



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 386 OF 2017

(Formerly Machakos ELC No. 222 OF 2014)

JONATHAN KAPOSHI.....PLAINTIFF

VERSUS

COLLETA MBATHA MAWEU.....1ST DEFENDANT

MUTHIANI MUNYUA.....2ND DEFENDANT

ONESMUS KALL.....3RD DEFENDANT

SAMUEL MULWA.....4TH DEFENDANT

JOYCE KAVIL.....5TH DEFENDANT

RULING

What is before Court for determination is the 3rd and 4th Defendants' Notice of Motion application dated the 20th July, 2018 brought pursuant to Section 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, Order 11 Rule 3 (1) (h) and Order 51 of the Civil Procedure Rules. The Applicants seek consolidation of ELC No. 386 of 2017; ELC No. 257 of 207; ELC No. 85 of 2017; ELC No. 91 of 2017 and ELC No. 184 of 2017 and thereafter to proceed as one action under ELC No. 386 of 2017.

The application is premised on the summarized grounds that the parties in the various suits stated above filed the same in respect of ownership interests/ rights in land parcel number Kajiado/ Kaputiei Central/ 839 registered in the name of Kaposhi Ole Njoroge Nakumama which he secretly subdivided on or about February, 2012 into title numbers Kajiado/ Kaputiei Central/ 2346; 2347 as well as 2348 and fraudulently transferred into the names of Kenneth Obimbo Odhiambo, Jonathan Kaposhi (his son) and Nteene Ole Kaposhi) his wife. The said subdivision were intended to defeat the beneficial ownership rights/ interests of some of the parties in these suits, who had previously purchased different portions of the suit property and had been granted possession thereof and have been in occupation for many years to date. The issues arising from the said suits are substantially similar as to whether Kaposhi Ole Njoroge Nakumama could properly and lawfully ignore the various contractual arrangements/ agreements and subdivide as well as transfer the land as he did. Further, the determination of the beneficial ownership rights/interests of the various parties including those to whom the suit property was fraudulently and secretly transferred. Whether the Plaintiffs in the various suits are entitled to the prayers sought therein. The consolidation of the said suits will lead to their expeditious disposal thereof and will provide a framework for fair dispensation of justice for parties. It will save judicial time as duplication of proceedings and multiplicity of suits would be avoided.

The application is supported by two affidavits sworn by SAMUEL MULWA the 4th Defendant herein, who reiterates their claim above and aver that it is just and equitable in the circumstances herein that the abovementioned suits are consolidated and thereafter proceed as one action under Kajiado ELC No. 386 of 2017. He reiterates that Kaposhi Ole Njoroge Nakumama sold portions of land parcel number Kajiado/ Kaputiei Central/ 839 at various times to different parties, gave them possession thereof, and they have been in occupation and use of the land as they waited for him to formally subdivide and transfer individual titles to the purchasers. He contends that the purchasers' have enjoyed quiet possession and occupation for many years without interruption contrary to claims by the said Kaposhi Ole Njoroge or Jonathan Kaposhi or Nteene Ole Kaposhi. He explains that due to the compensation of the Standard Gauge Railway, Kaposhi Ole Njoroge Nakumama in collusion with his wife and son secretly subdivided the land and transferred the new titles to the Plaintiff and his wife in order to escape the obligation under the various agreements/ transactions with the different parties in the suits sought to be consolidated. Further, that Kaposhi Ole Njoroge Nakumama, Jonathan Kaposhi and Nteene Kaposhi are already parties to the various suits sought to be consolidated. He reiterates that the Plaintiff herein is a beneficiary of the fraudulent and secret subdivision of the land and that upon consolidation of the suits the Court will be better placed to determine all the issues, even the competing interests of all the parties in view of the conduct of Kaposhi

Ole Njoroge Nakumama and his family members. He reaffirms that the Plaintiff will suffer no prejudice if the suits were consolidated.

The application is opposed by the plaintiff JONATHAN KAPOSHI who filed two affidavits where he deposes that the Applicant has not disclosed with sufficient details the suits he wants consolidated and the reasons or grounds on which the application is based, does not meet the threshold set for consolidation of cases. He contends that the suit by or against other parties are founded on the various sale agreements alleged to have been entered into. He states that the Applicants have no legal claim over the suit property, which is protected by law. He insists each transaction as per the individual agreement had its own terms and conditions to be met by the respective parties. He avers that there are many litigants and several advocates involved in the various suits sought for consolidation and if the application is allowed, the determination of the suits shall be seriously delayed, costs will escalate and it will require further amendments of pleadings as the suits are at various stages of prosecution. He reiterates that the subject matter of the suit is different in all the suits. Further, that he is the Plaintiff in this suit and not Kaposhi Ole Njoroge Nakumama who is not a party to this suit and the Applicant has not sought to enjoin him and should not therefore be a determining factor for consolidation with other suits where he is a party. He avers that portions of land title number Kajiado/ Kapatiei Central/ 839 was sold at various times to different parties and therefore each party has the onus of proving his/her case individually without relying on the evidence of others. He contends that the dispute over this transaction started long before the conception of the Standard Gauge Railway and it is misleading to the Court for the Applicant to claim that the suit is to confer undue benefit to the Plaintiff. He reaffirms that the various suits have no common denominator in order to allow consolidation. He explains that Kajiado ELC No. 184 of 2017 is an originating summons for adverse possession and is pending ruling on interim application and cannot be consolidated. Further, in Kajiado ELC No. 254 of 2017 there are twelve (12) Plaintiffs who have sued Kaposhi Njoroge Nakumama who is not a party to this instant suit. He denies knowledge of Kajiado ELC No. 91 and ELC No. 85 of 2012 as he is yet to be served with the notices. He confirms that he has since transferred to all the bona fide purchasers the land they bought from his family and any person claiming to be a purchaser ought to prove his own case on merit.

The Plaintiff and the 1st to 4th Defendants filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the two Notice of Motions dated 20th July, 2018, including the respective affidavits plus annexures therein and the parties' submissions, I find that the only issue for determination:

- Whether ELC No. 386 of 2017; ELC No. 257 of 2017; ELC No. 85 of 2017; ELC No. 91 of 2017 and ELC No. 184 of 2017 should be consolidated.

I note that the various suits mentioned above revolve around land parcel number Kajiado/ Kapatiei Central/ 897 which has since been subdivided. Further, that the various parties in the suit claim to have purchased their respective parcels of land at different times. I note the suits are pending at various stages in court. Order 11 Rule 3 (1) (h) of the Civil Procedure Rules provides that:

- (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—**
- (h) consider consolidation of suits;**

In the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** the learned Judge explicitly stated the criteria for consolidation of suits as follows: ' **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.***

Further in the said case while quoting the case of **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

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

In relying on the abovementioned judicial authorities as well as the legal provisions cited above, I hold that the three suits sought to be consolidated are seeking varied reliefs and insofar as I concur with the Applicants that consolidation would be convenient, it is not that simple since there are various suits involved, which are at different stages. At this juncture, I opine that consolidation would delay the matters instead of expediting them, and this might disadvantage or prejudice a party. I am of the view that the three suits should proceed separately but simultaneously.

It is against the foregoing that I find the application unmerited and will disallow it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 18th day of March, 2018

CHRISTINE OCHIENG

JUDGE