



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

T CHUKA

CHUKA ELC MISC. CASE NO. 07 OF 2018

KANGA MWIRABUA.....1ST PLAINTIFF/APPLICANT
MBIUKI MWIRABUA.....2ND PLAINTIFF/APPLICANT
CIAMBERE KANGANGI.....3RD PLAINTIFF/APPLICANT
CIAMUI KANGANGI.....4TH PLAINTIFF/APPLICANT
JOHN MUTEGI KANGANGI.....5TH PLAINTIFF/APPLICANT
KABURU KANGANGI.....6TH PLAINTIFF/APPLICANT
KAARI KANGANGI.....7TH PLAINTIFF/APPLICANT
CIAMBAKA KANGANGI.....8TH PLAINTIFF/APPLICANT
NYAGA MPUNGU.....9TH PLAINTIFF/APPLICANT
KAGENDO CIAMBAKA.....10TH PLAINTIFF/APPLICANT
KITHINJI KABURU.....11TH PLAINTIFF/APPLICANT
MUTHONI MUTEGI.....12TH PLAINTIFF/APPLICANT

VERSUS

NDEREBA NAICHU.....DEFENDANT/RESPONDENT

RULING

1. This ruling concerns an application brought to court by the applicant and which states that it is premised upon section 18(1)(b) of the Civil Procedure Act and any other enabling provision of the law.
2. The application is dated **21st November, 2019** and seeks the following orders:
 1. That this honourable court be pleased to withdraw civil suits numbers Chuka C.M.C.C. Environment and Land no. 47 of 2018 and No. 166 of 2017 with a view to consolidate, try and dispose of the same.
 2. That cost of this application be costs in the cause.
3. The application has the following grounds:-
 1. That by dint of section 38 of the Limitation of Actions Act, Cap.22 Laws of Kenya the Chief Magistrate lacks jurisdiction to hear and determine the two suits which subject matter is anchored on adverse possession to land pursuant to section 37(1) of the

Limitation of Action Act, Cap 22 Laws of Kenya.

2. That civil suit number Chuka C.M.C.C. No.47 of 2018 was initially filed in the High Court at Meru as Environment and Land Case No. 83 of 2010 (OS).
3. That the suit was transferred from Meru to Chuka on territorial jurisdiction grounds.
4. That when the file was received at the Chuka Law Court Civil registry, the C.E.O. allocated the same to the chief magistrate instead of allocating it to the High Court, Environment and land division.
5. That the claim for adverse possession in C.M.C.C. (E&L) No. 47 of 2018 is the same to the counter claim of C.M.C.C. No. 166 of 2017 which is land title No. KARINGANI/MARIANI/395.
6. That for convenience sake and expeditions (sic) disposal of the two cases it would be quite in order to withdraw the two matters from the Chief Magistrate in Chuka to the Chuka High Court E & L division.
7. That no one would suffer any prejudice or hardship for the consolidation of the two cases.

4. The application is supported by the Supporting Affidavit of **MBIUKI MWIRABUA** which states as follows:

1. That I am the 2nd applicant in this application.
2. That I have the authority and mandate of my co-applicants to make this affidavit on their behalf and on my own behalf. A copy of that authority is attached and marked “MM1”
3. That I am well versed with all matters concerning the two (2) cases pending before the Chief Magistrate’s court in Chuka, to wit Chuka C.M.C.C. No. 166 of 2017 and E & L No. 47 of 2016 (OS).
4. That the two cases are both anchored on occupation of land title number Karingani/Mariani/395. A copy of the green card for the said land is attached and marked “MM2”.
5. That all the applicants herein are claiming adverse possession of the suit land while the respondent is claiming ownership or proprietorship of the same.
6. That there would be no prejudice caused to any party and such consolidation would be for the best interest of the justice, time and costs saving.
7. That consolidation of the two suits named herein is necessary for the purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditions (sic) and proportionate disposal of the dispute herein.
8. That what is deposed herein is true to the best of my knowledge, information and belief.

5. The application was canvassed through written submissions.

6. The applicants’ written submissions are reproduced in full herebelow without correction of spelling or other mistakes, if they exist.

APPLICANTS SUBMISSION ON THE NOTICE OF MOTION DATED 21/11/2018

The application before this court is brought under section 18 (1) (b) (i) of the Civil Procedure Act, Cap 21 Laws of Kenya .The said provision provides:-

“18 (1) on the application of any of the parties and after hearing such of them as desire to be heard, or of its own motion without such notice the High Court nay at any stage”;-

- a)
- b) Withdraw any suit or other proceedings pending in any court subordinate to it and thereafter.
 - (i) try or dispose of the same ;or
 - (ii)
 - (iii)
- c)

Both suits subject matters of this application are pending before the Chief Magistrate in Chuka. One of them is Chuka **C.M.C.C No. 47 of 2017** formally filed in the High Court at Meru as **H.C. E & L No.83 of 2016 (OS)** while the other is Chuka **C.M.C.C. No.166 of 2017**.

My lord, the suit Meru **H.C E&L No.83 of 2016** which is now Chuka **C.M.C.C No.47 of 2017** was filed on 23rd June, 2016. The claim was for Adverse possession under the limitation of Actions Act, Section 38 (1) of the Limitation of Actions Act, Cap 22 Laws of Kenya provides as follows:-

“38 (1) where a person claims to have become entitled by adverse possession to Land registered under any of the Acts cited in Section 37, or land comprised in a Lease registered under registered Land Act (now repealed), he may apply to the High Court for an Order that he be registered as the proprietor of the Land or lease in place of the Person then registered as the proprietor of the land”.

The import of filing the application herein was because it is only the High Court that has jurisdiction to transfer suits from the magistrate court to either itself or to any other court by dint of section 18(1) of the Civil Procedure Act and again it is only the High Court that has jurisdiction to determine matters of adverse possession by dint of Section 38(1) of the Limitation of Actions Act.

My lord, it is very clear from the Court record that the applicants had initially filed the suit now given Chuka **C.M.C.C No.47 of 2017** in the High Court as required by the law. When the court transferred the matter from Meru to Chuka on territorial grounds, the court executive officer or administrator erroneously allocated the suit to the Magistrate’s Court instead of the High Court. This mistake cannot be visited to the innocent litigant who has no control over the administrative duties of the court.

My lord, the claim for adverse possession in **C.M.C.C No.166 of 2017** was brought about by defendant Counter-claim filed on 4th December, 2018. The same was filed with the leave of court granted on 7th November, 2018.

Both suits referred to above have one common subject matter. That is Land parcel number **KARINGANI /MARIANI/395**. In both cases the applicants herein cannot be blamed for the want of jurisdiction in the magistrate’s court. In Chuka **C.M.C.C 47 of 2017** the court Administrator is to blame for allocating the suit to the wrong court (Magistrate’s court instead of the High Court and in Chuka **C.M.C.C No.166 of 2017** the applicants herein are defendants who had no control on where the suit is filed. They came up with their claim of adverse possession in their defense and counter-claim.

Finally, my lord, I am instructed that this transfer is unlikely to cause any prejudice or hardship to the Respondent. We wish to buttress our submissions with the authority in the case of **KITHITA NGEANA vs MWANIKI KISUME in the High Court of Kenya at Kitui Civil case No. 2 of 2016**. A copy of the Judgement of **HONORABLE JUSTICE MR. L.N. MUTENDE** delivered on 14th March, 2018 is attached.

My lord, we are alive to the need of timely filing of such application. I wish to state my lord that the applicants filed their defence and counter-claim, which brought in the issues of adverse possession in C.M.C.C NO. 166 OF 2017 on 23rd November, 2018 and this application on the same day.

My lord, it was in fulfillment of my role as an advocate under section 1A (3) of the civil procedure act that I advised my client to bring up this application which in my view would serve the overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the 2 suits .

My lord, on behalf of the applicants herein we sincerely promise to fast track the hearing and disposal of these suits if this application is allowed. We pray that our application be allowed with costs to be in the cause.

Dated this 23rd Day of March, 2019

ASHFORD GERRARD RIUNGU

For; M/S A.G RIUNGU & COMPANY

ADVOCATE FOR THE APPLICANTS.

7. The respondent’s submissions are reproduced in full herebelow without correction or spelling or other mistakes, if they exist.

RESPONDENT’S SUBMISSIONS

The applicant’s application dated 21st November 2018 seeks to have Chuka ELC No. 47 of 2018 and Chuka ELC No. 166 of 2017 consolidated tried and disposed together in the High Court.

The respondent in his replying affidavit dated 3rd April 2019 avers that in Chuka CM ELC No. 166 of 2017 he has sued the 3rd-12th applicants since they are the ones who are occupying the suit land illegally. The 1st and 2nd applicants are not in occupation so he has no cause of action against them. HC. ELC No. 47 of 2018 is preferred by the 1st and 2nd applicants against the defendant. The claims are different even if the subject matter is the same.

The parties being not the same in both cases, makes the two suits improper for consolidation. Both can be heard on their own independent merits.

We so submit.

DATED at MERU on this 7th day of May, 2019

For: KAUMBI & Co.

ADVOCATES FOR THE RESPONDENT

8. I have carefully considered the submissions filed by the parties' advocates in support of their diametrically incongruent assertions. I have also considered the one authority proffered by the applicant in support of his arguments. As the principles enunciated in that authority have already been explained in the applicant's written submissions which have been reproduced in full in the earlier part of this ruling, it is not necessary that they be regurgitated.

9. The claim by the applicant in Chuka CMCC No. 47 of 2018 is predicated upon a claim for adverse possession. In their defence in CMCC No. 166 of 2017, the defendants have introduced a counter-claim which is grounded on adverse possession. Both cases, therefore, have adverse possession ramifications.

10. To definitively hear and determine all issues pertinent to the 2 suits, I find that the prayer that they be consolidated has merit.

11. It is directed as follows:

- a) Prayer 1 in the application is allowed and the lead file will be ELC No. 47 of 2018, which, if necessary, will be allocated a new number.
- b) Both parties are to concurrently fully comply with Order 11, CPR, within 30 days of today.
- c) Parties will come to court for **directions on 25th September, 2019.**

Delivered in open Court at Chuka this 31st day of July, 2019 in the presence of:

CA: Ndegwa

Ndungu Linus h/b Riungu for the Applicant

Muthomi Gitari h/b Kaumbi for the Respondent

P. M. NJOROGE

JUDGE