



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ELC CASE NO. 54 OF 2017(O.S)
(Formerly KISII ELC CASES 88 OF 2016 & 192 OF 2013)

MARGARET ACHIENG ODERA.....PLAINTIFF/RESPONDENT

VERSUS

DANIEL ASAMBO OBIER.....DEFENDANT/APPLICANT

RULING

1. A Notice of Motion application dated 5th June 2014 (the application), by the Defendant/applicant represented by Omonde Kisera Advocate is brought under **order 11 Rule 3(h) of the Civil Procedure Rule. Section 1A, 1B, 3A, and 63€ of the Civil Procedure Act** and all enabling provisions of the law. The Defendant/Applicant seeks orders as follows;-

a. **Spent**

b. **THAT this Honourable court be pleased to consolidate the instant suit herein with Kisii High Court Civil case No. 192 of 2013 (Daniel Obiero Vs. Alfred Amdavi & Another) for hearing and determination.**

c. **Costs of this application be provided for.**

2. The application is supported by the Defendant's/Applicant's supporting affidavit sworn on 5th June 2014. It is based on five (5) grounds namely;-

1) The two suits are similar as they relate to same land in dispute which land is 6 Acres out of title number **KANYAMKAGO/KAWERE/2650** and 2651.

2) The defendant in Civil suit No. 192 of 2013 are the unseen persons claiming same Six acres they have been sued for through the plaintiff in the instant suit who similarly and clearly claims six acres of the suit land.

3) The pleadings in both suits reveal the aforesaid similarity as the replying affidavit has alluded to the plaintiff herein using and exhibiting the houses of the defendants in the Civil case No. 192 of 2013 as her house to support her title vide adverse possession.

4) Judicial time should be economically used to avoid duplicity of trial.

5) The application is made in good faith and in the best interest of expeditious disposal of the two

matters without duplicity.

3. The plaintiff's/respondent's counsel, Mr. Oguttu Mboya, filed a statement of grounds of opposition dated 20th June 2016. The grounds are that;-

1) The instant Notice of Motion application, is Pre-mature, Misconceived, Incompetent and otherwise legally untenable.

2) The instant suit touches and/or concerns a distinct claim founded on adverse possession, which is separate and at variance with the claim vide KISII HCC ELC Case NO. 192 of 2013, files by and/or at the instance of the defendant/applicant and which forms the basis of the intended consolidation.

3) In any event, the plaintiff/respondent herein, is not party and/or privy to the proceedings vide **KISII HCC Case No.192 of 2013**. Consequently, the parties in respect of the two proceedings herein, are dissimilar.

4) On the other hand, the crux and/or gravamen of the two (2) suits herein are separate and distinct. In this regard, the intended consolidation does not suffice and/or avail, whatsoever.

5) The application for consolidation, touching and/or concerning the two (2) suits which are dissimilar, is calculated to obstruct, delay and/or otherwise defeat the expeditious hearing and disposal of the instant claim.

6) In any event, the instant application does not disclose any reasonable cause of action whatsoever and/or howsoever.

7) The defendant/applicant herein is non-suited.

8) Besides, the instant application constitutes and/or amount to an abuse of the due process of court and same is contrary to the provisions of **Section 1A & B of the Civil Procedure Act, Chapter 21, Laws of Kenya**.

9) In the premises, the Notice of Motion application herein is devoid of Merits, whatsoever and/or howsoever.

4. On 25/7/2016 Mutungi J. sitting at Kisii ELC, made the following directions including;

a) The Deputy Registrar to make arrangements for file No. 192 of 2013 to be put together with the instant file to facilitate the hearing of the application for consolidation.

5. On 8/2/2017, the suit was transferred to this court by an order dated the same day. The transfer followed the establishment of this court.

6. The Defendant's/Applicant's counsel filed written submissions dated 24th July 2017. He prayed for consolidation of this suit with Kisii ELCC No. 192 of 2013. The counsel submitted that in Civil suit No. 192 of 2013, the Defendant/Applicant sued Alfred Amdavi and Jossam Zedekiah as trespassers upon the defendant's/applicant's LR No. KANYAMKAGO/KAWERE/II/2650. He filed photographic evidence in court showing the illegal structures the said trespassers had erected on the suit land. He further submitted that during the pendency of that suit, the Defendant/Applicant filed the instant suit in respect of the **LR. NO. KANYAMKAGO/KAWERE/2650** for adverse possession.

7. The counsel also submitted that the very house(s) on the photos, the land acreage measuring 6 acres and the same portion of land is the same in the two (2) suits. He urged this court to treat the prayers for consolidation not far-fetched. That it is a plot and mischief being played by the Defendant/Applicant in Kisii ELC suit No. 192 of 2013 to get the same land but rather through the present plaintiff.

8. The counsel for the Plaintiff/Respondent filed submissions dated 7/8/2017. He gave the introduction and background of the instant suit and Kisii ELC case number 192 of 2013. He identified one issue for determination namely;-

a. Whether the same question of law and fact arise in both the instant suit and Kisii ELCC No. 192 of 2013.

9. The counsel further submitted that the instant suit touches and or concerns a distinct claim founded on adverse possession. Further that the plaintiff is not a party or privy to the proceeding in Kisii ELCC No. 192 of 2013 and that there are no common questions of law and fact in the two suits to warrant consolidation, among others things. He termed the application devoid of merit and ought to be dismissed with costs. The counsel relied on the following authorities:-

- a. Order 11 rule 1 Civil Procedure Rules 2010.
- b. Section 1A, B of Civil Procedure Act Cap 21 Laws of Kenya.
- c. RMG – Vs. NG interested party SO LTD & MD LTD(2013)eKLR
- d. Joseph Njoroge Kanganila-v- Harrison Wagacha Munyui

10. I have studied the entire Notice of Motion application, statement of grounds of opposition and written submission by counsel representing respective parties. The issue to determine is whether the same questions of law and fact arise in both cases.

11. The Defendant/Applicant put forth five grounds for the application. He stated, among others, that the two suits are similar in the sense that they relate to the same land in dispute which is 6 acres out of title number Kanyamkago/Kawere/2650 and 2651. That it would economically save judicial time to avoid duplicity of cases.

12. In the grounds of opposition and submissions, the counsel for the Plaintiff/Respondent states that the two suits are separate and distinct. I consider the Order and Section of the law cited together with the case law relied upon by counsel.

13. In the instant suit, the Plaintiff/Respondent claims adverse possession against Defendant/Applicant. On the other hand, in Kisii ELCC No. 192 of 2013, the Defendant/Applicant seeks a permanently injunction against Amudavi and another whom he termed as trespassers on the suit land.

14. The Defendant herein is the 1st Plaintiff in Kisii ELCC No. 192 of 2013. It is discernable from the pleadings in both cases that the claims concern the same land, same acreage (size) and the Defendant feature in both cases although in different capacities. The net effect is that the same question of law and fact arise in both cases.

15. **Article 159 (2) (b) of the Constitution of Kenya, 2010** provides for a guiding principle that justice shall not be delayed. Consolidation sought herein would be for expeditious disposal of both cases and would not prejudice any party to either suit in question. Admittedly the instant application is meant to enhance the delivery of justice in the cases. Parties may be added to the suit as Plaintiffs and or Defendants. Also parties will be at liberty to file counter-claims as may be appropriate.

16. In the result, I find the application merited in the interest of justice in the circumstances.

17. I allow the application with no order as to costs.

18. The parties to amend, file and serve pleadings accordingly within 60 days from the date hereof.

19. Mention for directions on 5th March, 2018

20. The Defendant/Applicant's counsel to be notified accordingly.

George M.A Ongondo

Judge

DELIVERED, SIGNED and DATED in open court at MIGORI this 5th day of December , 2017.

G.M.A. ONGONDO

JUDGE

In the presence of;

- 1. Mr Ezra Awino counsel holding brief for Oguttu Mboyacounsel for the Plaintiff/Respondent**
- 2. Alfred Amudavi, 1st Defendant in Kisii ELCC 192 of 2013**
- 3. Josephine Lori, court assistant**