



**Githinji & 400 others v Attorney General & 5 others; Mureithi & 2 others (Affected Party) (All Suing for and on Behalf of Murathimi Clan) (Environment & Land Case 205 of 2013) [2015] KEELC 852 (KLR) (18 November 2015) (Ruling)**

*Johana Githinji & 400 Others v Attorney General & 5 Others [2015] eKLR*

Neutral citation: [2015] KEELC 852 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 205 OF 2013**

**L WAITHAKA, J  
NOVEMBER 18, 2015**

**BETWEEN**

**JOHANA GITHINJI & 400 OTHERS & 400 OTHERS & 400 OTHERS ..... PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL & 5 OTHERS & 5 OTHERS & 5 OTHERS ..... RESPONDENT**

**AND**

**JOHN PETER MUREITHI ..... AFFECTED PARTY  
SHADRACK MUTERU GITONGA ..... AFFECTED PARTY  
JAMES NDUNG’U THEURI ..... AFFECTED PARTY  
ALL SUING FOR AND ON BEHALF OF MURATHIMI CLAN**

**RULING**

1. On 20th March, 2014 this court (read Nyeri ELC) issued an order in the following terms:-

“This matter coming up for hearing of the application dated 21/2/2014 on 19th day of March, 2014 before Hon. Justice A. Ombwayo and upon hearing submissions from both counsels for the applicants and respondents respectively and upon perusing the said application and the annexures annexed thereon.

IT Is Hereby Ordered By Consent



1. That plaintiffs in Nyeri HCC 212 of 2011 be and are hereby enjoined in petition No. 14 of 2013.
  2. That Civil Case Nyeri HCC No. 212 of 2011 is hereby stayed pending the determination of this case (petition No. 14/13) and thereafter to abide by the outcome of this case.
  3. That all persons listed in the suit No. 212 of 2011 as members of Nyeri Hill Farm Maganjo Land Owners who are not parties in this suit be deemed as petitioners.
  4. That the 1st and 2nd respondents be and are hereby given 30 days to file replying affidavits.
  5. That the petitioners to file and serve submissions within 30 days after service.
  6. That the respondents to file and serve replying submissions within 30 days of service.
  7. That the court do visit the disputed parcel of land on the last day of the hearing.
  8. That Nairobi High Court ELC No. 401 of 2013 be and is hereby transferred to Nyeri ELC to be determined together with Petition No. 14 of 2013 at Nyeri.
  9. That the transfer to be effected within the next 14 days.
  10. That Mr. Wanyiri Kihoro, Mr. Sichangi and Mr. Nzioka to appear for the petitioners.
  11. That hearing is fixed on 3rd, 4th, 5th, 6th and 7th November, 2014.”
2. Before the suits could be set down for hearing, as contemplated in the order cited above, three applications were filed, inter alia, seeking to set aside the order for consolidation of the suits.
  3. The 1<sup>st</sup> application, dated 22nd April, 2014, seeks the following orders:-
    1. That the application be certified as urgent.
    2. That the file relating to ELC NO. 401 of 2013 Nairobi be forthwith returned to Milimani ELC Court to be heard on 3<sup>rd</sup> June, 2014 as previously ordered by Hon. Justice Ms. P. Nyamweya.
    3. That clauses No. 8 and 9 of the order issued on 19<sup>th</sup> March, 2014 by Hon. Justice Ombwayo in petition No. 14 of 2013 (this petition) be set aside.
    4. That Hon. Ombwayo do disqualify himself from hearing the suit.
    5. That costs of the application be provided for.
  4. The 2<sup>nd</sup> application dated, 28th May, 2014, seeks the following orders:-
    - a) That Nyeri Petition No.14 of 2013 be transferred back to Nyeri high Court to be heard and determined there in accordance with the provisions of *the Constitution*, the law and the current petition rules;
    - b) That any prevailing orders, if any, for the consolidation of the petition with any other case/ petitions arising from the hearing on 13th May, 2014 be set aside and such other case/petitions be heard and determined separately as instituted and previously planned.



5. The 3rd application, dated 26th November, 2014, seeks orders that:-
  - 1) Petition number 14 of 2013 which is currently referred as ELC No. 205 of 2014, after it was returned from Kerugoya High Court be given its former/new petition reference number as opposed to having ELC reference number;
  - 2) All papers, documents, applications and bundles relating to other cases, currently inserted, bundled together and/or attached to ELC No.205 of 2014 (Nyeri Petition No.14 of 2013) be removed, separated and/or detached from the petition.
  - 3) The Court order, if any, for consolidation of Nyeri Petition No.14 of 2013 with Nairobi ELC No. 401 of 2013, or any other case, if so ordered be vacated.
  - 4) Order No. 10 issued on 20th March, 2014 in Petition No.14 of 2013 be vacated and the petitioners be allowed to appoint advocate(s) of their own choice
6. The 1<sup>st</sup> application is premised on the grounds that by reason of the order made on 19<sup>th</sup> March, 2014 the affected parties are deemed as having been enjoined into this petition (Nyeri High Court Petition No.14 of 2014); that ELC NO.401 of 2013 Nairobi (previously Constitutional Petition No.398 of 2006) has been pending since 2006 and the same is scheduled for highlighting of submissions on 3<sup>rd</sup> June, 2006 and that the intended consolidation of ELC NO.401 of 2013 Nairobi with this petition will create unnecessary confusion because the two cases are at different stages and involve different parties. The applicants further contend that the Milimani Environment and Land Court registry irregularly remitted file No. 401 of 2013 to this Court (read Nyeri ELC) without any orders from the court to do so.
7. Concerning clause 8 and 9 of the order cited herein above, the applicants contend that by ordering the consolidation of the two suits, the judge condemned them unheard.
8. With regard to the prayer for the judge to recuse himself, the applicants claim that the trial judge (Ombwayo J.) had represented one of the parties to wit, the Hon.Attorney General in ELC No. 401 of 2013.
9. The application is supported by the affidavit of Shadrack Muteru Gitonga who has described himself as one of the affected parties in this matter and one of the petitioners in Nairobi ELC NO. 401 of 2013, sworn on 22<sup>nd</sup> April, 2014, where the grounds thereon are reiterated.
10. The 2<sup>nd</sup> application is premised on the grounds that the order for transfer of the petition to Kerugoya Court and Consolidation with another case/petition was made by the court without an application being made for transfer by the petitioners and without consultation with the advocate for the petitioners. The applicants contend that since the trial judge had disqualified himself from hearing the petition, he lacked jurisdiction to make an order for consolidation and transfer of the case. The order for transfer of the suit is said to be an inconvenience to the petitioners.
11. The applicants also contend that the order for consolidation of the petition with 401 of 2013 which is at an advanced stage of hearing will create confusion and possible obstruction of justice for the petitioners.
12. The application is supported by the affidavits of the applicants' counsel, Wanyiri Kihoro and the 1<sup>st</sup> Petitioner, Johannah Githinji Njoroge, sworn on 28<sup>th</sup> May, 2014, in which the grounds on the face of the application are reiterated.



13. The 3<sup>rd</sup> application is premised on the grounds that the current suit is framed as a petition under the petition rules 2013 and that it was not commenced by way of a plaint under the Civil Procedure Rules and the *Environment and Land Court Act*, 2011 (ELCA) hence different legal procedures will be employed in the cases.
14. The applicants contend that the cases consolidated with the petition have no connection with it and explain that the petitioners want to manage their petition independently. It is further contended that the applicants have not appointed some of the advocates cited in the order to act for them and have no money to pay them.
15. Maintaining that the order for consolidation was issued without any application to that effect, counsel for the applicant submits that the order is patently illegal, oppressive and obstructive to the interests of the petitioners.
16. The application is supported by the affidavit of the advocate for the applicants, Wanyiri Kihoro, sworn on 26<sup>th</sup> November, 2014, in which the grounds thereon are reiterated.
17. In reply and opposition to the applications dated 28<sup>th</sup> May, 2014 and 26<sup>th</sup> November, 2014 counsel for one of the petitioners in the consolidated suits, swore the affidavit filed on 6<sup>th</sup> September, 2015. In that affidavit the deponent, Mr. Gikandi Ngibuini, has deposed that save that petitioners in petition No. 205 of 2014 are different from those in Kerugoya petition No. 177 of 2014 (formerly Nairobi constitutional petition No. 398 of 2006), the subject matter in both petitions is the same. The respondents are also said to be the same in both petitions.
18. Pointing out that petition No. 205 of 2014 was filed later in time than Kerugoya petition No. 177 of 2014, the deponent contends that an order for de-consolidation of the suits will lead to duplication of evidence and wastage of precious judicial time.
19. Explaining that the cause of action in both petitions arises from the same facts and that common questions of law and fact are likely to arise, the deponent submits that it is desirable that the two petitions be heard together. Mr. Ngibuini opines that if the two petitions are not heard and determined together, there is a likelihood of conflicting judgments being entered in respect of same issues of law and fact hence creating confusion and breakdown of law and order.
20. Explaining that consolidation will further the overriding objective set down in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Mutunga Rules), Mr. Ngibuini deposes that no prejudice or injustice would be occasioned if consolidation is ordered.
21. The application dated 26<sup>th</sup> November, 2014 is also opposed through the affidavit of Rev. Mutahi David sworn on 11<sup>th</sup> June, 2015. In that affidavit the deponent refers to the order cited herein above and gives the circumstances that led to recording of the said consent order for consolidation of the suits.
22. Explaining that the consent order herein arose out of the free will of all the parties, including the petitioners represented by Mr. Wanyiri Kihoro, Rev Mutahi states that the consent constitutes a binding contract between the parties.
23. Mr. Mutahi points out that upon entry of the consent order, the applicants took steps in compliance of the order by filing additional list of petitioners.
24. Explaining that no undue hardship will be occasioned on any party to the petitions if consolidation is ordered, Mr. Mutahi states that it is in the best interest of justice that the matters be determined together.



25. When the applications came up for hearing counsel for the applicants, Mr. Wanyiri Kihoro, reiterated his contention that their petition cannot be given an ELC number because it is not bound by the Civil Procedure Rules. Explaining that their matter was okay until it was transferred to the Kerugoya Court, he urged that it reverts to its former number or they be allocated another number.
26. Concerning the order made on 19<sup>th</sup> March, 2014 for consolidation of the suits hereto, he reiterated his contention that there was no application before the court for consolidation of the suits. He argued that pursuant to the order, a number of suits are before this court some of which are res judicata.
27. Concerning the order appointing the advocates to represent the petitioners, he submitted that under the constitution, parties have the right to choose counsel of their own choice.
28. With regard to the application dated 22<sup>nd</sup> April, 2014 counsel for the applicants Ms Murage, informed the court that they have since received instructions from their client to withdraw the application. Ms Murage explained that most of the issues raised in the application had been overtaken by events and that they have since changed their minds on the issue of de- consolidation of the suits.
29. Concerning the application dated 28<sup>th</sup> May, 2014 Mr. Kihoro informed the court that prayer (a) was heard and determined by the Kerugoya Court. With regard to the prayer for de-consolidation of the suits, he informed the court that the issue is adequately addressed in his submissions for the application dated 26<sup>th</sup> November, 2014.
30. Concerning the applications dated 28<sup>th</sup> May, 2014 and 22<sup>nd</sup> November, 2014 counsel for some of the petitioners, Mr. Mugo, submitted that the notice to the Government of 30 days has been declared by both the High Court and the Court of Appeal to be unconstitutional.
31. With regard to the orders made on 19<sup>th</sup> March, 2014 he submitted that the orders were consent orders.
32. Pointing out that the application dated 26<sup>th</sup> November, 2014 seeks to reverse the said orders yet it is not an application for review, Mr. Mugo submitted that consent orders can only be set aside by consent.
33. Contending that the applicants are asking this court to sit on appeal on those issues; yet it is a court of concurrent jurisdiction, Mr. Mugo submitted that this court lacks jurisdiction to reverse those orders.
34. Concerning the contention that a petition cannot be consolidated with other ELC Matters, Mr. Mugo submitted that the decision made in Malindi regarding jurisdiction settles that issue.
35. Referring to Section 3 of ELCA and pointing out that the substratum of the suit is the same in both petitions, Mr. Mugo submitted that consolidation of the suits will help the court achieve the overriding objective set out under Section 3 of ELCA which is to dispose of matters expeditiously.
36. Explaining that this court can only set aside its orders in the circumstances contemplated in Section 19(3) of ELCA, he submitted that since the orders hereto were not ex parte orders, this court cannot set them aside.
37. On behalf of Counsel for the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents, Mr. Wekesa, Ms Murage opposed the application for de-consolidation on the grounds that the suits relate to the same subject matter, involve same parties and raise same issues of law. Further, that there is likelihood of duplication of evidence and issuance of conflicting judgments if the suits are heard separately.
38. Explaining that consolidation of the suits will further the overriding objective set under Section 3 of ELCA, Ms Murage submitted that the applicants have not demonstrated what prejudice, if any, they would suffer if the matters are heard together.



39. Despite the indication by the applicants that they had withdrawn the application dated 22nd April, 2014 and that they have changed their mind on the prayer for de- consolidation of the suits, counsel for the 2nd respondent, Mr. Cheruiyot, submitted that the application had not been properly withdrawn.
40. Contending that the orders of 19th March, 2014 did not consolidate the matters as argued by Mr. Mugo and Ms Murage, Mr. Cheruiyot urged the court to order that the matters be heard separately.
41. In a rejoinder, Mr. Kihoro associated himself with the submissions of Mr. Cheruiyot and urged the court to order that the petitions be heard separately.
42. On her part, Ms Murage, reiterated her explanation that save for the prayer for de-consolidation, all the other prayers in the application dated 22nd April, 2014 had been overtaken by events. She maintained that her clients have since changed their minds on the prayer for de-consolidation of the suits and urged the court to order that the matters be heard together. Should the court not be inclined to order consolidation of the suits, she urged the court to order that petition No. 401 of 2013 be heard first since it was filed before the other Petitions.

### **Analysis and determination**

43. As pointed out above, the three applications herein relate to the order made on 19<sup>th</sup> March, 2014 which is cited herein above. Since the applications raise similar issues of law and fact, I will determine them together.
44. With regard to the 1<sup>st</sup> application, counsel for the applicant informed the court of the applicants' desire to withdraw it. The reason given for the withdrawal was that most of the prayers have been overtaken by events. Upon reading the orders sought in that application and the changed circumstance of the case, I agree with Ms Murage that the only prayer worthy of consideration is that for de-consolidation of the suits. With regard to that prayer, counsel informed the court that the applicants' have since changed their minds concerning that prayer. She joined hands with the respondents in pleading for the matters to be heard together as earlier agreed.
45. Counsel for the applicants in the applications dated 28<sup>th</sup> May, 2014 and 26<sup>th</sup> November, 2014, Mr. Wanyiri Kihoro, faulted the orders for consolidation of the suits on the grounds that they were not premised on any application from any of the parties; for taking away the right of parties to be represented by advocates of their own choice and being likely to confuse issues as the legal procedures to be adopted in hearing of the suits are different.
46. The applications, as far as they seek to set aside the orders are challenged on the ground that the orders are consent orders hence can only be set aside through consent by the parties or if the conditions for setting aside consent orders are satisfied. In this regard, it submitted that the applicants have not satisfied the conditions for setting aside consent orders.
47. With regard to the contention that hearing the matters may be confusing or prejudice the rights of the parties, it is submitted that the applicants have not demonstrated what prejudice they will suffer if the matters are heard together.
48. In a different turn of events, Mr. Cheruiyot submitted that the court did not order for consolidation of the suits but for the suits to be heard together.
49. Having read and considered the reasons given for the prayer for setting aside the orders hereto, I note that counsel for the applicant does not deny having been party to the proceeding pursuant to which the orders were issued. His argument is that there was no application by any of the parties for consolidation of the suits. In my view, there needed not be an application for the court to issue directions on how the



dispute brought before it was going to be handled or managed. The most important issue here is not whether there was an application for consolidation of the suits but the involvement of the parties in charting the way forward in dealing with the matters brought to the attention of the court. The record before me shows that the impugned orders were issued by consent of the parties.

50. Although it is alleged that the orders do not reflect what the parties agreed on, it has not been demonstrated to this court in what way the orders are at variance with what the parties agreed. If anything, if that were the case, the aggrieved parties ought to have moved the court for rectification of the orders, instead of attempting to unprocedurally vary those orders.
51. Having found the orders hereto to have been issued by consent of the parties, I agree with the submission by counsel for the 3rd, 4th 5th and 6th respondents that the consent orders are binding on the parties and can only be varied on grounds that justify the setting aside or variation of a consent order or by another consent by the parties involved. In this regard see case of Wasike vs. Wamboko (1988) KLR 429 and Jonathan Namulala Nyongesa v. Multi Business Shooters Investors Ltd & 2 Others (2015) e KLR.

In Wasike VS Wamboko it was held:

“A consent Judgment or order has contractual effect and can only be set aside on grounds which would justify setting aside a contract, or if certain conditions remain to be fulfilled which are not carried out”

52. In Jonathan Namulala Nyongesa supra the court stated:-

“There is no dispute that the order herein was entered by consent In Kenya Commercial Bank Vs. Specialized Engineering Company Ltd. [1982] KLR 485 the court held,

“An advocate has general authority on behalf of his client as long as he is acting bona fide and not contrary to express negative direction, in the absence of proof of any express negative auction, the order shall be binding.”

Further it was held that,

“A consent entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or by an agreement contrary to the policy of the court. Or where the consent was given without sufficient material facts or misapprehension or ignorance of such facts in general for reason which would enable the court to set aside an agreement.”

In the case of Brooke Bond Leibig (T) Ltd. versus Maliya 1975 [EA] 266 it was also held that a consent order made in the presence and with the consent of counsel is binding on all the parties to the proceedings. It cannot be varied or discharged unless it is obtained by fraud or collusion or is contrary to the public policy of the court.

- [7]. The Court of Appeal in Nyeri Civil Appeal no. 7 of 2014 Samuel Wambugu Mwangi Vs. Othaya Boys High School held that a consent order has a contractual effect upon the parties. That it cannot be set aside unless there is fraud collusion or any of the reasons that can justify the setting aside of the consent as in a contract.
- [8]. Likewise I find no valid reason to set aside the consent order that was made by the parties in court, all the parties were present and their advocates. A change of mind alone is not one of the reasons that can make a court of law set aside or vary a consent order of the parties”



53. Having read and considered the law governing setting aside consent orders, as enunciated in the above cited authorities and the peculiar circumstances that led to issuance of the consent orders herein, I am not satisfied that a case has been made for setting aside or variation of the orders.

**Did the court order the consolidation of the suits?**

54. The answer to this question is found in Order number 8 which is in the following terms:-

“Nairobi High Court ELC No.401 of 2013 be and is hereby transferred to Nyeri ELC to be determined together with Petition No.14 of 2013 at Nyeri.”

**What is the meaning of the phrase to be determined together as used in that order?**

55. In my view, when two suits are being heard together it does not mean that one of them is a test suit. To be determined together must mean that the issues of law and fact raised in the two suits will be considered together and not necessarily that one of the suits will be a test suit.
56. If the intention of the court was to have one of the petitions as a test suit, it would have issued an order similar to that issued vide order No. 2 in the impugned orders. That order makes it clear that Nyeri HCC No. 212 of 2011 was stayed pending the outcome of Petition No. 14 of 2013. It is only the parties in Nyeri HCC No. 212 of 2011 who will be bound by the outcome of Petition No. 14 of 2013.
57. In my view, even though Petitions No. 14 of 2014 and 401 of 2013 will be heard together, the parties therein will have to prove their respective cases before this court. Contrary to the contention by Mr. Kihoro, the advocates in those suits are clearly distinct. The order for representation must have only referred to the advocates representing the different petitioners in the suits, which advocates are known by the parties, in accordance to the instructions given them.
58. In my view the foregoing determination settles the question of consolidation or deconsolidation of the suits.
59. Turning to the prayer for the petition transferred from Kerugoya Courts to be given its previous number or be given a new petition number, since the issue does not go to the root of the matters, I direct that the petition be allocated its earlier reference number to wit, Nyeri petition No. 14 of 2014.
60. The upshot of the foregoing is that the applications herein, in as far as they seek the variation of the orders issued on 19<sup>th</sup> March, 2014, have no merit and are dismissed with costs to the respondents.
61. The application dated November 26, 2014 succeeds to the extent contemplated herein above. Otherwise, all the other prayers are found to be speculative and based on a miscomprehension of the order dated March 19, 2014 and denied.

The respondents, who defended the applications, are awarded costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 18<sup>TH</sup> DAY OF NOVEMBER, 2015.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Mr. Wanyiri Kihoro for some petitioners

Mr. Mugo for petitioners(Mbari ya Matheri)

Ms Murage h/b for Mr. Gikandi for petitioners (Mbari ya Murathimi Clan)



Mr. Makori h/b for Ms Masara for the 1st respondent

Mr. Mugambi for the 2nd respondent

Mr. Wekesa for the 3rd, 4th, 5th & 6th respondents

Court assistant - Lydia

