



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 112 OF 2014

(FORMERLY KERUGOYA ELC 515 OF 2013)

JAMES KARIUKI MURETE.....APPLICANT

VERSUS

NICHOLAS NGUTHI KIVINDA.....1ST RESPONDENT

ANTHONY NDII.....2ND RESPONDENT

RULING

1. By an originating summons dated 25th April 2006 brought under the provisions of **section 38 of the Limitation of Actions Act (Cap 22), Order XXXVI Rule 3D of the Civil Procedure Rules, 1948** and **all enabling provisions of the law**, the Applicant sought the following reliefs against the 1st Respondent;

- a. A declaration that the applicant has acquired adverse possession of LR Nthawa/Gitibu/2444 and that the Respondent is holding the title therein as a trustee for the Applicant.
- b. An order directing the Respondent to execute all necessary documents to transfer the said property to the Applicant failure to which the Executive Officer of this Honourable court be mandated to execute/sign all the necessary documents transferring the said land to the Applicant.
- c. Costs of this application be provided for.

2. The said originating summons was based upon the grounds shown on the face of the summons and supported by an affidavit sworn by the original Applicant, James Kariuki Murete. The gist of the application was that the Applicant and his family had been in exclusive possession of *Title No. Nthawa/Gitiburi/2444* (hereinafter known as the *suit property*) for over 12 years. The said application was later on, with leave of court, amended to include the 2nd Respondent as a party.

3. The Applicant thereafter filed an application for interlocutory orders pending the hearing and determination of the originating summons. The orders sought were granted on 26th July 2007 by the late Hon Justice Joyce Khaminwa. Thereafter, the Applicant did not take any serious steps to prosecute the suit which has been pending for over twelve (12) years now.

4. By a notice of motion dated 26th June 2018 brought under the provisions of **Order 1 Rule 12 of the Civil Procedure Rules**, the Applicant sought for consolidation of the instant suit with *Embu ELC No 341 of 2005*. The application was based on the grounds that both suits involved the same suit property and the same parties.

5. The said application was supported by an affidavit sworn by Stanley Mbogo Nyaga on 26th June 2018. It was contended that the parties and subject matter in the suits sought to be consolidated were the same and that it was imperative for the suits to be consolidated to obviate the possibility of the court arriving at two different or contradictory decisions.

6. The 1st Respondent's advocate, Njeru Ithiga, swore a replying affidavit dated 10th July 2018 in opposition to the said application. It was contended that *Embu ELC No. 341 of 2015* was finalized since judgement was delivered therein on 7th May 2005 hence consolidation was not a viable option. It was also contended that, in any event, the Applicant had not annexed any documentary evidence to establish any nexus between the two suits sought to be consolidated.

7. The 2nd Respondent filed grounds of opposition dated 26th July 2018 in opposition to the said application. The 2nd Defendant raised

objections similar to those of the 1st Respondent but added that he was not a party to *Embu ELC No. 341 of 2015*. It was also contended that the instant application lacked merit and that it was an abuse of the court process.

8. When the said application was listed for hearing on 26th July 2018 the advocates for the parties agreed to canvass it through written submissions. The Applicant was to file and serve his submissions within 14 days whereas the Respondents were to file and serve theirs within 14 days upon service by the Applicant.

9. By the time of preparing this ruling, however, none of the parties had filed submissions. The court shall, nevertheless, proceed to determine the application on the basis of the affidavits and other material on record.

10. In the case of **RMG Vs NG & Another [2013] eKLR** it was held, *inter alia*, that;

“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 matter 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.”

11. Similarly, in the case of **Nyati Security Guards & Services Ltd Vs Municipal Council of Mombasa [2004] eKLR** it was observed, *inter alia*, that;

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

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

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

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

12. Bearing in mind the above principles and considerations, the court is of the opinion that it was the responsibility of the Applicant to demonstrate the existence of common questions of law or fact or that the reliefs claimed in the two suits sought to be consolidated arose out of the same transaction or series of transactions. The Applicant did not annex copies of the pleadings in *Embu ELC No. 341 of 2005*. It is, therefore, not possible for the court to know the nature of the case, the reliefs sought therein, and the transaction or transactions which precipitated that suit.

13. The court notes that the instant suit is a claim based upon adverse possession under the **Limitation of Actions Act (Cap 22)**. It has not been demonstrated how, if at all, the other suit would affect the instant one and *vice versa*. The court finds that it has not been supplied with sufficient material upon which an order for consolidation may be granted.

14. There is one aspect of this suit which is worth mentioning even though it is not necessary to make a finding thereon for the purpose of this application. Although the Respondents contended that *ELC No 341 of 2005* was concluded, the Applicant in his witness statement dated 17th May 2018 asserted that the *ex-parte* judgement therein was set aside by the late Hon Justice Khaminwa. Be that as it may, it was the duty of the Applicant to demonstrate the pendency of the suit. However, in view of what I have already stated hereinbefore, it is not necessary to make a determination on this issue.

15. The upshot of the foregoing is that the court finds no merit in the Applicant’s notice of motion dated 26th June 2018 and the same is consequently dismissed with costs to the Respondents.

16. In view of the age of this suit, the parties herein are hereby required to comply with **Order 11 of the Civil Procedure Rules** by filing all necessary statements and documents in preparation for trial within 14 days from the date hereof. The court shall fix a hearing date upon delivery of the ruling.

17. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this 27th day of **SEPTEMBER, 2018**.

In the presence of Mr. Muriithi holding brief for Mr. P.N. Mugo for the Plaintiff, Mr. Ithiga for the 1st Defendant and Ms. Nzekele holding brief for Mr. Okwaro for the 2nd Defendant.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

27.09.18