



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUG OYA

ELC CASE NO. 258 OF 2013

BENSON G. MUTAHIPLAINTIFF

VERSUS

RAPHAEL GICHOVI MUNENE KABUTU..... 1ST DEFENDANT

MUSYOKI MUNENE KABUTU2ND DEFENDANT

NJAGI MUNENE KABUTU3RD DEFENDANT

MUCHIRA MUNENE KABUTU4TH DEFENDANT

NJOKI MUNENE KABUTU5TH DEFENDANT

RULING

The issue for my determination herein is whether this suit can be consolidated with KERUGOYA ELC Case NO. 809 OF 2013 (OS). The application by the defendants/applicants seeking a consolidation of the two suits is based on the following grounds;-

1. ***The two suits involve the same subject matter that is the parcel of land MBEERE/KIRIMA/3184***
2. ***The defendants in this suit are the plaintiffs in KERUGOYA ELC Case No. 809 of 2013 (OS)***
3. ***The consolidation of the two suits will avoid inconsistencies when judging the two matters***
4. ***Consolidation will enable disposal of the two suits***

The application was opposed by the plaintiff /respondent who filed a replying affidavit and raised the following issues, inter alia:-

- ***That this suit is brought by way of a plaint while KERUGOYA ELC Case No. 809 of 2013 is an Originating Summons***
- ***That this case has proceeded to trial and the plaintiff/respondent has closed his case and what is due now is the defence case***
- ***That the 2nd defendant is not a party to this suit though it is a party to KERUGOYA ELC Case No. 809 of 2013 (OS)***
- ***That this suit seeks orders of eviction while KERUGOYA ELC Case No. 809 of 2013 (OS) is a claim for adverse possession and therefore those two causes of action cannot be consolidated***
- ***That the defendants/applicants have not indicated why they took so long to make this application***
- ***That suits can only be consolidated if the parties are the same and the cause of action is also***

the same

- ***That consolidation will delay the case and this application is an abuse of the Court process.***

Submissions have been filed by counsels for both sides which I have considered together with the pleadings and rival affidavits

In KERUGOYA ELC Case No. 809 of 2013 (OS), the plaintiffs are the defendants in this case while the 1st defendant therein is the plaintiff herein. There is a 2nd defendant Co-operative Bank of Kenya Limited which is not a party in this case. In that case which is commenced by way of an Originating Summons, the plaintiffs are seeking that they have become entitled to ownership of portions of land measuring 60 acres out of land parcel No. MBEERE/KIRIMA/3184 which measures approximately 100 acres.

In this case which has been commenced by way of a plaint, the plaintiff who is 1st defendant in KERUGOYA ELC Case No. 809 of 2013 (OS) is seeking the eviction of the defendants (who are plaintiffs in KERUGOYA ELC Case No. 809 of 2013 (OS) from the same parcel of land No. MBEERE/KIRIMA/3184 and an order restraining the defendants from re-entering the said land. The defendants have filed a defence stating that they are the owners of the said land. In KERUGOYA ELC Case No. 809 of 2013 (OS), the defendant has also laid claim to the same land.

From the pleadings in KERUGOYA ELC Case No. 809 of 2013 (OS) and this case, the following issues are not in doubt:-

1. ***Both suits involve the parcel of land MBEERE/KIRIMA/3184***
2. ***The parties in both cases are the same except that there is a 2nd defendant (Co-operative Bank of Kenya Limited) in KERUGOYA ELC Case No. 809 of 2013 (OS).***
3. ***This case is part heard with the plaintiff having testified and closed his case on 30th October 2013. No other witness testified apart from the plaintiff***

Essentially therefore, the bottom line is that the subject matter in this case and that in KERUGOYA ELC Case No. 809 OF 2013 (OS) is the same i.e. ownership of land parcel No. MBEERE/KIRIMA/3184. The parties are also the same save that there is a 2nd defendant in KERUGOYA ELC Case No. 809 of 2013 (OS) who is not a party in this case. It is also important to note that apart from the firm of Muteithia Kibira advocate who are appearing for the 2nd defendant in KERUGOYA ELC Case No. 809 of 2013 (OS), the firm of Rose W. Njeru advocate are on record for the defendants in this case and also for the plaintiffs in KERUGOYA ELC Case No. 809 of 2013 (OS), while the firm of Duncan Muyodi advocate are on record for the plaintiff in this case who is the 1st defendant in KERUGOYA ELC Case No. 809 of 2013 (OS). Therefore, the common parties in both cases are represented by the same advocate.

The principles of consolidation of suits was re-stated in **STUMBERG AND ANOTHER VS POTGEITER 1970 E.A. 323** as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”

In the Indian case of **BRIJ KISHORE VS BIR SINGH & OTHERS at the High Court of Punjab and Harana (L.R 5922 of 2013** Justice Paramjeat Singh quotes the following from the Supreme Court Case of **PREM LALA NAHATA & ANOTHER VS CHANDI PRASAD SIKARIA, (2007) 2, SUPREME COURT CASES 551 at paragraph 18:-**

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more

convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

One of the issues that a trial Court considers during the pre-trial directions and conferences under **Order 11 Rule 3 (1) (h) of the Civil Procedure Rules** is the consolidation of suits in appropriate cases. This is with a view to furthering the expeditious disposal of the cases and to ensure proper case management. This however could not have been done earlier with respect to these two cases sought to be consolidated because KERUGOYA ELC Case No. 809 OF 2013 (OS) was filed on 26th November 2013 which was one month after the plaintiff herein had closed his case. The defendants have explained through the supporting affidavit of the 1st defendant that they could not file KERUGOYA ELC Case No. 809 of 2013 (OS) earlier due to financial constraints. That explanation sounds plausible and in any event, delay alone, if reasonably explained, cannot be a bar to the consolidation of suits in appropriate cases and especially when there is no evidence to suggest that any party will suffer prejudice. It is true that this case is part heard and the plaintiff has closed his case. Only the plaintiff testified in support of his case and no other witnesses were called and so there is no fear that the plaintiff cannot be recalled to testify afresh if need be. It is also clear from a reading of the Court of Appeal’s decision in **NGUMBAO VS MWATATE & TWO OTHERS 1988 K.L.R 549** that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore, the submissions by Mr. Muyodi, that this case cannot be consolidated with KERUGOYA ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in case law and in any case, no case was cited for the proposition.

In 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”

As stated earlier in this ruling, the issue here is whether this suit is amenable to consolidation with **KERUGOYA ELC Case No. 809 of 2013 (OS)**. 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***

Considering all the above, it is my view that this is a proper case for consolidation. Ultimately the main issue will be the ownership of land parcel No. MBEERE/KIRIMA/3184 and it will not be an efficient use of available judicial and administrative resources for one Court to determine that issue differently in this case and another Court to determine it differently in the other case. It has also been submitted that since KERUGOYA ELC Case No. 809 of 2013 (OS) is commenced by Originating Summons, it cannot be consolidated with this case which is commenced by way of a plaint. I do not think that can be a bar to consolidation at all because once directions are taken in KERUGOYA ELC Case No. 809 of 2013 (OS), the Originating Summons will be converted into a plaint and the replying affidavit will be the defence. It can also not be correct as submitted by Mr. Muyodi that a case for adverse possession cannot be consolidated with that of eviction. There is nothing to stop the registered proprietor of the land in dispute to seek the eviction of the party claiming to have become owner of the same through adverse possession. And with regard to the issue of how the parties will be designated upon consolidation, that is a matter on

which directions can be taken by the trial Court once consolidation is done.

Ultimately therefore, having considered the application dated 3rd September 2014 and the pleadings in both cases, I make the following orders:-

1. *This case and KERUGOYA ELC Case No. 809 of 2013 (OS) are hereby ordered consolidated for purposes of being heard and determined together and the hearing shall be on the basis of the pleadings already filed in the two suits subject to any subsequent amendments*
2. *This file shall be the lead file for purposes of filing any further pleadings and recording of proceedings*
3. *As the subject matter is land situated within Embu and as we now have an Environment and Land Court at Embu both files are hereby transferred to the Environment and Land Court at Embu for mention on 26th January 2015 for further orders.*
4. *Costs shall be in the cause.*

B.N. OLAO

JUDGE

17TH DECEMBER, 2014

17/12/2014

Before

B.N. Olao – Judge

Mwangi – CC

Mr. Muyodi for Plaintiff – present

Ms Njeru for Defendant – present

COURT: Ruling delivered this 17th day of December, 2014 in open Court.

Mr. Muyodi for Plaintiff present

Ms Njeru for Defendant present.

B.N. OLAO

JUDGE

17TH DECEMBER, 2014