



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO.150 OF 2010

DANIEL KALOKI KIOKO.....PLAINTIFF/APPLICANT

VERSUS

WILLY MUASA KIOKO.....1ST DEFENDANT

HOMEWARD AGENCIES LTD.2ND DEFENDANT

RULING

1. The Plaintiff/Applicant has moved this court by way of a Notice of Motion dated 22nd September, 2014 seeking orders of consolidation of the instant suit and HCCC. No. 294 of 2009 for purposes of hearing and determination.
2. The Application is anchored on Order 11 Rule 3(1) h of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.
3. The Application is based on the following grounds: That the Plaintiff herein is the Plaintiff in HCCC. No. 294 of 2009 against the 1st Defendant herein; that the suit property is Mavoko Block 2/2362; that the instant suit is in respect to a complaint that the 1st and 2nd Defendants wrongfully removed a caution and transferred Mavoko Block 2/2363 and that both cases are still pending.
4. The Application is supported by the Affidavit of Daniel Kaloki Kioko sworn on 22nd September, 2014.
5. The Respondents have opposed the Application. Andrew Mbaluto, the Managing Director of the 2nd Defendant, has sworn an Affidavit dated 27th October, 2014 in which he has deponed that HCCC. No. 294 of 2009 should be heard first before HCCC. No. 150 of 2010; that the court has no jurisdiction to entertain HCCC. No. 294 of 2009 in view of a Ruling in HCCC. No. 244 of 2000 and that the same ought to be referred to the Co-operative Tribunal.
6. The 2nd Respondent deponed that HCCC. No. 244 of 2000 was struck out for want of jurisdiction and consequently, the filing of HCCC. No. 294 of 2009 and later HCCC. No. 150 of 2010 is an abuse of court process.
7. The parties agreed to canvas the Application by way of written submissions which they did file and exchanged. I have read the pleadings, Affidavits and the parties' submissions.
8. The Plaintiff filed HCCC. No. 244 of 2000 against the 1st Defendant in this suit over ownership of share No. 724 with Lukenya Ranching and Farmers Co-operative Society Limited.

9. The Defendant therein, now Defendant No. 1, raised a Preliminary Objection on the ground that the Plaintiff, who was an Administrator of John Masau Kioko, had pleaded that the deceased and the Defendant were joint owners of the subject share. After hearing the Preliminary Objection, the court held that the proper forum to determine the suit was the Co-operative Tribunal established under the Co-operative Societies Act. The suit was thus struck out for want of jurisdiction.

10. The Plaintiff in HCCC No. 294 of 2009 is principally claiming for four (4) plots of land on behalf of the estate of John Masau Kioko, deceased, including parcel of land known as Mavoko Town Block 3/2362. In HCCC. No. 150 of 2010, the Plaintiff is seeking for cancellation of transfer and title made in favour of the 2nd Defendant *inter alia*.

11. The Respondents have opposed the Application on the ground that no common question of fact and law in both suits arise. Counsel relied on the case of ***Nyati Security Guards & Services Ltd vs. Municipal Council of Mombasa (2004) eKLR, Okoyo vs. Wasunna (2014) eKLR and Musyoka vs. S.P Ltd (2013) eKLR***. Further, it was argued that HCCC. No. 294 of 2009 cannot be consolidated with the instant suit because the same has been filed in the wrong forum as held by the court in HCCC No. 244 of 2000.

12. The common thread in the two suits, that is HCCC. No. 294 of 2009 and 150 of 2010 is the Mavoko Town Block 3/2362, the Plaintiff herein and the 1st Defendant herein who are parties in both suits. The 2nd Defendant has been included in the instant suit because he is now the registered owner of Mavoko Town Block 3/2362.

13. The court in HCCC. No. 244 of 2010 held that by dint of Section 76 of the Co-operative Societies Act, it did not have jurisdiction to entertain the suit.

14. The claim over Mavoko Town Block 3/2362 will attract common evidence in both matters in respect to the ownership and validity of transfer of the same to the 2nd Defendant. The rights of the Plaintiff and the 1st Defendant over the suit land will determine the rights of the 2nd Defendant.

15. The two suits have legal and factual issues which are intertwined and affects the rights of all the three parties. It is only fair and just and in tandem with the overriding objectives in Section 1A and 1B of the Civil Procedure Act and Article 159(2) of the Constitution that the matters be consolidated for hearing and disposal.

16. The issue as to whether this court has the jurisdiction to entertain the two claims in view of the provisions of Section 76 of the Co-operative Societies Act can only be dealt with at trial, or when a formal Application challenging the jurisdiction of this court is filed. The issue of whether this court has the requisite jurisdiction or not is not that obvious.

17. I say so because the suit property has since been transferred to a party who is not and has never been a member of the Co-operative Society.

18. The court therefore allows the Application dated 22nd September, 2014 as prayed.

DATED AND DELIVERED AT MACHAKOS THIS 31ST DAY OF MARCH, 2017.

OSCAR A. ANGOTE

JUDGE