



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

LAND CASE NO. 301 OF 2015

MARTIN CHIPONDA & 860 OTHERS.....PLAINTIFFS

-VERSUS-

MOHAMOOD KASSAM & 13 OTHERS...DEFENDANTS/RESPONDENTS

RULING

1. For determination is the notice of motion dated 5th December 2016 brought by the plaintiffs under section 1A & 3A of the Civil Procedure Act 2010 and Order 1 Rule 10, Order 8 rule 3 & 5 and Order 51 seeking the following orders:

1. Spent

2. The Court is pleased to add the following parties either as defendants or interested parties in this suit or any of the other suits mentioned here below; and order the issuance of appropriate Court process for service upon them:

a. Fatma Ali Abdalla; as reputed owner of 24.31% un-divided share of plot 818/II/MN measuring 4.993 Ha (11.024 acres);

b. Mohamed Abdalla Mandhry; as reputed owner of 75.69% un-divided share of plot 818/II/MN measuring 4.993 Ha (11.024 acres);

c. Land Settlement Fund Board of Trustees established under section 135 of the Land Act (as amended by section 90 of Act No 28); which is now charged with the responsibility to provide access to land for settlement of Squatters and provision of shelter or displaced persons, even if it involves purchasing privately registered land under section 135 (1) (C) of the Land Act.

d. National Land Commission.

3. The plaintiffs are granted leave to amend the statement of claim by way of plaint, so as to add causes of action against the new parties sought to be joined; with the result that all the issues in dispute in these suits are effectually determined in one trial;

4. The Court is pleased to consolidate all the actions pending before Court enumerated here below; touching on the plaintiffs' claims over the suit lands, being Plots 324, 382, 817, 818, 819 all of Section II Mainland North; for effectual determination of the dispute in one trial to save on costs and time; while effectually and expeditiously determining all the matters in dispute;

5. Directions on time-lines on amendment and service of Court process and amended pleadings, and entry of appearance as well as filing papers in reply are given;

a. Mombasa Constitutional Petition No. 74 of 2014 Kazungu Katana and 382 others versus Mahmood Kassam and 6 others, which is a claim for recovery of plots 324, 382, 817 and 819, all of Section II Mainland North;

b. Mombasa ELC NO. 201 of 2013 Ibrahim K. Baya and 12 others versus Mahmood Kassam and 7 others; being a claim for recovery of plot 819 (O. N. 330/2) of section II Mainland North;

c. **Mombasa ELC No. 298 of 2013 (OS) Muhambi Kalinga and 188 others versus Mahmood Kassam and 4 others; a claim for recovery by adverse possession of plot 819 of Section II Mainland North measuring about 314 acres;**

d. **Mombasa C.M.C.C. No. 1686 of 2016, Bandari Investment Company Limited versus Hashim Loma and 6 others, a claim by the plaintiff to recover approximately 59 acres of 817 (O. No. 324/2) of Section II Mainland North, which they reportedly purchased from Mahmood Kassam and Brothers;**

e. **Shanzu Criminal Case No. 822 of 2015 Rep v Michael Fondo and 10 others; a case for trespass to land;**

f. **Shanzu Criminal Case No. 1252/2016 Rep v Samuel Chivatsi; a charge that he injured animals on the suit land;**

g. **Shanzu Criminal Case number 1040/2016 Rep v Joha Athman Tsama, a charge of disobeying a lawful Court Order issued by the Shanzu criminal case, in respect of the same parcels of land.**

6. The costs of this application are provided for.

2. The application is supported by the grounds on the face of it and the supporting affidavit of Martin Chiponda sworn on 1st December 2016 and supplementary affidavit dated 11th December 2017.

3. The application is opposed by the 1st – 4th defendants who filed both grounds of opposition and a replying affidavit on 8th March 2017 and 24th April 2017 respectively. The 1st – 4th Respondents depose that the parties sought to be joined have no interest in plot No 819/II/MN which is the subject matter of the present suit. Secondly that Petition No 74 of 2014 is filed in the High Court which is distinct from the ELC. That the prayer for consolidation violates section 6 & 7 of the Civil Procedure Act. Lastly that criminal and civil cases cannot be consolidated as this Court has no original criminal jurisdiction. They depose that this application is made in bad faith and ought to be dismissed.

4. Both parties filed written submissions which I have read and considered together with the annexed case laws. First the plaintiffs seek to add more parties to the suit to be joined as defendants or interested parties. The two parties named in prayer No. 2 (a) & (b) of the motion are said to be owners of undivided shares of plot No 818/II/MN. The basis of seeking to join them is because the applicants are presently in physical possession and use of the said parcels. The subject matter of this suit is plot No 819/II/MN. The interest of the two new parties to be joined herein on plot 819 is not disclosed. If they own a separate piece of land as pleaded by the applicants i.e. 818 then that calls for a separate cause of action. If the applicants believe they live on this parcel, they ought to commence an action against them and not join them to this suit. Order 1 rule 19 (2) is specific to who can be added as a party.

5. The named parties in prayer No. 2 (c) & (d) of the motion are being sought to be joined in their capacities as government institutions. The same is allowed since no opposition was filed. This prayer is thus granted to the extent of joining only the Land Settlement Fund Board of Trustees and the National Land Commission.

6. Under prayer No. 4, the applicants sought the consolidation of this suit with several other suits. One of these is CMCC No 1686 of 2016 Bandari Investments Co Ltd vs Hashim Loma & 6 others where the subject matter in dispute is over plot No 817 (Original No 324/2). In his supplementary affidavit, Martin Chiponda deposed that this suit was terminated by Ogola J in JR Case No 7 of 2017. There is nothing more for this Court to say about it as the case is not alive anymore to be consolidated.

7. Another case listed for consolidation is H. C Constitutional Petition No 74 of 2014. From the copies of the pleadings annexed by the applicants, the same was filed in the High Court. The High Court has distinct jurisdiction from the Environment & Land Court. Unless the petition is transferred to this Court for trial and determination, this Court has no powers to call a file pending in a different Court before that Court is appropriately moved and consolidate it with an existing one. The applicants are alive to this procedure and know what to do. Hence their request to consolidate the two files existing in Courts of concurrent jurisdiction is bad in law.

8. The applicants have also urged that ELC 201 of 2013 & 298 of 2013 be consolidated with the present case. I note the two cases relate to the same piece of land. Some of the plaintiffs in the two suits are also plaintiffs in this suit. The two cases were commenced by different advocates other than the ones representing the applicants herein. Apart from annexing the Originating Summons and the plaint, the Court was not made aware the stage where the two cases (201 & 298) are at. The 1st – 4th Respondents deposed in paragraph 7 of their replying affidavit that ELC 298 of 2013 was dismissed on 4th November 2014 under the provisions of Order 17 rule 4. They annexed a copy of the dismissed order as “*M3b*.” The applicants in their supplementary affidavit did not deny the existence of this order except stating that the principle of res judicata cannot be pleaded where the claimants are not the same. The ELC case No 298 of 2013 having been dismissed, the same cannot be revived by an order of consolidation unless proper channel is followed before the order of consolidation can be made.

9. The remaining 3 cases listed under prayer Nos. 4 (e), (f) & (g) are criminal cases pending in Shanzu Law Courts. The law does not provide for trial of criminal and civil proceedings together under one file as they are governed by different regimes of the law. The criminal case is governed by Criminal Procedure Code while civil cases are governed by Civil Procedure Act & Rules. Secondly the Environment & Land Court has not been donated jurisdiction to hear & determine criminal cases. Thirdly the cases are pending in a subordinate Court and unless an application for transfer to this Court was made (which is impossible) an order of consolidation cannot issue. For the three reasons given herein above I decline to grant an order for consolidation in respect of this case and Shanzu Criminal cases Nos. 822 of 2015, 1252 of 2015 and 1040 of 2016.

10. In conclusion, the prayer for consolidation is refused for the reasons set out above. The application therefore succeeds in part in terms only of prayer **No. 2 (c) and (d)** being allowed and the amendment prayed in No 3 is limited to that extent. The amended plaint joining the 2 parties be filed within 14 days of the delivery of this ruling and served as provided under Order 5 the Civil Procedure Rules. I direct that

each party bears their own costs of this application.

Dated, signed & delivered at Mombasa this 25th May 2018

A. OMOLLO

JUDGE