



**Mulevu (Suing as the legal representative of the Estate of Mulevu Mbolu) v Musya & 2 others
(Environment & Land Case E017 of 2021) [2024] KEELC 780 (KLR) (20 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E017 OF 2021
CA OCHIENG, J
FEBRUARY 20, 2024**

BETWEEN

**JOSHUA MBOLU MULEVU (SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF MULEVU MBOLU) PLAINTIFF**

AND

**DANSON MUTUKU MUSYA 1ST DEFENDANT
JOHN KILOLO MANG'ELI 2ND DEFENDANT
KATELEMBO ATHIANI MUPUTI FARMING RANCHING CO-OPERATIVE
SOCIETY LTD 3RD DEFENDANT**

RULING

1. What is before Court for determination are two Notice of Motion Applications dated the 21st February, 2023 and 28th February, 2023 respectively. In the Notice of Motion Application dated the 21st February, 2023, the Plaintiff seeks the following Orders:-
 1. Spent
 2. That this Honourable Court be and is hereby pleased to consolidate the instant suit with Machakos Environment and Land Court Case No. 240 of 2017; *Daniel Kilolo Mangeli v Danson Musya & 2 Others*.
 3. That one John Mulonzi be enjoined in these proceedings as Interested Party.
 4. That pending the hearing and determination of the Application herein, the proceedings in Machakos Environment and Land Court Case No. 240 of 2017; *Daniel Kilolo Mangeli v Danson Musya & 2 Others* be stayed.



5. That the costs of the Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Joshua Mbolu Mulevu where he deposes that land parcel number Mavoko Town Block 3/1072 hereinafter referred to as the 'suit land', belonged to his late father Mulevu Mbova. He confirms there is a related suit being ELC No. 240 of 2017; *John Kilolo v Danson Musya & Others*. He explains that the 2nd Defendant herein is the Plaintiff in the aforementioned suit. Further, that the Plaintiff therein together with Joseph Mutuku Mulonzi purchased portions of land from his deceased father. He states that he is a key witness in ELC No. 240 of 2017 and hence it is necessary if the two files were consolidated.
3. The 2nd Defendant filed Grounds of Opposition dated the 28th February, 2023 where he contends that the said Application is an abuse of the legal process and procedure; violates Section 6 of the *Civil Procedure Act* and sought for this suit to be struck out.
4. In the Notice of Motion Application dated the 28th February, 2023, the 2nd Defendant seeks the following Orders:
 1. That Honourable be pleased to strike out the instant suit for being an abuse of Court process.
 2. Costs do abide the Application.
5. The Application is premised on the grounds on the face of it and the Supporting Affidavit of John Kilolo Mang'eli. He deposes that on 23rd May, 2017, he filed a suit being ELC No. 240 of 2017. He claims, the Plaintiff herein filed a Witness Statement dated the 15th December, 2018 and Agreement dated the 9th February, 2011 confirming he is the owner of the suit land. Further, that the said matter is at the defence stage. He explains that in 2021, four (4) years later the Plaintiff herein filed a new and separate suit relating to same land. Further, that he only changed the Plot Number from 2729 to 2760. He reiterates that the Plaintiff seeks to defeat administration of justice and confuse the Court by introducing a new Plot Number.
6. The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by Joshua Mbolu Mulevu, where he deposes that the said Application is devoid of merit and ought to be dismissed with costs. He contends that the instant suit seeks to establish the rightful ownership of the suit land as his deceased father was and still is the registered proprietor of the said suit land by dint of his membership and registration at the 3rd Defendant's Society. He argues that the issues raised in the Plaintiff deal with ownership and it is necessary for this Court to establish the rightful owner of the suit land. He confirms that there exists ELC Suit No. 240 of 2017; *John Kilolo Mang'eli v Danson Musya, Kyalo Kimuyu & another*. Further, that the Plaintiff in the aforementioned suit is actually the 2nd Defendant herein while the 1st and 2nd Defendants' in the aforementioned suit are purchasers having purchased land from his deceased father Mulevu Mbolu and put up permanent homes thereon. He denies being a party in the previous suit being ELC Suit No. 240 of 2017 as it is between the 2nd Defendant herein and purchasers. He reiterates that he filed the instant suit on behalf of his deceased father as a legal representative of his estate seeking for confirmation of the rightful owner of the suit land, an issue that ought to be determined primarily, before any findings on the purchasers' rights. Further, that he instructed his advocates to file an Application dated the 21st February, 2023 for consolidation of the instant suit with ELC No. 240 of 2017; *Daniel Kilolo Mang'eli v Danson Musya & 2 Others*. He avers that after filing the aforementioned Application, the Honourable Lady Justice Nyukuri deemed it just to adjourn the hearing in ELC Suit No. 240 of 2017 pending the determination of the Application for consolidation.



7. The two Applications were canvassed by way of written submissions.

Submissions

Plaintiff's Submissions

8. The Plaintiff in his submissions insists that the instant suit discloses a probable cause and as such ought to be sustained and determined on merit. Further, that it will be detrimental to the Plaintiff's right to be heard if the instant suit is struck out prematurely. He contends that he brought this suit as a legal representative of his deceased father, who was the rightful owner of the suit land by dint of his membership and allocation by Katelembo Athiani Muputi Farming and Ranching Co-operative Society Limited. Further, that the other parties are purchasers and thus third parties while he is the proper and primary party to prosecute the suit. He argues that there are same questions of law or fact that arise in the instant suit as well as Machakos ELC No. 240 of 2017, as it revolves around the question on the legal ownership of land parcel number Machakos Town Block 3/1072 which was formerly Katelembo Plot No. 2730. He further submits that his deceased father, the late Mulevu Mbova, was the owner of the suit land by virtue of his Membership Number 1699 at the 3rd Defendant. Further, that the 2nd Defendant started laying an ownership claim in the whole suit land. He reiterates that consolidation of the two suits will further enhance certainty and avoid a situation whereby different orders will be issued with regards to the ownership of the suit land. Further, that, it is very apparent that by virtue of the two suits, having the same subject matter, land parcel number Machakos Town Block 3/1072 which was formerly Katelembo Plot No. 2730, the reliefs sought therein automatically arise out of the same transaction and no party will be disadvantaged or prejudiced. Further, consolidation will not confer any undue advantage to the other party. To buttress his averments, he relied on the following decisions: *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR; Allahabad High Court of India in *P.P. Gupta v East Asiatic Co.*, Air 1960 All 184 which was relied on in *Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others* [2018] eKLR; *Chesinende Farmers Cooperative Society Limited v Joel K. Bett (being sued on his own behalf and on behalf of Chesinende Rural Craft) & 25 others) & another* [2018] eKLR; *Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others* [2014] eKLR and *Law Society of Kenya v The Centre for Human Rights and Democracy*, Supreme Court of Kenya, Petition No. 14 of 2013.

2nd Defendant's Submissions

9. The 2nd Defendant submits that the practice of filling new and separate cases despite the existence of a similar case on the same subject matter amounts to an abuse of Court process. Further, that the Plaintiff is using a judicial process to irritate him. He argues that the instant suit is sub judice by dint of Section 6 of the *Civil Procedure Act*. He reiterates that the intention of consolidation of the two suits is not for justice but to conceal fraud. To buttress his averments, he relied on the following decisions: *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others* (2022) eKLR and *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* (2004) eKLR.

Analysis and Determination

10. Upon consideration of the two instant Notice of Motion Applications including the Grounds of Opposition, respective Affidavits and rivaling submissions, the following are the issues for determination:- Whether this suit should be consolidated with ELC No. 240 of 2017. Whether this suit should be struck out.



11. On consolidation of suits, Order 11 Rule 3(1) (h) of the [Civil Procedure Rules](#) provides inter alia:-
- “(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;”
12. In the case of [Benson G. Mutabi v Raphael Gichovi Munene Kabutu & 4 others](#) [2014] eKLR the court provided the criteria for consolidation of suits and stated thus:-
- “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.”
13. Further in the case of [Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others](#) (2014) eKLR. The Supreme Court of Kenya provided the parameters on consolidation of suits and stated *inter alia*:-
- “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.”
14. In this instance the Plaintiff has sought to consolidate this suit with the aforementioned ELC No. 240 of 2017, which was filed by the 2nd Defendant against other parties. I note in both suits, the fulcrum of the dispute revolves around the suit land which was owned by the deceased who was the father of the Plaintiff herein. The 2nd Defendant stakes a claim over the whole of the suit land. The Plaintiff explained that his deceased father had indeed sold the suit land to other persons namely Joseph Mulonzi, Kyalo Kimuyu and Daniel Mavindu who have established permanent residences thereon. Based on the facts as presented while associating myself with the cited decisions, I find that since both suits revolve around the suit land, it is my considered view that no party will suffer prejudice or disadvantage if the two suits were consolidated to determine the rightful owner(s) of the said land. At this juncture, I opine that consolidation would be most convenient, as it will facilitate the efficient and expeditious disposal of the two cases.

As to whether this suit should be struck off.

15. The 2nd Defendant has sought for this suit to be struck off.
16. The legal provisions governing striking out of pleadings is contained in Order 2 Rule 15(1) of the [Civil Procedure Rules](#), 2010 which provides as follows:-
- “At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-



- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action;
or
- (d) it is an abuse of the process of the court.”

17. In the case of *Delphis Bank Limited v Caneland Limited* [2014] eKLR, the Court of Appeal held that:-

“The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application striking the defences was based is perhaps *D.T. Dobie & company (Kenya) Ltd v Muchina* which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”

See also the case of *D.T. Dobie & Company (K) Ltd v Joseph M. Muchina & anor.* (1980) eKLR.

- 18. In the Plaintiff, the Plaintiff claims to have acquired the suit land through transfer by way of transmission. Further, he has sought for cancellation of the title to the suit land which is in the name of one of the Defendant’s as well as orders of a permanent injunction and eviction orders directed at the Defendants. In ELC No. 240 of 2017, the Plaintiff therein who is the 2nd Defendant herein claims ownership of the suit land and seeks to evict the Defendants therefrom. The Plaintiff herein has confirmed he is a witness in the said suit as his late father sold the suit land to other persons.
- 19. Based on the pleadings herein which I have highlighted and noting that the disputed title emanated from a deceased person’s estate, it would be pertinent to decipher the root of the title so as to determine the rightful owner of the said suit land. In relying on the legal provisions cited above, while associating myself with the decisions quoted and applying them to the circumstances at hand, I find that the Plaintiff has disclosed a reasonable cause of action as against the Defendants. I opine that this suit is hence not sub judice as claimed by the 2nd Defendant since the Plaintiff herein is not a party in ELC. No. 240 of 2017. To my mind, I find that 2nd Defendant has not demonstrated the pertinent reasons why this suit should be struck out.
- 20. In the circumstance, I find the Notice of Motion Application dated the 21st February, 2023 merited and will allow it. I find the Notice of Motion Application dated the 28th February, 2023 unmerited and will decline to strike out this suit. I direct that this suit be consolidated with ELC No. 240 of 2017 for hearing and final determination.
- 21. Costs of the two Applications will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

