaintiff herein subsequently filed a notice of motion dated 12th July 2018 seeking an order for transfer of *Embu CMCC No. 34 of 2014* from the CM's Court at Embu to this court for the purpose of its consolidation with the originating summons in the instant suit and for trial and disposed by this court.

4. The said application was based upon the grounds stated on the face of the motion and supported by an affidavit sworn on 12th July 2018 by the Plaintiff's advocate on record. It is obvious that the said application was filed because it would have been impossible to consolidate the two suits whilst pending in two different courts. It was contended that since a claim for adverse possession can only be heard by this court, then it would be in the interest of justice to transfer the suit pending before the CM's Court to this court for the purpose of consolidation and trial.

5. The Defendant filed grounds of opposition dated 25th October 2018 in opposition to the Plaintiff's said two applications. The Defendant raised twenty two (22) grounds of opposition and asked the court to dismiss them with costs. In summary, it was contended that the said applications were intended to stall the hearing of *Embu CMCC No. 34 of 2014* which was already part heard; that the affidavits sworn by the Plaintiff's advocate were incompetent and should be struck out; that the said applications were *sub-judice*; that there was undue delay in filing the applications; and that the claim of adverse possession was an afterthought which was never raised before the Magistrate's court. The rest of the grounds simply raised factual matters which should have been contained in an affidavit.

6. The record also shows that upon filing of the Defendant's grounds of opposition, the Plaintiff filed a further affidavit sworn on 7th November 2018 in response to the grounds of opposition dated 25th October 2018.

7. When the said applications were listed for hearing on 27th September 2018, the parties were directed to file and exchange their respective written submissions within 28 days. However, by the time of preparation of this ruling, none of the parties had filed submissions.

8. The court has considered the said two applications by the Plaintiff, the Defendant's grounds of opposition thereto as well as the Plaintiff's further supporting affidavit. It would appear that the Defendant herein filed *Embu CMCC No. 34 of 2014* against the Plaintiff herein as a legal representative of the estate of Augustino Njeru seeking her eviction from the suit property. The instant originating summons seeks a declaration that the Plaintiff has become entitled to the suit property on account of the doctrine of adverse possession under the **Limitation of Actions Act (Cap 22)**.

9. The court is aware that claims for a declaration that a person has become entitled to some land by virtue of adverse possession can only be entertained by the superior court. That is what **section 38 of the Limitation of Actions Act (Cap 22)** provides for. In the court's opinion, such a claim cannot be competently ventilated before the Magistrate's Court. The Plaintiff in the instant case was, therefore, perfectly entitled to institute the instant originating summons for relevant orders. The mere fact of filing it does not mean that it shall automatically succeed. The Plaintiff will still have to demonstrate and prove the usual elements of adverse possession.

10. The issue of transfer of suit from the Magistrate's Court to the Environment and Land Court is a matter of judicial discretion. Like all judicial discretion, it must be exercised in a judicious matter. It cannot be excised on the basis of whim, caprice or sympathy. It must be based upon some reason.

11. The court has considered the reason why the Plaintiff is seeking transfer of *Embu CMCC No. 34 of 2014* to this court. The reasons are not frivolous or fanciful. The court considers that some common questions of law and fact may arise in both suits which would make it prudent to have the two actions heard and determined together. The court is persuaded that the explanation for seeking transfer is reasonable. Accordingly, the court finds merit in the notice of motion dated 12th July 2018 and the same shall accordingly be allowed.

12. The next aspect for consideration is whether or not the Plaintiff has made out a case for consolidation of the two suits. The factors to be considered in an application for consolidation were summarized in the case of **RMG Vs NG & Another [2013] eKLR** as follows;

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the subject matter be disposed of at the same time. This would mean that the suits are brought together for the purpose of disposing of them simultaneously; if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously.”

13. Similarly, in the case of **Nyati Security Guards & Services Ltd Vs Municipal Council of a [2004] eKLR** it was stated, *inter alia*, that;

“The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where;

i. Some common questions of law or fact arise in both or all of them; or

ii. The right or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions; or

iii. For some other reason it is desirable to make an order consolidating them.”

14. Bearing in mind the above principles and considerations, the court is of the opinion that the Plaintiff has demonstrated grounds for consolidation of the two suits. Whereas the Defendant seeks to assert title to the suit property on account of registration in his suit, the Plaintiff in the instant originating summons seeks to demonstrate that the Defendant's title has been extinguished on account of adverse possession. The court is thus satisfied it is desirable to have the two suits consolidated and heard together.

15. The court finds no merit in the various grounds of objection contained in the Defendant's grounds of opposition dated 25th October 2018. The mere fact that one suit is part heard cannot deprive the court of its jurisdiction and discretion to order consolidation as long as the suits in issue can conveniently be heard together. There is no valid objection to the Plaintiff's advocate swearing affidavits in support of the applications for transfer and consolidation of suits. The two applications are purely formal and procedural in nature. They are not applications of such a nature as would require the Plaintiff's advocate to be called upon to testify in the proceedings or to be cross-examined on the affidavits.

16. Although the Defendant claimed that the two applications were *sub-judice* it was not demonstrated in what manner they were *sub-judice*. According to **Black's Law Dictionary**, *sub-judice* means that is under active adjudication before a court or judge. The doctrine prevents discussion or deliberation on the merits of a pending case outside the judicial forum seized of the matter. The doctrine of *sub-judice* does not prevent a party from seeking a transfer of suit or seeking consolidation of suits before a judicial forum.

17. The Defendant's objection on account of delay in filing the instant application is not a frivolous one. Undue delay in filing an application may disentitle an applicant from the orders sought especially where the adverse party has thereby suffered prejudice. However, in the circumstances of the instant case, the Defendant did not demonstrate any prejudice he may have suffered on account of the delay.

18. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 12th July 2018 and the same is consequently allowed in terms of order No. 1 thereof. The Plaintiff's chamber summons dated 18th April 2018 is also allowed in terms of order No. 1 thereof. Costs of both applications shall be in the cause.

19. In view of the age of one of the suits the subject of consolidation, the court shall fix a date for directions on the hearing of the consolidated suits upon delivery of the ruling.

20. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 22ND day of JANUARY, 2019.

In the presence of Mr Ithiga holding brief for Ms Kithaka for the Plaintiff and Mr Guantai for the Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

22.01.19