



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

HCC 182 OF 2010

TITUS KIRAGUPLAINTIFF

VERSUS

THE COMMISSIONER OF LANDS1ST DEFENDANT

LAWRENCE MAINA MWANGI2ND DEFENDANT

KINARU KIMAIGA NDUBI.....3RD DEFENDANT

SALIM GULAM HUSSEIN GILANI.....4TH DEFENDANT

JOHNSON GACAU KIVERA5TH DEFENDANT

ATTORNEY GENERAL6TH DEFENDANT

RULING

(Application to consolidate two suits; second suit filed after one defendant was struck out of previous suit for want of service of summons; the order for striking out later reversed and the defendant reinstated; given this position, no need to have the second suit; order for consolidation denied; all issues to be addressed in the first instituted case)

1. The application before me is that dated 16 March 2015 filed by the plaintiff. The principal prayer is for consolidation of this suit (Nakuru HCCC No. 182 of 2010) with the case Nakuru ELC No. 149 of 2014. The application is grounded mainly on the argument that the defendant in Nakuru ELC No. 149 of 2014 was defendant in this suit, but was removed on a technicality, which necessitated the filing of the suit Nakuru ELC No.149 of 2014. In his supporting affidavit, the plaintiff has explained that he filed this suit against one Lawrence Maina Mwangi (2nd defendant) and others. The said person was not served with summons and he filed an application for the suit against him to be struck out. The plaintiff depones that the application was allowed and the suit against him struck out. Since the case had not been heard, he then filed the suit Nakuru ELC No. 149 of 2014. The two cases are now pending and it is his view that they should be consolidated.

2. The 4th defendant filed a replying affidavit to oppose the application. He has deposed inter alia that the application is meant to breathe life on the claim of Lawrence Maina Mwangi which was dismissed in the ruling of 4 April 2014. It is his view that the plaintiff now wants to bring back the said Lawrence Maina Mwangi which is an abuse of the court process.

3. I took in the submissions of Mrs. Mwangi for the applicant, Mr. Karanja appearing for Mr. Lawrence Maina Mwangi, and Mr. Kariuki for the 5th defendant. Mr. Kisila for the 5th defendant did not make any submissions.

4. I have considered the application and had a careful look at the proceedings herein. I note that this suit was commenced by way of plaint on 20 July 2011 against one defendant, namely The Commissioner of Lands. Later, on 27 July 2011, the plaint was amended to include two more defendants, that is Lawrence Maina Mwangi as 2nd defendant, and Kinaru Kimaiga Ndubi as 3rd defendant. The claim by the plaintiff is that he is the legal proprietor of the land parcel Nakuru Municipality/Block 18/59 having been issued with a title deed in the year 1985. In the year 2007, he avers that he discovered that the 1st defendant has issued a title deed to the said Lawrence Maina Mwangi which he claims to be a fraudulent title. Using the said title, the land was transferred to the 3rd defendant. In the suit, he asked for the title of the 3rd defendant to be cancelled.

5. On 29 July 2013, the 2nd defendant, Lawrence Maina Mwangi, filed an application seeking to have the suit against him struck out for the reasons that he had not been served with summons within the period prescribed in the Civil Procedure Rules. The application was heard, and in a ruling delivered on 4 April 2014, my predecessor, Justice L.N. Waithaka, allowed the application and dismissed the suit against the said Lawrence Mwangi. Later, there followed a similar application filed by the 3rd defendant, where he argued that the suit against him should also be dismissed for want of service of summons. In the meantime the land parcel Nakuru Municipality/Block 18/59 was subdivided into three parcels namely Nakuru Municipality Block 18/157, 158 and 159. Two of these plots were sold to the Salim Gulam Hussein Gilani and Johnson Gacau Kibera. The plaintiff therefore filed an application seeking to have these two persons enjoined as 4th and 5th defendants. My sister, Waithaka J, made a consolidated ruling, delivered on 24 October 2014, on the application by the 3rd defendant to be struck out, and the application to enjoin the 4th and 5th defendants.

6. In the ruling, she revisited her previous ruling of 4 April 2014 (it will be recalled that in this ruling, the learned judge had dismissed the case against the 2nd defendant for failure to serve summons). It was her view that she had made the said decision by error. She in the same vein declined to allow the application by the 3rd defendant to be struck out for want of service of summons. Essentially, she directed the 2nd and 3rd defendants to remain as defendants in the suit. I therefore take it that the 2nd and 3rd defendants are still parties to this suit and that the order of 4 April 2014 was overridden by that of 24 October 2014. On the application by the plaintiff to amend plaint, the same was allowed and the plaintiff permitted to bring on board the 4th, 5th defendants and 6th. As this case stands, it does have 6 defendants.

7. Given the above position, I do not see why the plaintiff needs the case Nakuru ELC No. 149 of 2014. He stated that he filed that case because the 2nd defendant was struck off this suit. Now that the 2nd defendant was reinstated by the ruling of 24 October 2014, there is no purpose in having the suit Nakuru ELC No. 149 of 2014. It is best that all issues be handled and be resolved in one case. It does appear as if the parties and counsels have been laboring under the mistaken belief that the order dismissing the suit against the 2nd defendant still prevails, which is not the position.

8. For the above reasons, I decline to allow the order for consolidation. For the avoidance of doubt, I do emphasize that Lawrence Maina Mwangi is 2nd defendant in this case and he is at liberty to file defence within 14 days from today. The issues in the suit Nakuru ELC No. 149 of 2014 will be resolved in this suit as there is no need to have a second suit over the same matters.

9. There will be no orders as to costs on this application, and since the suit Nakuru ELC No. 149 of 2014 was filed pursuant to a ruling that was later reversed, there will be no orders as to costs on that case as well.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 13th day of October 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr E. G. Mwangi for the plaintiff /applicant

N/A on part of 1st defendant

Ms. Gitau present for 2nd defendant

N/A on part of M/s Sheth & Wathigo Advocates for 3rd and 4th defendants

Mr. Kariuki present for 5th defendant

N/A for 6th defendant

Court Assistant: Janet

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU