



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 679 OF 2017**

**(Formerly Machakos ELC Case No. 177 of 2008)**

**NTOYIAN OLE SIRONKA.....1ST PLAINTIFF**

**KAYIE OLE NTASIKOI & 129 OTHERS.....131ST PLAINTIFFS**

**(as per attached signed List)**

**VERSUS**

**TUPET OLE MURRE.....1ST DEFENDANT**

**SAKITA OLE NAROK.....2ND DEFENDANT**

**LEMOMO OLE NTENKESE.....3RD DEFENDANT**

**(sued as officials of IL PARTIMARU GROUP RANCH)**

**DAVID SOPON MBATI.....4TH DEFENDANT**

**STEPHEN OLE SEPERE.....5TH DEFENDANT**

**AND**

**KAYIE OLE NTASIKOI**

**& 129 OTHERS .....(PROPOSED INTERESTED PARTIES**

**(as per attached signed list)**

**RULING**

The applications before Court are two Notice of Motions dated 14th September, 2014 and 31st October, 2014 respectively.

The Notice of Motion dated 14th September, 2014 is brought pursuant to Sections 1A, 1B, 3A of the Civil Procedure Act; Order 1 Rule 8(3) of the Civil Procedure Rules; Article 60(1) (g) and 159(2) of the Constitution; Section 4(1) & (2) (g) & (m) of the Land Act and all the other enabling provisions of the Law. The application is based on the grounds which in summary is that the Applicants are all members of the IL PARTIMARU GROUP RANCH (the group ranch) and constitute 130 of the 160 members yet to be issued with title deeds to their respective parcels of land. The suit herein was supposedly instituted

on behalf of the Applicants though no notice to that effect has ever been issued to them as required by Order 1 Rule 8(2) of the Civil Procedure Rules. The Applicants have a direct interest in the suits herein and have suffered serious prejudice as a result of the protracted and endless litigation herein. The Applicants would be directly and materially affected by the outcome of the suit(s) herein. The Applicants are possessed of material information and facts which would aid in the proper determination of the suit(s) herein. Out of the 435 original members of IL PARTIMARU GROUP RANCH, 268 members have on diverse dates been issued with title deeds to their respective parcels and many have proceeded to develop, subdivide, sell, charge, bequeath or otherwise dispose or deal with their lands as titleholders. The dispute herein has been going on for nearly two decades and over the years the same has metamorphosed, mutated and culminated into numerous analogous court cases including NRB HCCC 808 OF 1996; KAJIADO RMCC NO. 62 OF 1998; NRB HCCCA NO. 1497 OF 1999; CIVIL APPLICATION NO. NAI 323 OF 1999; NRB HCCC 561 OF 2000; NRB HCCC 1098 OF 2001; NRB HCCC NO. 233 OF 2001; and NRB HCCC 418 OF 2006 ( which on transfer became the MKS HCCC 177 of 2008). Further, over the years the Court in the various cases has issued different Rulings, Orders, Directions, Judgments and Decrees that have in part been conflicting, contradictory and confusing thus further compounding the problem rather than addressing it. From the commencement of the court cases herein to date nearly half of the membership of the Group Ranch have since died of old age and other natural causes and some of the remaining are elderly, sickly or at any rate fed up with the terminable dispute. As a result of the subdivisions, selling, charging, bequeathing and other dispositions and alienation of individual lands by the title holders, there are now thousands of innocent Third Parties for value and without notice who hold title and other proprietary interests in the lands formerly forming part of the IL PARTIMARU GROUP RANCH and who stand to be directly affected by any adverse orders made regarding the dispute herein. No attempts has ever been made by the parties herein to notify the thousands of Third parties having a direct interest in this case.

The application is supported by the affidavit of KAYIE OLE NTASIKOI where he deposes that together with 129 co-applicants herein they are all members of the IL PARTIMARU GROUP RANCH. He avers that 130 Applicants herein amongst the remaining 160 members of the Il Partimaru Group Ranch are yet to be issued with title deed to their respective parcels of land. He claims that there are those who have not benefitted from the use and utility of their respective land titles and have suffered/ stand to suffer the most, due to the sustained state of limbo, delay, uncertainty and anxiety caused by the instant case. He states that as Applicants they have a direct interest to the case herein and have suffered serious prejudice due to the protracted and endless litigation. He insists that as an insider, the disputes relating to the IL PARTIMARU GROUP RANCH have mainly been due to personal and parochial interests as opposed to the best interest of the membership of the said Group Ranch.

The Second Notice of Motion dated 31st October, 2014 is brought pursuant to Section 13 of the Environment and Land Court Act, Sections 1A, 1B and 3A of the Civil Procedure Rules and all the other enabling provisions of the Law. The application is based on the grounds that the four suits relate to the same subject matter and the same legal issues arise involving the same parties. Further it is economical, expeditious and just for the four suits to be consolidated. There was an Order dated 23rd May, 2014 by Hon. Justice Gitumbi for the files to be availed to enable the Judge to give directions. Further, in a ruling dated 17th December, 2012, Professor Justice Joel Ngugi was of the view that it would be prudent if this suit can be consolidated with the other pending ones so that the issues can be resolved once and for all.

This application is supported by the affidavit of GIDEON SOLONKA KILAKOI who is the advocate handling this case on behalf of the 4th and 5th Defendants. He avers that he knows of his personal knowledge that the subdivision of the ILPARTIMARU Group Ranch was nullified by the High Court in Nairobi vide Case No. 561 of 2000. He states that the subdivision of the said Group Ranch was disproportionate, arbitrary, unfair and oppressive to the large members of the Group Ranch precipitating to the civil suit Nairobi HCCC No. 561 of 2000, in which the Honourable Court ordered that there be equal subdivision and allocations of the Group land to all its members. He claims three officials of the IL PARTIMARU Group Ranch namely TUPET OLE MURRE, SAKITA ILE NAROK (deceased), LEMOMO OLE NTEKESE acting in cahoots with certain members of the said Group Ranch filed two different suits namely NAIROBI HCCC No. 233 of 2001 and HCCC NO. 1098 of 2001 in an attempt to defeat the aforesaid Decree issued in HCCC NO. 561 of 2000. Further these three officials were

subsequently purportedly sued by one NTOIYAN OLE SIRONKA in Nairobi HCCC No. 418 of 2006 which suit was transferred to Machakos Court and given HCCC No. 177 of 2008. He reiterates that the High Court declared null and void the title deeds issued in contravention of the Decree in HCCC 561 of 2000. He contends that there are counterclaims in HCCC No. 233 of 2001, HCCC No. 1098 of 2001 and HCCC No. 177 of 2008 seeking for the cancellation of all the title deeds in contravention of the Decree issued in HCCC No. 561 of 2000, and all these suits are still pending. He states that on 22nd July, 2014 the Hon. Lady Justice Gitumbi gave orders in HCCC No. 243 of 2008 directing that all the five (5) files namely HCCC No. 561 of 2000, HCCC No. 233 of 2001, HCCC No. 1098 of 2001, HCCC No. 177 of 2008 and HCCC No. 243 of 2008 be availed to the Hon. Judge to give directions. That the said files have since been availed to this Honourable Court. He affirms that if the suits are not consolidated, the Defendants/Applicants will be put to great expenses defending the same issues in different forums with the hazard of conflicting judicial decisions emerging therefrom.

The application is opposed by the 2<sup>nd</sup> to 131<sup>st</sup> Plaintiffs who states that the application does not meet the threshold for consolidation of suits in that some of the suits being sought to be consolidated are not pending before court as the same have been finalized as evidenced in the decree in HCCC 561 of 2000 and also involve different parties seeking varying reliefs. The Application is scanty and presumptuous and does not provide any useful information to enable the court determine in favour of consolidation. Consolidation of the suits will only compound confusion and delay that so far characterized this suit. The application is misguided and an abuse of the process of court. In the circumstances consolidation will not aid the Court in achieving the overriding objective of the Civil Procedure Act and Rules to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

The application is also opposed by the 1st and 3rd Defendants who filed a replying affidavit sworn by LEMOMO OLE NTEKESE the 3rd Defendant herein who is also the Chairman of ILPARTIMARU GROUP RANCH where he deposes that the dispute involving the parties started way back in 1992 when the process to dissolve the group ranch began and has been going on for more than two decades. Further that over the years the matters in issue has metamorphosed, mutated and culminated into numerous analogous cases. He avers that the application seeking to consolidate HCCC 561 of 2000, HCCC No. 233 of 2001, HCCC No. 1098 of 2001 and HCCC No. 243 of 2008 is misguided non starter and an abuse of the process of the court. Further that these suits have been filed by various Plaintiffs against different Defendants, seeking distinct orders and are in different stages. He states that HCCC No. 243 of 2008 involves two individuals with their respective titles and the Group Ranch or any parties herein are not parties to this suit; while HCCC No. 1098 also involves distinct 18 Plaintiffs in their individual capacities and against ILPARTIMARU Group Ranch seeking distinct prayers for individual titles. He contends that there is another HCCC NO. 1487 of 1999 which has a great bearing as to the context with which the 4th Defendant has been fighting for management and control of the Group Ranch. He claims it is untrue and misleading that there are counterclaims in all the matters, as in HCCC NO. 1098 of 2001, it is allegedly by the Group Ranch whilst documents were filed by the 4th Defendant purporting to be the Chairman of the Group Ranch which was and is not the case. Further that in 561 of 2001, the 5th Defendant herein was the Plaintiff against the Group Ranch. He reiterates that it is misleading that the subject matter in all the suits relate to group land of ILPARTIMARU Group Ranch which is not the case and by seeking to consolidate the cases with their respective peculiar circumstances, it does not meet the conditions of consolidation. He insists it is a fallacy, incorrect and reckless to claim that if the suits are not consolidated Defendants will be put to great expense defending the same issues.

The Parties filed their respective written submissions and it is only Mr. Solonka advocate for the 3rd and 4th Defendants, who highlighted his. I have considered all the parties submissions on record.

### **Analysis and Determination**

Upon perusal of the two Notice of Motions dated 14th September, 2014 and 31st October, 2014 respectively including the supporting/replying affidavits plus annexures therein and the Grounds of Opposition, I find that the following are the issues for determination:

- Whether this suit should be referred to the traditional dispute resolution mechanism for

- determination.
- Whether the proposed interested parties should be enjoined in this suit.
  - Whether the following suits HCCC 561 of 2000, HCCC 233 of 2001, HCCC 1098 of 2001 and HCCC 243 of 2008 should be consolidated.

I note that HCCC 561 of 2000 was determined and a Decree issued and one of the key orders was that the process of subdivision and allocation of ILPARTIMARU Group Ranch be repeated/rectified. Article 159 (2)(c) of the Constitution provides that: '***In exercising Judicial Authority, the courts and tribunals shall be guided by the following principles - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).***

***Clause (3) provides that ' Traditional dispute resolution mechanisms shall not be used in a way that -***

***(a) contravenes the Bill of Rights;***

***(b) is repugnant to justice and morality or results in outcomes that are repugnant to justice and morality;***

***(c) is inconsistent with this Constitution or any other written law.'***

In relying on the facts presented by the parties and the provisions of the Constitution I note that since HCCC 561 of 2000 had already been heard and determined with a Decree issued more than 10 years ago, it is out of the ambit of the Traditional Justice Resolution Mechanism (TJRM). However I find that the other three pending suits can only be referred to TJRM once the parties have adhered to Order 11 and agreed on the issues and this can be tackled during the Pre Trial Conference and not at this juncture.

On the question of the proposed interested parties to be enjoined in this suit.

Order 1 Rule 10 of the Civil Procedure Rules stipulates as follows:

***'(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'***

In the case of **ELC Mombasa Civil Case 18 of 2013** the learned Judge held that: '***that for interested parties they only require that involvement to be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit. As interested parties the applicants need only interest in the subject of the suit or in any other relevant matter affecting the suit.'***

I note that this suit was supposedly instituted on behalf of other parties. Further that the proposed interested parties seek to be enjoined in the suit because they claim to be members of the ILPARTIMARU Group Ranch, are in possession of material information and facts which would aid in the proper determination of the suit herein and would be directly affected by the outcome of the suit. I note the Respondents did not expressly oppose them being enjoined in the suit. In relying on Order 1 rule 10 of the Civil Procedure Rules and in the **ELC Mombasa Civil Case 18 of 2013 quoted above**, I do not see any prejudice that will be suffered by the respondents if they are enjoined in this suit and I proceed to

allow the proposed interested parties' application.

On the question of consolidation of suits, I note and have different parties who are seeking various rulings and are pending at various stages in court.

In the case of *Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others* [2014] eKLR the learned Judge explicitly stated the criteria for consolidation of suits as follows: 'The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-

***1. Do the same question of law or fact arise in both cases?***

***2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction***

***3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party***

**Order 11 rule 3(1) (h) provides that**

**1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—**

**(h) consider consolidation of suits;**

Further in the said case while quoting the case of *LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013*, the Supreme Court of Kenya had this to say about consolidation of suits:-

***“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. 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”***

The cases intended to be consolidated have different parties and pending in court at various stages, with HCCC 561 of 2000 already determined and decree issued. Further the questions of law and or fact which arise in all these case are different, the reliefs sought are varied as the claim did not arise from one transaction. Further that the same question of law or fact may not arise in those suits. In so far as consolidation would be proper, but it is not as simple on the face of it taking into account that there are several suits. Inasmuch as the overriding objective of the court is to expeditiously dispose of the cases before it, it should also not confer advantage /disadvantage or prejudice any party during the process.

In the circumstances I find that it would defeat the purpose of justice if the said suits were consolidated at this juncture and consolidating the three suits at this stage would prejudice the parties in the respective suits. These suits should each proceed on their own merit for hearing and final determination.

**Dated signed and delivered in open court at Kajiado this 13<sup>th</sup> day of November, 2017.**

**CHRISTINE OCHIENG**

**JUDGE**

**REPRESENTATION**

Mr. Kagor holding brief for Solonka for 4<sup>th</sup> to 5<sup>th</sup> Defendants

No appearance for plaintiff

No appearance for Kanchory

Court Assistant Mpoye