



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 579 OF 2017**

**(Formerly Nairobi ELC No. 377 of 2015)**

**MOSES KIRRUTI LEMPASO.....1<sup>ST</sup> PLAINTIFF**

**GRACE WAITHERA KIRRUTI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**OBADIAH K. BUNYI.....1<sup>ST</sup> DEFENDANT**

**OLE KASASI LIMITED.....2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE LAND REGISTRAR KAJIADO COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiffs' Notice of Motion dated the 1<sup>st</sup> March, 2016 brought pursuant to Article 159 of the Constitution, Sections 1(A), 1(B), 3 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules, Sections 13(1) (2) (d) of the Environment and Land Court Act and all the other enabling provisions of the Law. The application seeks orders of court to consolidate ELC 377 of 2015; ELC 1088 of 2015; ELC 1089 of 2015; ELC 1090 of 2015 and ELC 1092 of 2015, since their causes of action emanate from subdivisions from the suit property known as KAJIADO/OLOOITIKOSHI/KITENGELA/1957 measuring 42.0 hectares or thereabouts. It further seeks orders to bar the Counsel for the Plaintiffs' in ELC 1088 of 2015; ELC 1089 of 2015; ELC 1090 of 2015 and ELC 1092 of 2015 and for 1<sup>st</sup> Defendant in ELC 377 of 2015, one George Muhoro trading as G.M. Muhoro Advocate to cease acting on behalf of the said parties, since he has proprietary claim rendering him a possible witness, hence incapable in law and in fact to be counsel in the said suits and or proceedings herein. The applicant is further seeking that the 4<sup>th</sup> Defendant to make full disclosure of all the entries made in the Land Register at Kajiado in respect of the suit land.

The application is supported by the affidavit of GRACE WAITHERA KIRUTTI who is the 2<sup>nd</sup> Plaintiff herein where she deposes that they had sought for vesting orders for the suit land. She avers that on 12<sup>th</sup> October, 2015, they were served with a demand letter from messrs Mwadumbo & Company Advocates demanding that they vacate from land parcels numbers KAJIADO/KITENGELA/ 33568; 33569; 33570; 33571; 33572; 33574; 33575 and 33576 respectively. Further that the said firm of advocates was purportedly acting on behalf of their nine (9) clients among them the 1<sup>st</sup> Respondent and his advocate who purportedly claimed proprietary interest on the said parcels of land. She claims the aforementioned parcels of land were resultant subdivisions from the suit land. She contends that vide the judgement of the Tribunal dated the 22<sup>nd</sup> February, 2011, 1<sup>st</sup> Plaintiff was declared the lawful owner of the suit property, with the 1<sup>st</sup> Respondent's Advocate adversely mentioned, which demonstrates his proprietary claim rendering him a possible witness. He states that during the subsistence of the instant suit, four suits namely ELC 1088 of 2015; ELC 1089 of 2015; ELC 1090 of 2015 and ELC 1092 of 2015 were instituted by George Muhoro trading as G.M. Muhoro Advocate on behalf of the Plaintiffs' while in ELC 377 of 2015 he is acting for the 1<sup>st</sup> Defendant. He insists these suits are fatally defective for duplicity with the substantive suit herein as they all relate to the whole or portions of the suit property. She reiterates that it is in the interest of justice if all the aforementioned suits were consolidated, with the 4<sup>th</sup> Defendant compelled to make full disclosure of the dealings and entries in respect of the suit land.

The 1<sup>st</sup> and 2<sup>nd</sup> Respondents opposed the application.

The 2<sup>nd</sup> Respondent filed a replying affidavit sworn by SIMON MUKIRI who is its Director where he denied being a party in ELC No. 1088

of 2015; ELC No. 1089 of 2015; ELC No. 1090 of 2015; and ELC No. 1092 of 2015 respectively. He confirmed that the suit land was subdivided by the 1<sup>st</sup> Plaintiff herein into KAJIADO /KITENGELA / 12922 and KAJIADO /KITENGELA / 12923 pursuant to orders issued by this Court on 14<sup>th</sup> June, 1995 vide Nairobi HCCC No. 4861 of 1989 and a decree issued on the 23<sup>rd</sup> October, 1997. He explained that after the said subdivision, the 1<sup>st</sup> Plaintiff transferred KAJIADO /KITENGELA /12923 to the late David Gichumbi Njoroge as per the orders of the Court dated the 14<sup>th</sup> June, 1995. Further that in 2008 they formed the 2<sup>nd</sup> Defendant jointly with David Gichumbi Njoroge and at the time of incorporating the company, he had already subdivided KAJIADO /KITENGELA /12923 into four parcels namely KAJIADO /KITENGELA /27302; KAJIADO /KITENGELA /27303; KAJIADO /KITENGELA /27304 and KAJIADO /KITENGELA / 27305 respectively, and they were registered in his name. He contends that David Gichumbi Njoroge then transferred the four parcels namely KAJIADO /KITENGELA /27302; KAJIADO /KITENGELA /27303; KAJIADO /KITENGELA /27304 and KAJIADO /KITENGELA / 27305 to the 2<sup>nd</sup> Defendant. He reiterates that this suit does not arise from the ruling dated the 22<sup>nd</sup> February, 2011, that was issued by the Rift Valley Provincial Appeals Committee where only the 1<sup>st</sup> Plaintiff and 1<sup>st</sup> Defendant appeared as they were in dispute over KAJIADO /KITENGELA / 12922. Further that neither the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants herein nor parties in the ELC No. 1089 of 2015; ELC No. 1090 of 2015 and ELC No. 1092 of 2015 participated in the proceedings before the Rift Valley Provincial Appeals Committee. He claims the Rift Valley Provincial Appeals Committee erroneously introduced the 2<sup>nd</sup> Defendant's parcels of land in their deliberations and further gave orders affecting them, when the 2<sup>nd</sup> Defendant had not appeared before it nor had its property been subject to the dispute. He reaffirms that vide the Machakos High Court Miscellaneous Civil Application No. 167 of 2011, the orders of the Rift Valley Provincial Appeals Committee were stayed pending the hearing and determination of this suit. Further, that the cause of action culminating in the dispute between the Plaintiffs/Applicants herein as well as the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in this suit are different from the facts leading to the disputes between the parties in ELC No. 1089 of 2015; ELC No. 1090 of 2015; and ELC No. 1092 of 2015. He reiterates that consolidating all these suits as sought by the Plaintiffs herein will lead to further complexities and delay the just as well as expeditious disposal of it.

The Plaintiffs', 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their respective written submissions that I have duly considered.

### **Analysis and Determination**

Upon perusal of the materials presented in respect of the Notice of Motion dated the 1<sup>st</sup> March, 2016, I find that these are the issues for determination:

- Whether Case Numbers ELC 377 of 2015; ELC 1088 of 2015; ELC 1089 of 2015; ELC 1090 of 2015 and ELC 1092 of 2015 should be consolidated for hearing and final determination.
- Whether the Counsel for the Plaintiffs in ELC 1088 of 2015; ELC 1089 of 2015; ELC 1090 of 2015 and ELC 1092 of 2015 who is also Counsel for 1<sup>st</sup> Defendant in ELC 377 of 2015 one George Muhoro trading as G.M. Muhoro Advocate do cease acting on behalf of the said parties.
- Whether the 4<sup>th</sup> Defendant should make full disclosure of all the entries made in the Land Register at Kajiado in respect of land parcel number KAJIADO /OLOOITIKOSHI /KITENGELA /1957

On the question of consolidation of suits, a criteria for consolidation of suits was well laid down in the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014]** eKLR where the learned Judge explicitly stated as follows: ' **The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-**

1. *Do the same question of law or fact arise in both cases?*
2. *Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction*
3. *Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party*

**Order 11 rule 3(1) (h) provides that:**

**1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—**

**(h) consider consolidation of suits;**

Further in the case of **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

***“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it”***

Even though the Plaintiff contends that the claims in all the aforementioned suits emanate from disputes relating to parcels of land which were resultant subdivisions of land parcel number KAJIADO/OLOOITIKOSHI/KITENGELA/1957, I note that all these suits have different Plaintiffs' who are seeking varied reliefs in their respective suits. Further, the questions of law and or fact which arise in all these suits are different, as the reliefs sought are diverse since the claims did not arise from one transaction but a series of transaction involving varied parties. Even though the Plaintiffs have made a strong case for consolidation of the suits, but it is not simple on the face of it taking into account that there are several suits. Inasmuch as the overriding objective of this court is to ensure expeditious disposal of cases and

consolidating all the suits would be the best means to ensure this, I find that it would be in the interest of justice if each suit was heard separately so as not to prejudice the parties in respect of the reliefs they are seeking.

In the circumstances, I will concur with the 1<sup>st</sup> and 2<sup>nd</sup> Respondents' submissions that consolidation would be an inconvenience and it would defeat the purpose of justice if the said suits were consolidated at this juncture. I make a finding that these suits should each proceed separately on their own merit for hearing and final determination.

As to whether the Counsel for the Plaintiffs in ELC 1088 of 2015; ELC 1089 of 2015; ELC 1090 of 2015 and ELC 1092 of 2015 who is also Counsel for 1<sup>st</sup> Defendant in ELC 377 of 2015 one George Muhoro trading as G.M. Muhoro Advocate should cease acting on behalf of the said parties, I note in the case of **British American Investments Company (K) Limited V. Njomaitha Investments Limited & Another (2014) eKLR**, Hon Kamau J stated as follows:

*' .. where a party asserts that conflict of interest exists, they must provide sufficient evidence to demonstrate that indeed such conflict of interest exists. It is incumbent upon such party to show that it has suffered or will suffer prejudice if such an advocate or firm of advocates continues to so act for the party. Mere suspicion, apprehension of a possible conflict of interest or fear of prejudice cannot be a basis to stop an advocate from acting on behalf of a party.'*

In relying on the above case, I note the Plaintiffs' are alleging the Counsel has proprietary claim and can be a witness in this case, which allegations are denied by the said Counsel. Except for this allegation, the Plaintiffs have not provided any further sufficient proof to demonstrate the conflict of interest nor have they stated the prejudice they would suffer if the firm of messrs GM Muhoro Advocate continued to act for their clients. I note that it is the said parties Constitutional right to choose a Counsel of their own choice and this right cannot be interfered with by the opposing parties' mere suspicion on conflict of interest. In the circumstances, I will decline to grant this prayer as sought for by the applicants.

As to whether the 4<sup>th</sup> Defendant should make full disclosure of all the entries made in the Land Register at Kajiado in respect of KAJIADO/OLOOITIKOSHI/KITENGELA/1957, I find that the Plaintiffs' are indeed entitled to information held by the 4<sup>th</sup> Defendant as regards the said land and will allow the prayer as sought.

It is against the foregoing that I will decline to grant prayers 3 and 4 of the Notice of Motion dated the 1<sup>st</sup> March, 2016 but proceed to allow prayer no. 5 only.

Costs will be in cause.

**Dated signed and delivered in open court at Ngong this 4th day of April, 2018**

**CHRISTINE OCHIENG**

**JUDGE**