



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 79 OF 2015

PENROSE SHILASALA NAMISI.....PLAINTIFF

VERSUS

THE GOVERNMENT OF

TRANS-NZOIA COUNTY.....1ST DEFENDANT

COUNTY PUBLIC SERVICE BOARD

TRANS-NZOIA COUNTY.....2ND DEFENDANT

RATILAL GOSAR GODHIA.....3RD DEFENDANT

VIPUL RATILAL.....4TH DEFENDANT

AVIR KANTI SHAH.....5TH DEFENDANT

RULING

1. The Notice of Motion dated 13th May, 2019 seeks the following orders:

(1) That this court be pleased to make an order consolidating this suit with Kitale ELC No. 136 of 2014 - Penrose Shilasala Namisi -vs- Benjamin Nyamumbo Oonge & 3 Others for purposes of hearing and final determination.

(2) That upon grant of prayer (1) above the instant case be taken as the lead file for purposes of further proceedings and/or recording of the proceedings.

(3) Costs be provided for.

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the supporting affidavit of the applicant. These are that the plaintiff herein filed another suit to wit **Kitale ELC No. 136 of 2014 - Penrose Shilasala Namisi -vs- Benjamin Nyamumbo Oonge, Ratilal Gosar Dodhia, Vipul Ratilal and Avir Kanti Shah**; that **Kitale ELC No. 136 of 2014** and the instant suit involve the same subject matter to wit **Kitale Municipality Block 7/20**; that there are common questions of law and fact in issue; that the issues that are likely to arise from the two cases are substantially the same and have the same core of operative facts and questions of law; that there is a likelihood of duplication of evidence and issues if the two cases are left to proceed independently; that an order of consolidation is appropriate to ease trial and management of issues at the trial and that no prejudice will be occasioned to the defendants if the orders sought is made.

3. The grounds of opposition were filed on 8/7/2019 by 3rd, 4th and 5th defendants who opposed the application and pray that it be dismissed with costs on the following grounds:

(1) Consolidation of this suit with Kitale ELC No. 136 of 2014 is undesirable because it will make the hearing longer and defeat the purpose of saving time as the plaintiff is represented by different advocates in the two suits.

(2) Consolidation of this suit with Kitale ELC No. 136 of 2014 is inappropriate because the reliefs claimed in the two suits do not arise from the same transaction.

(3) Consolidation of this suit with Kitale ELC No. 136 of 2014 will disadvantage the 3rd, 4th and 5th defendants as it will

convolute and cloud the real issues in controversy thus making it difficult for them to conduct their defence.

(4) The application for consolidation has been brought after inordinate delay which has not been and cannot be sufficiently explained.

4. The 1st defendant filed grounds of opposition dated **22/7/2019** in opposition and avers that the application is misconceived and a misinterpretation of the law on consolidation of suits; that the two suits are founded on totally different and distinct causes of action with no common predominant issues for determination; that this suit is based on matrimonial property rights of a spouse while **Kitale ELC No. 136 of 2014** is based on the rights of a joint owner arising from alleged joint ownership; that the plaintiff's claim in this suit is moot, otiose and even *res judicata*, given that the Court of Appeal while dismissing her appeal in **Eldoret Civil Appeal No. 104 and 67 of 2014** already made a determination that there could not have been a valid marriage between the plaintiff and **Benjamin Nyamumbo Oonge** the 1st defendant in **Kitale ELC No. 136 of 2014** as she was lawfully married to someone else, namely **George Obuya Ndubi**; that the fact of her said marriage to the said **George Obuya Ndubi** is not only contained in some of her affidavits but was also in the finding of the ruling by this court herein dated **26/2/2015** and affirmed by the Court of Appeal in its ruling in the two appeals; that consolidation of these two suits will unnecessarily embarrass the trial of **Kitale ELC No. 136 of 2014**.

5. The 1st defendant prays that the plaintiff's application for consolidation be dismissed with costs.

6. I have examined the pleadings in both cases. I find that the subject matter is the same, that is, **Kitale Municipality Block 7/20**.

7. The plaintiff appears to be claiming an interest of one kind or the other in both suits. It is sufficient to state that **Kitale ELC No. 136 of 2014** was instituted while the land had not been disposed of to the 1st and 2nd defendants herein by the plaintiff's husband.

8. The plaintiff's husband and his transactions with 3rd, 4th and 5th defendants feature substantially in both suits. The 3rd, 4th and 5th defendants are also defendants in **Kitale ELC No. 136 of 2014**.

9. The only explanation why the 1st and 2nd defendants were not made parties in that case is that they had not acquired the land. Indeed among the particulars of fraud amplified in **paragraph 20** of plaint dated 8/6/2015 in this case is the purported transfer to the 1st defendant of the suit property whilst the **Kitale ELC No. 136 of 2014** was still pending.

10. In both cases the suit is alleged to have been acquired jointly by the plaintiff and her husband. The mention of the Matrimonial Property Act in this case does nothing to distance it from claim in **Kitale ELC No. 136 of 2014**.

11. It is quite clear that in the circumstances similar issues of law and fact arise in both suits. This court is of the view that these suits do not need to be tried separately. It would save a lot of valuable judicial time if they were consolidated.

12. The application dated **13/5/2019** is therefore granted in terms of prayer **No. (1)**. However **Kitale ELC No. 136 of 2014** will be the lead file. The parties in the consolidated suit will be in the order followed in **Kitale ELC No. 136 of 2014**. In addition the 1st and 2nd defendants herein shall be added therein as the 5th and 6th defendants. All subsequent pleadings and other documents shall bear the heading as provided in this paragraph.

Dated, signed and delivered at Kitale on this 30th day of September, 2019.

MWANGI NJOROGE

JUDGE

30/9/2019

Coram:

Before: Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Arunga for Plaintiff/Applicant

Mr. Bisonga for 2nd, 3rd and 4th Respondents

Mr. Kitembe for Sifuna for Defendant/Respondent

COURT

Ruling read in open.

MWANGI NJOROGE

JUDGE

30/9/2019