



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 21 OF 2017**

**GRACE WAIRIMU NJOGU MURIITHI (Suing as the Administrator  
of the Estate of the late WAIGANJO MURIITHI.....PLAINTIFF**

**VERSUS**

- 1. ANTHONY MURAGE MUTOGI Alias KANYAGO**
- 2. AGOSTINE MUNGERE MUTOGI**
- 3. ESTHER WARUI MUGO (Sued as the Administrator of the  
Estate of the late JOHN MUGO KATHERE**
- 4. CATHERINE WAWIRA MURAGE (Sued on her own behalf and as  
Next friend of STEPHEN MURAGE (a person of unsound mind)**
- 5. PRASIAH NYAWIRA NGACHA**
- 6. PETER MURIITHI KINYUA**
- 7. JANE WANJIRU MURIITHI.....DEFENDANTS**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 28<sup>th</sup> April 2017 and filed herein on 5<sup>th</sup> May 2017 seeking the following orders:

- 1. That this Court do consolidate this case with KERUGOYA ELC CASE No. 124 of 2014.***
- 2. Costs be provided for.***

The application is based on the grounds set out therein and supported by the affidavit of **GRACE WAIRIMU NJOGU** the plaintiff herein in which she has deposed, inter alia, that there is **KERUGOYA ELC CASE No. 124 of 2014** filed by the 1<sup>st</sup> defendant and it is important that this case and **KERUGOYA ELC CASE No. 124 of 2014** are consolidated.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants did not oppose the application.

The 1<sup>st</sup> defendant filed grounds of opposition describing the application as bad in law, incompetent and incurably defective and that the plaintiff ought to have applied to be enjoined in **KERUGOYA ELC CASE No. 124 of 2014**.

The 5<sup>th</sup> defendant filed both a replying affidavit and grounds of opposition. She also described this application as incompetent, bad in law and an abuse of the Court process. She too was of the view that the plaintiff should have applied to be enjoined in **KERUGOYA ELC CASE No. 124 of 2014**. She deposed to other matters which in my view are not relevant to this application.

Only the plaintiff's counsel **Ms THUNGU** filed submissions to the application.

I have considered the application, the responses thereto by the 1<sup>st</sup> and 5<sup>th</sup> defendants and the submissions by counsel for the plaintiff **Ms THUNGU**.

***“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a frame work for a fair and impartial dispensation of justice to the parties .....” – LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY & OTHERS SUPREME COURT OF KENYA PETITION No. 14 of 2013.*** In the same case, the Supreme Court stated that:

***“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. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the Respondents if consolidation is ordered as prayed”.***

The principles to be applied when a Court is considering consolidation of suits were set out in the case of **NYATI SECURITY GUARDS & SERVICES LTD VS MUNICIPAL COUNCIL OF MOMBASA 2004 e K.L.R** as follows:

- 1. That there are two or more suits pending in the same Court.**
- 2. Common questions of law or fact arise in both or all of the cases; or**
- 3. The rights or reliefs claimed in them are in respect of or arise out of the same transaction or series of transactions; or**
- 4. For some other reasons, it is desirable to make an order for consolidation.**

And in **STUMBERG & ANOTHER VS POTGEITER 1970 E.A 323**, the Court stated the broad principle regarding consolidation of suits as follows:

***“When there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”***

Therefore, where two or more suits are pending at the same Court raising common issues of facts or law, it is desirable, in order to achieve the expeditious disposal of such suits, that they be consolidated. That is why the consolidation of suits is among the issues to be considered by the Court early in the trial process during the case conference provided for under ***Order II of the Civil Procedure Rules***.

In an application seeking the consolidation of suits, one would expect the Applicant to place before the Court the common issues of fact or law that arise in both cases sought to be consolidated. Unfortunately however, the plaintiff in this case has not bothered to point out either in her affidavit nor the application itself, which common issues arise both in this case and **KERUGOYA ELC CASE No. 124 of 2014** to warrant a consolidation of the two suits. That has made it difficult for this Court to know whether indeed those are good grounds to warrant the orders of consolidation. The easiest way would have been to annex to the application, the pleadings in **KERUGOYA ELC CASE No. 124 of 2014**. That was not done. Parties must remember that it is their responsibility to place before the Court all the evidence necessary to determine the dispute presented to the Court. It is not the duty of the Court to fish for evidence. Whereas I could very easily have called for and perused the pleadings in **KERUGOYA ELC CASE No. 124 of 2014**, I cannot do that because as I draft this ruling, I am no longer working at **KERUGOYA COURT** having been transferred to **BUNGOMA COURT** in April 2018 and therefore I do not have the luxury of calling for that file. That has made my task unnecessarily arduous because I have had to comb through the record herein to find out if there is any common issue of fact or law in this case and **KERUGOYA ELC CASE No. 124 of 2014**.

I have however found the answer to that question in paragraph six (6) of the 6<sup>th</sup> and 7<sup>th</sup> defendants' defence filed herein on 12<sup>th</sup> April 2017. Therein, it is pleaded as follows:

***“The 6<sup>th</sup> and 7<sup>th</sup> defendants aver that the issues raised in this matter are substantially the same with the issues raised in KERUGOYA ELC CASE No. 124 of 2014 and at the appropriate time, the defendants will be moving the Court for appropriate orders”.***

The 5<sup>th</sup> defendant on her part has pleaded in paragraph eight of her defence that:

***“The 5<sup>th</sup> defendant denies paragraph 19 of the plaint and avers that there is a suit pending concerning the same subject matter instituted by the Estate of WAIGANJO MURIITHI i.e. KERUGOYA ELC CASE No. 124 of 2014 and shall raise a Preliminary Objection at the appropriate moment before the hearing of the claim to have this instant suit struck out”.***

Given those averments by the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants in their defences, and indeed taking into account that the 6<sup>th</sup> and 7<sup>th</sup> defendants did not oppose this application, I am satisfied that there are common issues of fact and law in this case and **KERUGOYA ELC CASE No. 124 of 2014** to warrant the consolidation of both suits.

In the circumstances, the plaintiff's Notice of Motion dated 28<sup>th</sup> April 2017 is hereby allowed. Costs shall be in the cause.

The two cases shall be mentioned together for further orders.

**B.N. OLAO**

**JUDGE**

**7<sup>TH</sup> MAY, 2018**

Ruling dated and signed at Bungoma this 7<sup>th</sup> day of May 2018.

To be delivered at Kerugoya on notice.

**B.N. OLAO**

**JUDGE**

**7<sup>TH</sup> MAY, 2018**