



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 343'B' OF 2012

OLALUI GROUP RANCH PLAINTIFF

VERSUS

TWARI KONCHELLA & 608 OTHERSDEFENDANTS

RULING

1. On 23rd May 2014 the plaintiff filed a Notice of Motion dated 22nd May 2014 expressed to be brought under Orders 11(3), (1) (h) and 51 (1) of the **Civil Procedure Rules**. By the application the plaintiff sought the following substantive order:-

“That this honourable court be pleased to consider and/or order the consolidation of HCC No. 359 of 2011. Michael Kishoni Ole Kisa & 8 Others –vs- Hon. Gideon Konchella & 11 Others and HCC No. 343'B' of 2012, Olalui Group Ranch –vs- Tawari Konchella & 608 Others.”

The application was based on the grounds that consolidation would facilitate the expeditious disposal and management of the two cases and further that the two suits are in respect of the same subject matter and that the witnesses and documents and the facts in both matters were the same and/or similar. The application was further supported on the grounds set out in the supporting affidavit of Kipkoech B. Ngetich Advocate for the plaintiff sworn on 22nd May 2014.

2. The application for consolidation was opposed by Hon. Gideon S. Konchella, the 1st defendant in HCCC No. 359 of 2011 vide a replying affidavit sworn on 13th August 2014. Inter alia the deponent asserts that the causes of action in HCCC No. 359 of 2011 and the instant suit are distinct. The deponent states the cause of action in HCCC No. 359 of 2011 (formerly Nakuru HCCC No. 129 of 2004) relates to the subdivision of land parcels **Narok/Transmara/Olalui/2, 3, 4, 5, 6, 7, 8 and 9** on or about 16th April 1980 which the deponent states were for public use namely Mutengur Airstrip, Mutengur Prison, Mutengur AIC, Mutengur Health Centre, Mutengur Trading Centre, Olongimaitie School, Olongimaitie Dispensary and Health Centre respectively which have since been developed and are in use by the public. The deponent states that these public entities have not been made parties to these proceedings.

3. The 1st defendant in HCCC No. 359 of 2011 further claims the plaintiff's cause of action against him is predicated on a transfer of **LR No. Narok/Transmara/Olalui/II** effected to him on or about 22nd July 1986 which cause of action he asserts is statute barred under the **Limitation of Actions Act**, Cap 22 Laws of Kenya.

4. On 10th February 2016 the court directed the parties to argue the plaintiff's application dated 22nd May

2014 by way of written submissions but before this application could be disposed, the 54th defendant in HCCC No. 343'B' of 2012, **John Kady Sosio** on 9th March 2016 filed a notice of Motion expressed to be made under Section 3 and 3A of the Civil Procedure Rules and sought the following substantive order:-

“That the court be pleased to transfer the dispute herein to the National Land Commission for investigation with respect to the historical dispute herein.”

5. The application was based on the following grounds set out on the face of the application:-

- 1. That the dispute relates to historical distribution of the former Olalui Group Ranch.**
- 2. That the constitution and the National Land Commission Act empowers the National Land Commission to investigate and redress historical land disputes/injustices.**
- 3. That the National Land Commission has already expressed their willingness to investigate the dispute and make a report to court.**
- 4. That it will save the court’s precious time and resources to allow this application.**
- 5. That the Constitution promotes alternative dispute resolution hence it would be in the interest of justice to allow this application.**

6. The application was further supported on the supporting affidavit sworn by the said John Kady Sosio on the 7th March 2016. The deponent attached a letter dated 17th February 2016 from the National Land Commission vide which the commission expressed its willingness to handle the matter. The letter in part stated thus:-

“There has been a dispute over ownership and utilization of parcel No. Narok/Transmara/Olalui/13 amongst the group members. Their matter is in court since 2012. Members of the now defunct Group Ranch via a letter approached the National Land Commission for alternative resolution as provided for under Article 67 (2) of the Constitution of Kenya. The commission accepted their request to mediate for them in order to resolve the matter.”

7. The court certified the application dated 7th March 2016 urgent and directed the same to be served on all the parties for mention on 30th March 2016 for directions and/or further orders. On 30th March 2016 Mr. Sankale advocate appeared for 200 of the defendants and Mr. Nyaberi advocate held brief for Koceyo advocate for the 54th defendant, the applicant herein. There was no appearance for the plaintiff. Mr. Sankale advocate stated that the defendants had no objection to the proceedings herein being stayed to allow the National Land Commission to investigate the dispute and make a report as sought by the 54th defendant in his application dated 7th March 2016. The court on the basis of the counsels representations granted the request for the stay of the present matter pending receipt of the recommendation of the National Land Commission.

8. The court order granting the request by the 54th defendant to have the National Land Commission handle the dispute by the parties and staying proceedings in the present matter to await the decision and/or recommendation by the National Land Commission provoked the plaintiff’s application dated 20th April 2016 filed on 21st April 2016. The application expressed to be brought under Order 45 Rule 1 and 2 and Order 10 Rule 11 of the Civil Procedure Rules seeks inter alia the following orders:-

- 1. That the Honourable court be pleased to review and/or set aside its orders of the 30th March, 2016.**
- 2. That the costs of the application be provided for.**

9. Grounds on which the application was based were among others that the orders were granted ex parte, that the court was misguided that all parties had consented to the order to have the matter heard before the National Land Commission which was not the case as the plaintiff had not consented; that the plaintiff's failure to attend the court was not deliberate as it is the court registry that had misled the plaintiff that the court would not sit between the 28th March 2016 and 18th April 2016.

10. John Kady Sosio, the 54th defendant who had filed the application to have the National Land Commission allowed to investigate the dispute and make their recommendation filed a replying affidavit in opposition to the plaintiff's application sworn on 24th May 2016 where he reiterates the National Land Commission is best suited to handle the matter and denies the commission has been compromised either by himself or any other person. Christopher Kiiru Tamula one of the other defendants also swore a replying affidavit dated 22nd June 2016 in opposition to the plaintiff's application where he states the order made by the court on 30th March 2016 was appropriate having regard to the circumstances of the matter as it would facilitate justice to all the parties. The deponent denies the court was misled to grant the order arguing that the court properly evaluated and appreciated all the facts and made the order in the interest of justice.

11. The court on 30th June 2016 directed the parties to argue the plaintiff's application by way of written submissions. The parties have consequently filed written submissions respecting the application for consolidation by the plaintiff dated 22nd May 2014 and the plaintiff's application dated 20th April 2016 seeking to review or set aside the court orders of 30th March 2016 granted pursuant to the application by the 54th defendant dated 7th March 2016 where the court ordered a stay of proceedings pending receipt from the National Land commission of its report and recommendations. I propose to deal with the application for consolidation first and then the application seeking review and/or setting aside of the court order of 30th March 2016.

12. Application by the plaintiff dated 22nd May 2014

The foundation of the plaintiff's application is that the plaintiff Olalui Group Ranch was the original owner of the land parcel number **Narok/Transmara/Olalui/1** which measured approximately 7241 Hectares. It is this parcel of land the plaintiff claims was irregularly and illegally subdivided to create land parcels 2 – 14. Land parcel number **Narok/ Transmara/Olalui/II** was transferred to the 1st defendant Hon. Gideon S. Konchella (HCCC No. 359 of 2011) on or about 22nd July 1986 while land parcel **Narok/Transmara/Olalui/13** measuring approximately 5769 Hectares was transferred to the plaintiff on 28th February, 1995 as per the certificate of official search dated 25th March 2004. This is the parcel of land that the plaintiff claims was also subsequently irregularly and illegally subdivided to create parcel Nos. 15-607 which were allocated to the 1st – 604th defendants (HCCC No. 343'B' of 2012). The consequent subdivision of land parcel **Narok/Transmara/Olalui/13** is from the abstract of title shown to have been registered in the name of the plaintiff on 28th February 1995 long after the 1st defendant (HCCC No. 359 of 2011) was registered as owner of land parcel **Narok/Transmara/Olalui/II** on 22nd July 1986. The subdivision of the land parcel **Narok/Transmara/Olalui/1** resulted in the creation of subtitles **Narok/Transmara/Olalui/2-14**. These subdivisions took place between 1980 and 1986 and the resultant titles were issued.

13. As per the plaintiff's pleadings (paragraph II of the plaint) in HCCC No. 343'B' of 2012 land parcel number **Narok/Transmara/Olalui/13** was subdivided on or about 29th July 2005 to create land parcels **Narok/ Transmara/Olalui/ 15-607** and the parcels were allocated to the 1st – 604th defendants. It is not possible that the circumstances that led to the subdivision of land parcel **Narok/Transmara/Olalui/1** in the early 1980s to create land parcels **Narok/Transmara/Olalui/2-14** were similar to the circumstances that led to the subdivision of land parcel **Narok/Transmara/ Olalui/13 in 2005** to create parcels **15-607**. The transaction cannot be described as one as clearly the transactions were distinct and separate.

14. In HCC No. 359 of 2011 the plaintiff seeks declarations that the subdivision of land parcel number

Narok/Transmara/Olalui/1 into parcels **2–14** was fraudulent and hence null and void and seeks a retransfer of the subtitles to the plaintiff. In HCC No. 343‘B’ of 2012 the plaintiff seeks a declaration that it is the registered owner of land parcel **Narok/Transmara/Olalui/13** and that the subdivision and registration of the resultant parcels No. **15-607** in the name of the illegal allottees is fraudulent and hence null and void. The plaintiff seeks a restitution of the title to its name. This latter suit clearly is restricted to transactions relating to land parcel **Narok/Transmara/ Olalui/13** and these transactions took place from 2005 and do not relate to dealings that resulted in the subdivisions of land parcel number **Narok/Transmara/Olalui/1** which took place in the 1980s.

15. In the case of **Cecilia Kiajimbai & Another –vs- Evangeline Tirindi & Another [2015] eKLR, Gikonyo, J.** while considering when a court may order consolidation of suits stated that consolidation will be ordered:-

- (a) Where there are two or more suits or matters pending in the same court.**
- (b) Some common question of law or fact arises in both or all of them.**
- (c) The rights or relief claimed in them are in respect of or arise out of the same transaction or series of transactions; or**
- (d) For some other reason it is desirable to make an order for consolidation.**

In the case of **Nyati Security Guards & Services Ltd –vs- Municipal Council of Mombasa [2004] eKLR Maraga, J.** (as he then was) stated thus:

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

16. In the case of **Eunice Nyairungu –vs- Libey Njoki & 2 Others [2015] eKLR**, I held that where the suits raise separate issues they cannot be consolidated. In the case I stated thus:-

“...I hold that the issues in each of the suits are separate and distinct and the same cannot be conveniently tried in one suit. To do so would be to introduce a measure of confusion which would prejudice a fair trial of the suits. In one of the suits the plaintiff is claiming co-ownership while in the other suit a different plaintiff is claiming to be a purchaser not from the person claiming co-ownership but from another party. Clearly the two suits raise separate and distinct issues and separate causes of action which in my view are not at all related.”

17. In the present matter as I have illustrated earlier in this ruling the causes of action arose at different times and cannot be said to be part of one transaction and/or a series of transactions. On the basis of the pleadings the issues are separate and distinct. Indeed distinct parcels of land are the subject matter. My view is that the two suits sought to be consolidated cannot be conveniently tried together and that consolidation of the same would lead to blurring of the issues and introduce unnecessary confusion which would render the trial more complicated. No advantage would be gained by ordering the consolidation of the two suits. Accordingly the plaintiff’s application dated 22nd May 2014 is accordingly dismissed with costs.

18. Plaintiff’s application dated 20th April, 2016.

The order granted on 30th March 2016 on the application by the 54th defendant to have these proceedings stayed to await the determination by the National Land Commission of the dispute between the parties was granted by the court on a misapprehension that all the parties had agreed to have the dispute heard before the National Land Commission. The plaintiff has since made it clear that they had not consented

to the matter being handled by the National Land Commission. The plaintiff through Michael Kishon Ole Kisa had opposed the application vide the replying affidavit sworn on 18th March 2016.

19. On 30th March, 2016 when the order staying these proceedings to await the decision of the National Land Commission was made, the plaintiff was absent and was unrepresented. The plaintiffs have given a good reason as to why neither themselves nor their advocate was present in court on 30th March 2016. The court having been seized with the matter could not properly make an order of reference to the National Land Commission without the concurrence of the plaintiff and/or without hearing the plaintiff on the application by the 54th defendant and making a determination thereof. The application by the 54th defendant dated 7th March 2016 was scheduled for mention on 30th March 2016 for directions on its disposal. In the absence of the plaintiff the court could not properly make an order disposing the application on a mention unless the parties consented to the order. I am accordingly satisfied the court order was erroneously made under a misapprehension that all the parties were agreed to have the matter handled by the National Land Commission.

20. Accordingly, I set aside and vacate the order made by this court on 30th March 2016. The parties are directed to have the application by the 54th defendant/applicant fixed for interpartes hearing at the court registry. The costs for the plaintiff's application dated 20th April 2016 shall be in the cause.

21. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 17th day of February, 2017.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ogola for plaintiff

N/A for the 54th defendant

Ms. Mogushe for Sankale for the 283 defendants

N/A for some defendants

N/A 607-609 defendants

Milcent Court Assistant

J. M. MUTUNGI

JUDGE