

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**ELC CASE NO. 34 OF 2019**

**JOHN OSORO OMBESE ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**JOHN KUMENDA..... DEFENDANT/APPLICANT**

**RULING**

1. For determination is the application dated 8<sup>th</sup> November, 2025 wherein the Defendant/Applicant is seeking the following orders:

**a. Spent**

**b. Spent**

**c. THAT this Honourable Court be pleased to call, remove and transfer the entire record in Kisii MCELC No. E012 of 2024 to itself, for purposes of consolidation and proper adjudication of the dispute between the Parties.**

**d. THAT upon transfer, this Honourable Court be pleased to order the consolidation of Kisii ELC Case No. 34 of 2019 and Kisii MCELC No. E012 of 2024, the two suits**

**raise similar issues, facts, and causes of action relating to land parcels KISII MUNICIPALITY/BLOCK 1/350, 351, and CENTRAL KITUTU/DARAJA MBIL1/789, to avoid conflicting judgments and promote the overriding objective of the court.**

**e. THAT the costs of this application be provided for.**

**f. Such further and or other orders as this Honourable court may deem fit and expedient.**

2. The application is premised on the grounds pleaded on the face of it and further supported by the facts deposed to in the affidavit sworn on the same date. The applicant avers, inter alia, that the claims in respect of KISII MUNICIPALITY/BLOCK 1/350 and 351, as against the applicant's land number CENTRAL KITUTU/DARAJA MBIL1/789, have been the subject of various previous suits that have been litigated together. The issues in dispute are identical, and the court would be called upon to determine the same and similar issues, with a danger of arriving at conflicting decisions that may embarrass the court.

3. The Applicant asserts that it is evident that all the suits, namely Kisii CMCC No. 742 of 1999, Kisii ELC No. 716 of 2016, and the instant ELC No. 34 of 2019, arise from the same set of facts or transaction, namely a boundary dispute involving parcels KISII

MUNICIPALITY/BLOCK 1/351, 350, and CENTRAL KITUTU/DARAIA MBIL1/7S9, and between the same parties or their legal representatives.

4. THAT the multiplicity of proceedings concerning the same parcels of land poses a serious risk of conflicting findings and judicial inconsistency, which this Honourable Court must guard against in the interests of justice, proportionality, and judicial economy. In the affidavit in support of the application, the Applicant annexed copies of the Plaintiff and the Defence filed in MCELC E012 of 2024.
5. The Plaintiff/Respondent filed grounds of opposition stating as follows;
  - i. *The parties and the subject matter in the two suits are different.*
  - ii. *Both suits have been confirmed for hearing and the application is meant to delay the expeditious trial of the said suits.*
  - iii. *The Plaintiff in MCELC no. E012 of 2024 has not been joined in this application.*
  - iv. *The issues raised in this application is res judicata application dated 7<sup>th</sup> April, 2022 which was disallowed.*

6. The Defendant/Applicant filed written submissions dated 8<sup>th</sup> January, 2026, while the Plaintiff/Respondent submissions were filed on 18<sup>th</sup> February, 2026. I have read and considered the arguments raised in both submissions.

**Analysis and determination:**

7. After considering the pleadings and the submissions, I frame these two issues for determination: whether this application is res judicata, and, if not, whether an order for consolidation should be granted.
8. The Respondent only filed grounds of opposition, which did not annex a copy of the application dated 7<sup>th</sup> April, 2022, or of the order determining that application. The application is said to have been made in Kisii ELC NO. 741 of 2016, a suit which is not sought to be consolidated with the present suit.
9. Given that the pleadings in the said ELC 741 of 2016 are not before this court, nor has a copy of the order arising therefrom been attached, and the Respondent having not stated what constituted a breach of the doctrine of res judicata, I find no ground to hold that the present application is res judicata.
10. On the merit of the application, I have perused the pleadings in both suits to be able to answer the key question of whether the matters in issue in this case are similar to those in issue in MCELC E012 of 2024, to warrant the order for consolidation. Notably, the dispute in this claim

revolves around encroachment. The Plaintiff is accusing the Defendant of having encroached upon their portion of land, Kisii Municipality/Block 1/350.

11. In the plaint in MCELC E012 of 2024, annexed to the affidavit in support of the motion, the cause of action at paragraph 4 also concerns encroachment. The Plaintiff in that suit pleaded that the survey report prepared pursuant to a court order issued in ELC 741 of 2016 indicates that the construction by this Applicant partly occupies L.R. No. KISII MUNICIPALITY/BLOCK 1/351.

12. Although parcel numbers Block 1/350 and Block 1/351 are owned by two distinct persons, the cause of action in both instances is the same. The Defendant/applicant is likely to give similar evidence in both cases. Secondly, if a need arises to send a government surveyor to identify the disputed boundaries of the suit parcels, it would save costs and time if such a visit is done once.

13. The Plaintiff/Respondent cited the case of **Jan Bonde Nielsen versus Herman Philups Steyn & 2 Others (2012) eKLR**, which stated, regarding consolidation, as follows;

**“Consolidation of suits is done under inherent powers of the court and for purposes of achieving overriding objectives of the Civil Procedure Act; that is for expeditious and proportionate disposal of civil disputes. Therefore, the main**

**purpose of consolidation of suits is meeting the ends of justice as it saves costs, time and effort and to make the conduct of several actions more convenient by treating them as one action...**” (underline mine for emphasis).

14. In this instance, if the two suits are consolidated, once the two Plaintiffs have given their testimony, the Defendant's evidence will be the same for defending both claims, and the resulting judgment will be one. This will save the parties and the court time by conducting a single hearing and issuing a single judgment. For this reason, I am persuaded that the Applicant has made out a case for consolidation.

15. Will the Plaintiff in MCELC E012 of 2024 suffer prejudice for the failure to include him in this application? Yes, but the prejudice is not incurable, as the transfer of the suit to this court and the subsequent consolidation do not affect his right to a fair hearing. He will still have the opportunity to present his case and cross-examine the Defendant at the hearing of the case, just like if he were to prosecute his case separately.


16. In conclusion, the application dated 8<sup>th</sup> November, 2025, is allowed, and the following orders are issued:

- a. THAT this Court does order the transfer of the entire record in Kisii MCELC No. E012 of 2024 to itself for the purposes of**

consolidation and proper adjudication of the dispute between the parties.

- b. Once the suit MCELC E012 of 2024 is transferred to our court, the ELC Registry is directed to forthwith receive the file and assign it a new number.
- c. THAT upon transfer, the said case (MCELCE E012 of 2024) is ordered to be consolidated with this case, Kisii ELC Case No. 34 of 2019. This case shall be the lead file by virtue of having been filed earlier (as indicated by the year of filing).
- d. Each party to bear their respective costs of this application.
- e. On the date of delivery of this Ruling, a mention date shall be fixed to confirm the consolidation before the matters are fixed for hearing.

Dated, Signed and Delivered at KISII this 16<sup>th</sup> day of April, 2026.

  
A. MOLLO  
JUDGE