



REPUBLIC OF KENYA



Transcounty Developers Limited v National Land Commission & 3 others (Environment and Land Case 118 of 2020) [2026] KEELC 2174 (KLR) (16 April 2026) (Ruling)

Neutral citation: [2026] KEELC 2174 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND CASE 118 OF 2020**

**CK YANO, J
APRIL 16, 2026**

BETWEEN

TRANSCOUNTY DEVELOPERS LIMITED PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

PROTUS HAMISI WAMBANDA 2ND DEFENDANT

CHINA WUYI COMPANY LIMITED 3RD DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 4TH DEFENDANT

RULING

1. The 2nd Defendant/Applicant filed a Notice of Motion dated 21st November, 2025 against the Respondents seeking the following orders: -
 - i. Spent.
 - ii. That this honourable court be pleased to grant the 2nd defendant/applicant leave to file his witness statements and documents within a set period of time.
 - iii. That upon grant of prayer 2 hereinabove, this honourable court be pleased to issue an order of consolidation of this suit with Eldoret Chief Magistrates Court ELC Case No. 150 of 2019.
 - iv. That costs of this application be provided for.
2. The application is premised on 17 grounds on the face thereof and on the applicant's Supporting Affidavit sworn on even date.



3. The applicant deponed that when her advocate on record visited the ELC court registry for perusal of the court record/file, they discovered that the 2nd defendant was never granted an opportunity to comply with Order 11 as provided in the Civil Procedure Rules.
4. He thus maintained that pursuant to the provisions of the *Civil Procedure Act* and *the Constitution*, he should be granted leave to file his witness statement and documents in support of his claim so as to enable the court to exhaustively determine the issue of ownership of the suit land herein
5. Further, it is also his claim that he had earlier filed 2 cases to wit; ELC Case No. 46 of 2015 and CMELC Case No. 150 of 2019 in the Chief Magistrates Court. That the issue in dispute in both suits is the ownership of parcel of land known as Kapsaret/kapsaret Block 10 (lamaiywet)/732.
6. It is therefore his contention that the present suit, which also concerns the ownership of the same parcel of land kapsaret/kapsaret block 10 (lamaiywet)/732 should be consolidated with the 2 suits previously instituted and which are pending for determination since the subject matter in all three cases is the same.
7. He averred that it is in the interest of justice that the said 2 previous suits/cases be consolidated with the present suit for hearing and final determination by this court.
8. He thus urged the court to allow the application and grant the orders sought.
9. The application was opposed. The plaintiff/respondent filed a Replying Affidavit dated 23.12.2025 sworn by Simon Lilan, an Advocate of the High Court of Kenya having conduct of the matter on behalf of the plaintiff/respondent, in response to the averments made in the present application.
10. He dismissed the present application as being vexatious and an abuse of the process of court.
11. It was his claim that the prayer to consolidate the instant suit with ELC Case No. 46 of 2015, which had earlier been consolidated with CMC ELC No. 150 of 2019 cannot be granted for the reason that the said suit was dismissed on 20.09.2023 and does not therefore exist.
12. He further dismissed the applicant's claim that his advocate was only instructed on 10.05.2023 and was fully aware that he did not have the 2nd defendant's original file. It is therefore his contention that it has been 2 years and 7 months since the applicant's advocate was instructed and no sufficient reason has been given for not perusing the court file for purposes of ascertaining the status in the proceedings.
13. In response to the prayer sought for leave to file the witness statement and documents, he averred that under Order 3 Rule 2, a party may be granted leave to file written statement where the leave is sought 15 days prior to the trial conference. It was his contention that no prayer had been made to extend the 15 days' period and therefore the leave sought herein cannot issue.
14. It is his claim that the plaintiff's case has already proceeded for hearing and that the plaintiff called 3 witnesses and closed its case and it would therefore be unfair and unjust for the application to be allowed at this stage.
15. In addition, he deponed that contrary to the claim in paragraph 11 of the grounds of the application, it was his contention that the suit was set down for hearing in the presence of the 2nd defendant/applicant.
16. In conclusion, he urged the court to dismiss the application with costs.
17. The 2nd defendant/applicant filed a Supplementary Affidavit dated 16.03.2026 in response to the averments made in the replying affidavit.



18. It was his claim that his current advocate on record is based in Bungoma town within Bungoma County and that it was not easy for them to be able to peruse the court file.
19. He maintained that it is clear from the court record that he was not granted an opportunity to file his documents. That even though he had recorded the statement with the previous advocate on record, it was not possible to ascertain whether the same had been filed or not due to the confusion of the application to cease acting filed by his previous advocate.
20. He admitted the averments made that the plaintiff's witnesses had already testified and the plaintiff's case closed and undertook to incur any costs that would arise in having them recalled if need be.
21. He also admitted the claims raised by the plaintiff/respondent that ELC Case No. 46 of 2015 and CMCC ELC 150 of 2019 having been dismissed and added that he was not aware since the said dismissal was done in his absence and he did not receive any Notice of Dismissal.
22. In conclusion, he urged the court to grant him leave and allow him to file his witness statement and documents as sought.
23. This court issued directions on the 24.11.2025 that the present application be canvassed by way of written submissions. However, upon perusal of the court record and the online filing platform, CTS, I have only seen the submissions filed by the plaintiff/respondent dated 23.12.2025 together with authorities, which I have read and considered. Be that as it may, this court will proceed to render its decision as hereunder.

Analysis and Determination:

24. Having carefully considered the Application and the grounds therein, the Supporting Affidavit, Further Affidavit and the annexures thereto, the replying affidavit in response to the application as well as the rival submissions in totality, it is my considered view that the issues arising for determination are as follows: -
 - i. Whether leave can be granted to the applicant to file his witness statement and documents.
 - ii. Whether the instant suit can be consolidated with CMELC No. 150 of 2019
 - iii. Whether the present application is merited.
 - iv. Who shall bear the costs of the present Application.
25. The above issues for determination having been duly identified, I will now proceed to discuss the same as hereunder.

Whether leave can be granted to the applicant to file his witness statement and documents;

26. The 2nd defendant/applicant has sought leave to file his witness statement and documents on the basis that it has only come to their attention that the previous advocate did not file said documents and they only recently discovered the same upon perusal of the court record.
27. It is also his contention that the matter was fixed for hearing of the main suit prematurely without being given an opportunity to confirm compliance with order 11 of the Civil Procedure Rules.
28. The said claims were dismissed by the plaintiff/respondent who maintained that it has been over 2 years since the present advocate having conduct of the matter on behalf of the applicant took over the matter from the previous advocate and no sufficient reason and justification has been tendered by the



- applicant on the unreasonable delay on their part to peruse the court record and take the necessary steps to regularize their position.
29. Further, it is the respondent's claim that the plaintiff case has proceeded for hearing and 3 witnesses have been called to testify and the plaintiff's case subsequently closed. They therefore maintained that it would be unjust and prejudicial on the plaintiff/respondent should the application be allowed at this stage.
 30. The order sought herein on the grant of leave is discretionary in nature and not an automatic right. Therefore, the court in exercising such discretion is called upon to exercise the same judiciously taking into account the circumstances of the case and not based on sympathy.
 31. The Court of Appeal in the case of JMM vs. GNJ (2023) KECA 99 (KLR) held, inter alia: -

“Judicial discretion then is the exercise of judgment by a Judge or court based on what is fair under the circumstances and guided by the rules and principles of law. Every discretion be it judicial and judicious must be based on prudence, rationality, sagacity, astuteness, considerateness and reasonableness. There is no hard and fast rule as to the exercise of judicial discretion by a court because if it happens then, discretion will become fettered.”
 32. In determining this issue, this court takes note of the 2 competing rights at play and its duty and/or mandate to balance the said rights. On the one hand is the right to fair trial owed to the plaintiff and its witnesses who have already testified and on the other hand is the right to be heard owed to the 2nd defendant/applicant, who is seeking the court's discretion to be given an opportunity to file his witness statement.
 33. Order 7 Rule 5 of the Civil Procedure Rules provides the documents to accompany a defence or counter-claim. Rule 5(c) and (d) states that the witness statement as well as copies of documents to be relied on at the trial respectively are to be filed. It is important to point out that the 2nd defendant's Statement of Defence was filed on 19.01.2021.
 34. This court has taken into account the rival position by the parties herein, particularly the reason given by the applicant for the delay occasioned in filing the present application.
 35. In view of the above, it is my finding that the reason advanced by the applicant is not sufficient and to the satisfaction of the court in the circumstances. This court has observed and noted with concern the 2nd defendant/applicant's laxity and lack of effort in prosecuting his case.
 36. As correctly pointed out by the plaintiff/respondent's advocate, the present advocate took over the conduct of the matter sometimes in 2023. It is not enough for the applicant to simply state that the previous advocate has never release the file to the current advocate or that the current advocates are based in Bungoma town within Bungoma County and could not therefore peruse the court file earlier.
 37. There must be a reasonable and sufficient explanation and demonstration of due diligence on his part and the steps actually taken to confirm the status of the matter and regularize their position. A delay of almost 3 years is certainly not a demonstration of due diligence.
 38. Be that as it may and without prejudice to the foregoing, in the interest of justice and in observance with the constitutional right to be heard, I will proceed to exercise my discretion in favor of the applicant and grant him leave to file his witness statement and file his documents.
 39. Further, this court takes note of the likelihood and need for the re-opening of the plaintiff's case if need be for purposes of recalling witnesses and filing additional documents if need be.



Whether the instant suit can be consolidated with CMELC No. 150 of 2019;

40. The plaintiff/respondent in his replying affidavit deponed that the prayer for consolidation cannot issue for the reason that the said suit ELC Case No. 46 of 2015 as consolidated with CMC ELC Case No. 150 of 2019 was dismissed and does not therefore exist. He annexed a copy of the Order issued by Hon. Lady Justice J.M Onyango on 20.09.2023 and marked as ‘CSL2’
41. These averments were acknowledged and admitted by the 2nd defendant/applicant in paragraph 11 of his Supplementary Affidavit dated 16.03.2026.
42. I have carefully looked at the said annexure ‘CSL2’ which is a copy of the Court Order issued on the 20.09.2023 by Hon. Lady Justice J.M. Onyango and it is evident that the said suit ELC Case No. 46 of 2015 was dismissed for want of prosecution under Order 17 Rule 2 of the Civil Procedure Rules.
43. In essence therefore, the said suit having been dismissed, it follows that the order for consolidation is untenable and cannot issue since the said suit does not exist.
44. This court therefore finds that prayer No. (iii) in the application is not merited and is hereby dismissed.

Whether the present application is merited;

45. In view of the findings in issue No. (i) above, this court finds that the present application is partially merited to the extent of the prayer No. (ii) in the application.
46. Consequently, this court finds that the applicant is entitled only to the orders sought in prayer no. (ii) of the application.

Who shall bear the costs of the present Application

47. The general rule is that costs shall follow the event in accordance with the proviso to section 27 of the [Civil Procedure Act](#), unless the court is satisfied otherwise.
48. However, in view of the circumstances of the present case and application, this court finds need for the 2nd defendant/applicant to pay throw away costs.

Conclusion:

49. The upshot of the above is that the present application vide the Notice of Motion dated 21st November, 2025 is partially merited and is hereby allowed on the following terms: -
 - a. Leave be and is hereby granted to the 2nd defendant/applicant to file and serve his witness statements and documents within a period of 7 days from the date of the ruling hereof.
 - b. Failure to strictly comply with the timelines in order (a) above the leave automatically lapses.
 - c. The applicant be and is hereby ordered to pay the plaintiff Kshs. 30,000/= as throw away costs, within a period of 30 days from the date hereof.
50. It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16TH DAY OF APRIL, 2026.

HON. C. K. YANO

JUDGE

Ruling delivered in the presence of: -



Ms. Masengeli fro 2nd Defendant.

No appearance for Plaintiff.

No appearance for 1st, 3rd & 4th Defendants.

Court Assistant – Laban

