



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 342 OF 2015

{FORMERLY CIVIL SUIT NO. 21 OF 2008 (O.S.)}

PERIS NDAGARA W/O KAUMBUTHU.....1ST PLAINTIFF
MURIUKI S/O KAUMBUTHU.....2ND PLAINTIFF
PETER MURIITHI.....3RD PLAINTIFF
DAVID NYAGA KAUMBUTHU.....4TH PLAINTIFF
NJOMO S/O KAUMBUTHU.....5TH PLAINTIFF
ANDREW IRERI.....6TH PLAINTIFF

VERSUS

NYAGA S/O MBOGO.....1ST DEFENDANT
JOSEPH NJIRU S/O MBOGO.....2ND DEFENDANT
JAMES NYAGA S/O MBOGO.....3RD DEFENDANT
MOSES NJIRU S/O MBOGO.....4TH DEFENDANT
NJOMO S/O MBOGO KATHARANGUCHU.....5TH DEFENDANT
SALESIO KINYUA NYAGA.....6TH DEFENDANT
PATRICIA MUTITU W/O HARUN KANYUA.....7TH DEFENDANT

RULING

1. On or about 7th June 2017 the 6th Plaintiff, Andrew Ileri Njeru, (hereinafter known as the “Applicant”) filed a notice of motion dated 5th June 2017 under certificate of urgency seeking orders for referral of the suit for alternative dispute resolutions and for consolidation of this suit with Embu ELC No. 57 of 2017 and Embu ELC No. 360 of 2015 with the instant suit. The said application was expressed to be founded upon sections 19 and 20 of the Environment and Land Court Act 2011, Order 46 Rules 1, 2 & 3 of the Civil Procedure Rules and Article 159(2) (a) (b) & (c) of the Constitution of Kenya.

2. The said application was based upon the several grounds shown on the face of the motion and supported by the Applicant’s own supporting affidavit sworn on 5th June 2017. So far as I can gather from the supporting affidavit, the Applicant is seeking consolidation because the 3 suits revolve around *Title No. Kagaari/Kigaa/404* (hereinafter the “suit property”). The Applicant claims to have purchased a portion of the said property from the 2nd Plaintiff. He also wanted the court to appoint two (2) arbitrators to hear and determine the land dispute.

3. As far as the court can gather from the said application, it would appear that there are apparently two conflicting court decisions in relation to the suit property. It would appear that the 1st and 2nd Plaintiffs obtained a judgement in their favour to share the suit property vide NBI

HCCC No. 1253 of 1975 (OS), whereas the Defendants (or some of them) obtained an interest to the suit property through succession proceedings vide Succession Cause No. 5 of 1979.

4. The 2nd Plaintiff, Muriuki S/O Kaumbuthu, filed a replying affidavit giving a convoluted history of the land dispute amongst the parties herein. He appeared to support the Applicant's said application for consolidation of the 3 suits and referral of the dispute to alternative dispute resolution.

5. The 1st to 5th Plaintiffs filed a notice of appointment of advocates on 24th July 2017 appointing the firm of Kiratu Kamunya & Co Advocates to act for them. They were previously acting in person even though the record shows that all proceedings were being directed by the Applicant. The firm of Kiratu Kamunya & Co Advocates did not file any response on behalf of the 1st to 5th Plaintiffs.

6. The Defendants herein were represented by the firm of Morris Njage & Co Advocates. He filed grounds of opposition dated 28th June 2017 and a replying affidavit sworn on the same date. He attacked the Applicant's said application on the following grounds;

1. The application was misconceived since the parties had not filed any agreement to refer the dispute to arbitration.
2. The application was an abuse of the court process.
3. The Applicant was guilty of non-disclosure of material facts.
4. The Applicant had violated the *sub-judice* rule by making reference to a pending ruling in Embu ELC No. 57 of 2017.
5. The Applicant was a vexatious litigant.

7. In his replying affidavit, the Defendants' advocate enumerated a list of seventeen (17) cases in which the Applicant was allegedly involved either as a party or an 'advocate' representing the various litigants. He contended that the Applicant was a vexatious litigant who had also contravened the Advocates Act by practicing as an advocate while unqualified to do so.

8. The court has considered the Applicant's said application, the replying affidavits on record, and the submissions of the Applicant. Although it was agreed on 11th October 2017 that the parties were to file and exchange written submissions on the said application, only the Applicant had filed some form of submissions by the time of preparation of the ruling. The court, shall nevertheless, determine the application on the basis of the material on record.

9. There are numerous issues which have been raised by the parties in their affidavits and grounds of opposition. The court shall, however, consider and determine only those issues which are necessary for the purpose of the application at hand. The 1st is whether the Applicant has made out a case for referral of the dispute to arbitration. The 2nd is whether the three suits referred to in the application should be consolidated.

10. The legal provisions relating to application of alternative dispute resolution are to be found in the **Constitution of Kenya, the Environment and Land Court Act 2011 Civil Procedure Act (Cap 21) and the Civil Procedure Rules, Article 159 (2) (c)** enjoins this court to promote alternative forms of dispute resolution such as reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.

11. The provisions of **Section 20 of the Environment and Land Court Act 2011** provide as follows in relation to Alternative Dispute Resolution;

"(1) Nothing in this Act may be construed as precluding the court from adopting and implementing, on its own motion, with the agreement of or at the request of the parties, any other appropriate means of alternative dispute resolution including conciliation, mediation and traditional dispute resolution mechanisms in accordance with Article 159(2) (c) of the Constitution.

12. The enabling procedural provisions of **section 59C of the Civil Procedure Act (Cap 21)** stipulates that;

1. A suit may be referred to any other method of dispute resolution where the parties agree or the court considers the case suitable for such referral.

2. Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may, in its discretion, order.

3. Any settlement arising from a suit referred to any other alternative dispute resolution method by the court or agreement of the parties shall be enforceable as a judgement of the court.

13. On the other hand, the enabling provisions of **Order 46 Rule 20 of the Civil Procedure Rules** provide that;

1. "Nothing under this order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.

2. The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution.

3. Where a court mandated mediation adopted pursuant to this rule fails, the court shall forthwith set the matter down for hearing and determination in accordance with the Rules.

14. It is clear from a reading and analysis of the above cited provisions that alternative dispute resolution may be undertaken either by consent of the parties concerned or upon the court's own initiative where the court is satisfied that such a process is suitable and viable. The first alternative is not available because the Defendants are not amenable to referral to alternative dispute resolution.

15. In my opinion, an alternative dispute resolution process should not be imposed upon an unwilling party unless there are compelling reasons to do so. One of the important principles of a credible alternative disputes resolution process is that it should be voluntary. In my view, parties to a dispute cannot meaningfully engage in an alternative disputes resolution process under compulsion. The court finds no compelling reason to direct the parties to settle the existing land dispute through arbitration against their will. The Applicant's request for a referral to arbitration shall, therefore, not be granted.

16. The second question relates to consolidation of suits. The court has jurisdiction to order the consolidation of suits where common questions of fact and law arise and where such suits may conveniently be tried together. In the case of **Nyati Security Guards & Services Ltd Vs Municipal Council of Mombasa [2004] eKLR** the court made the following pronouncement on the applicable principles on consolidation of suits;

"The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where;

i. Some common questions of law or fact arises in both or all of them; or

ii. The right or relief claimed in them are in respect of the same transaction or series of transactions; or

iii. For some other reason it is desirable to make an order for consolidating them."

17. Similarly in the case of **RMG Vs NG & Another NBI HCCC No 29 of 2009 (OS) [2013] EKL**R the principles were summarized as follows;

"The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the subject matter should be disposed of at the same time. This would mean that the suits are brought together for the purpose of disposing of them simultaneously if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously."

Although the Applicant sought consolidation of the instant suit with two other suits, he did not provide sufficient particulars of the other two suits. For instance, no pleadings, affidavits or other documents in relation to them were attached to the supporting affidavit.

18. In those circumstances, it would not be possible for the court to know the parties, issues, causes of action and reliefs sought in the other two suits without such crucial information. It would not be possible for the court to access, whether or not the 3 suits may conveniently be tried together.

19. In spite of the Applicant's said deficiency, the court decided to call for the two other files from the Registry. The only file which was available was Embu ELC No. 57 of 2017 (formerly NBI HCCC No. 1253 of 1975 – Originating Summons). A perusal of the said file indicated that it was basically a concluded suit. The record showed that judgement was delivered therein in 1987 but the decree holder had extracted the decree in 2011. By a ruling dated 27th July 2017 this court declared that the judgement delivered in 1987 was statute barred by the time the decree was extracted in 2011.

20. The upshot of the foregoing is that the court finds no merit in the Applicant's notice of motion dated 5th June 2017 and the same is hereby dismissed with costs to the Defendants.

21. The court has noted with concern that the instant suit has been pending for more than 10 years and there is no indication of any steps being taken by the Plaintiffs to get the suit ready for hearing. The court shall, therefore, give appropriate pre-trial directions for the parties to comply with **Order 11 Civil Procedure Rules** with a view to fixing the suit for hearing.

22. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **15th** day of **MARCH 2018**

In the presence of both the Plaintiff in person, Mr Mureithi holding brief for Mr Morris Njage & Co Advocates for the Defendants and in the absence of the 1st – 5th Plaintiffs.

Court clerk Leadys.

Y.M. ANGIMA

JUDGE

15.03.18