



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC CASE NO. 11 OF 2016**

**CHRISTINE CHEPKORIR ..... PLAINTIFF**

**VERSUS**

**BENJAMIN LANGAT..... 1<sup>ST</sup> DEFENDANT**

**JENNIPHER CHEPKWONY.....2<sup>ND</sup> DEFENDANT**

**RULING**

The 1st Defendant/Applicant filed a Notice of Motion dated 29th May 2017 pursuant to sections 6, 63, 1A, 1B, 3A and 3B of the Civil Procedure Act, Section 71 of the law of Succession Act and Article 159 of the Constitution of Kenya seeking the following main prayers;

- a) Spent
- b) That this honourable court be pleased to order a stay of the suit herein filed by the Plaintiff on 4<sup>th</sup> March 2016 where the plaintiff wants the defendants to be evicted from land parcel number KERICHO/KYOGONG/1259 formerly known as land parcel number KERICHO/KYOGONG/10 until the determination of the Originating Summons (O.S) dated and filed on the 24th April 2017.
- c) That this honourable court do order that the title deeds for KERICHO/KYOGONG/1259 be cancelled and annulled forthwith and the property in dispute revert to the original title KERICHO/KYOGONG/10 since the same was obtained fraudulently
- d) That this honourable court orders, that the (O.S) be heard first before the suit herein since the O.S has a similar subject matter which subject matter constitutes the suit herein.
- e) That this honourable court order that the suit herein be stayed since the grant of letters of administration intestate were not confirmed
- f) That the costs of this application be provided for.

The application is based on the grounds stated in the Notice of Motion and the 1st Defendant's supporting affidavit as well as Further Affidavit sworn on the 23rd June 2017.

The application is opposed by the defendants through their Grounds of Opposition and the affidavit of the 1<sup>st</sup> defendant sworn on the 29<sup>th</sup> May 2017. The parties opted to canvass the application by way of written submissions.

The main issues for determination are as follows:

- i) Whether the suit herein should be stayed pending the hearing and determination of the Originating Summons dated 24<sup>th</sup> April 2017.
- ii) Whether the instant suit should be consolidated with ELC No.43 of 2017 (O.S)
- iii) Whether the court should cancel the title deed in respect of KERICHO/KYOGONG/1259 and revert to the original title KERICHO/KYOGONG/10

On the first issue as to whether the suit herein should be stayed, it has been submitted on behalf of the applicant that the applicant's O.S should be heard first since it covers all the areas pertaining to the acquisition of the suit land and how long the applicants have occupied and developed it upto the point when the Respondent filed the instant suit seeking to evict them. The applicant further submits that even though he has filed a Defence and Counter Claim to the instant suit, he was precluded from raising the claim of Adverse Possession by the provisions of Order 37 of the civil Procedure Rules, as he could only do so by way of Originating Summons. The only legal avenue open to him was therefore to institute a separate claim by Originating Summons.

It has been submitted on behalf of the respondent that the applicants suit is subject to the provisions of section 6 of the Civil Procedure Act which states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”

The above provision deals with the principle of *res sub judice*. This principle requires the court to stay the consideration of any suit or application where a previous suit or application is pending determination by a court of competent jurisdiction. It is common ground that the issues raised in this suit are similar to those raised in ELC No 43 of 2017 (O.S) and that the instant suit is the one that was filed first. It therefore beats logic why the same should be stayed in favour of the applicant's O. S which was filed later.

In the case of **Kiama Wangai V John N. Mugambi & Another (2012) eKLR** it was held that where the court finds that the suits in question fall within the four corners of section 6 aforesaid, the court has no discretion in the matter but to stay the subsequent suit or suits.

The second issue for determination is whether the suits should be consolidated.

Having realized what fate their suit might face if it was subjected to the strict provisions of section 6 of the Civil Procedure Act, the applicants filed a further affidavit in which they pray that their suit be consolidated with the instant suit.

I have been referred to the case of **Ahmed Zain Mohammed V Zain Ahmed Zain & 4 Others (2003) eKLR** which held as follows:

“There are certain vital conditions though not exhaustive, which must be established before allowing an application for consolidation;

First, the issues raised by the application should be precisely or nearly similar.

Secondly, that the application sought to be consolidated must be of the same format, i.e both the applications should either be Chamber Summons, Notice of Motion or any other format provided for by law as long as they fall in the same class

Thirdly, the application should be brought under the same provisions of the law or are seeking the same prayers.

With regard to procedure, it was observed that the application could be made either orally or by chamber summons.

It must be noted that the above decision solely dealt with consolidation of applications and not suits as is the case in the instant matter and it therefore offers little guidance.

The issue of consolidation of suits was considered in **Nyali Security Guards & Services Ltd V Municipal Council of Mombasa (2000) eKLR** where the court held as follows:

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

- a) Some common question of law or fact arises in both or all of them;
- b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;
- c) For some other reason, it is desirable to make an order for consolidating them

Although this appears to be an afterthought, in my considered view consolidation is a more reasonable approach than the prayer for stay of a suit that was filed earlier in time. It also resonates with sections 1A and 1B of the Civil Procedure Act that deal with the overriding objective of litigation which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

As the court observed in the case of **Korean United Church of Kenya & 3 Others V Seng Ha Sang (2014) eKLR**; “Consolidation of suits is done for the purposes of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. 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”.

In order to meet the ends of justice, and also bearing in mind the provisions of article 159 (2) (d) of the Constitution, I invoke my inherent powers under sections 3A and order that the suit herein be consolidated with ELC No 43 of 2017 (OS).

The last issue for determination is whether the court should cancel the title deed in respect of KERICHO/KYOGONG/1259 and revert to the original title KERICHO/KYOGONG/10. This is the main bone of contention in the instant suit as well as the Originating Summons and I agree with the submission of learned counsel for the respondent that this is a substantive issue which the court cannot determine without the matter being subjected to a full hearing. I therefore decline to grant this prayer.

In conclusion, the prayer for stay of the suit herein (ELC No. 11 Of 2016) dated 4th March 2016 fails but instead I direct that the suit herein be consolidated with ELC No 43 of 2017 (O.S) for purposes of hearing and determination. The hearing shall be conducted on the basis of the pleadings already filed in the two suits. For the avoidance of doubt, the plaintiff in ELC no. 11 of 2016 shall be the Defendant in the Counterclaim in the same suit and in ELC No. 43 of 2017, while the Defendant in ELC No. 11 of 2016 shall be the Plaintiff in the Counterclaim and in ELC No. 43 of 2017 (O.S) and the suits shall be heard by way of viva voce evidence.

The parties shall comply with order 11 of the Civil Procedure Rules within 30 days from the date hereof.

The file for the suit herein shall be the main file for purposes of filing any further documents and recording proceedings.

The costs of this application shall be in cause.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 26TH DAY OF SEPTEMBER, 2017**

**J.M ONYANGO**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Ngetich for the Applicant

Miss Ngetich for the Respondent

Court Assistant: Rotich