



**Rage v Mohamed (Environment & Land Case 4A of 2023)
[2024] KEELC 3423 (KLR) (29 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3423 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND CASE 4A OF 2023**

JM MUTUNGI, J

APRIL 29, 2024

BETWEEN

MATAN HAJI RAGE PLAINTIFF

AND

BASHIR MOHAMED DEFENDANT

RULING

1. On 06.12.2022, the Plaintiff/Applicant filed MELC Case No. E022 of 2022 in the Chief Magistrate's Court at Garissa as Matan Haji Rage (Suing as the chairman of Emrey Welfare Group) v Bashir Mohamed now ELC 4A of 2023. In reply, the Defendant filed a Defence and a Counterclaim on 15.12.2022 seeking for declaratory orders in regard to the ownership of the suit property.
2. The Plaintiff withdrew his claim against the Defendant in the Lower Court leaving the Defendant's Counterclaim unprosecuted. On 19.12.2022, the Plaintiff filed Garissa ELC 11 of 2022, Matan Haji Rage & 15 Others v Bashir Mohamed where the same land as in the Lower Court was the subject matter. On 22.03.2023, the Lower Court ruled that the Defendant's Counterclaim in MELC Case No. E022 of 2022 do proceed to hearing but the Plaintiff indicated that he was not ready to proceed as she had filed before this Court, a Miscellaneous Application No. E002 of 2023 Matan Haji Rage (suing as the Chairman of Emrey Welfare Group) v Bashir Mohamed where he had sought the transfer of MELC 22 of 2022 Matan Haji Rage –v- Bashir Mohamed to this Court and further that the same be consolidated with the instant matter and heard together.
3. The Court upon considering the Miscellaneous Application allowed the transfer of the Lower Court suit MELC No. E022 of 2022 to this Court but did not grant the order for consolidation of the suit with Garissa ELC No. 11 of 2022. The Court left the issue of consolidation to be considered upon the Lower Court file being transferred to the ELC Court. The Lower Court file was transferred to the ELC Court and was renumbered Garissa ELC No. 4A of 2023. Before the Lower Court file was transferred to the ELC Court, the Court had in file Garissa ELC No. 11 of 2022 dealt with and disposed the Notice



of Motion application dated 31st January, 2023 filed by the Defendant who was also the Defendant, Counterclaimant in the suit before the Lower Court. In disposing the application, the Court held that although the Plaintiff who was also the Plaintiff in the Lower Court suit had withdrawn his suit before the Lower Court, the Defendant's Counterclaim still remained to be prosecuted and in that sense the suit before the Lower Court was subjudice. On that account the Court ordered stay of ELC No. 11 of 2022 pending the hearing and disposal of the suit before the Lower Court.

4. In the Ruling I delivered on 15th June 2023 in regard to the application dated 31st January 2013, under paragraphs 15 and 16 I rendered myself as follows:-
15. The Defendant has argued that the withdrawal of the suit by the Plaintiff against the Defendant did not dispose of the Counterclaim filed by the Defendant against the Plaintiff and the Counter claim which involves the same subject matter is therefore pending which rendered the present suit subjudice in terms of Section 6 of the Civil Procedure Act. The Learned Trial Magistrate in endorsing the withdrawal of the Plaintiff's suit against the Defendant did not revert to the Counterclaim, filed against the Plaintiff by the Defendant. The withdrawal of the Plaintiff's suit against the Defendant could not dispose of the Counterclaim unless the Defendant at the same time agreed to have the same withdrawn as against the Plaintiff. The Ruling given by the Trial Magistrate on 28th December, 2022 gave the impression that the suit had been withdrawn in its entirety to the extent that the Learned Magistrate made no mention of the Counterclaim. No application was made before him touching on the Counterclaim. That perhaps may explain the Defendant's application dated 15th February, 2023 filed before the Chief Magistrate's Court on 16th February 2023, annexed to the Defendant's further Affidavit. I do not know the fate of that application and will say no more about it save to observe that the suit before the Lower Court in some form appears to be alive and yet to be finally disposed of.
16. As I am persuaded that the suit before the Lower Court is alive and ongoing and that it involves the same subject as in the present suit, I do not think it would be desirable to have two Courts deal with a similar matter where the parties are similar or the same and the subject matter is the same. Such a scenario could result in embarrassment and/or confusion should the two Courts reach differing decisions. The suit before the Chief Magistrate's Court was earlier in time and that Court should be permitted to hear and conclude the matter. For that reason, I hereby order the present suit to be stayed pending the determination of Garissa CM ELC Case No. 022 of 2022.
5. At the time of rendering the Ruling the Court apart from noting the matter before the Magistrate's Court was alive and ongoing, was not aware of the status of the proceedings and consequently had to adopt a cautionary stance to avoid making a decision that would generate confusion and/or conflict.
6. Following the transfer of the file to this Court, Ms. Roble for the Plaintiff and Mr. Nyipolo for the Defendant appeared before me on 26/9/2023 for directions. Ms. Roble sought consolidation of Garissa ELC 11 of 2022 and ELC 4A of 2023(transferred Magistrate's suit). Mr. Nyipolo was opposed to the consolidation of the two matters. Given the scenario the Court directed both parties to file written submissions to ventilate their respective positions for consideration by the Court before rendering a Ruling.
7. In her submissions in support of the consolidation Ms. Roble for the Plaintiff stated that the suits involved the same subject matter being Plot. No. GSA/2019 in Bulla Igra which she claimed belonged to the Emrey Welfare Group. The Plaintiff before the Lower Court suit sought injunctive orders against the Defendant. The Defendant in the suit before the Magistrate's Court raised a Preliminary Objection to the suit inter alia challenging the competency of suit on account of the same being in contravention of Sections 4,5 and 6 of the Societies Act, Cap 108 Laws of Kenya, and on the ground that the Magistrate's Court lacked the pecuniary jurisdiction to entertain the matter. The Defendant



further filed a statement of defence denying the averments contained in the Plaintiff and further pleaded a Counterclaim staking claim of ownership to the suit property. The Defendant sought under the Counterclaim to be declared as the owner of the suit property and for permanent injunction to issue against the Plaintiff. The Preliminary Objection and the Statement of Defence and Counterclaim were filed on 13th December 2022 and 15th December 2022 respectively.

8. The Plaintiff on 16th December 2022 filed a Notice of withdrawal of the suit wholly as against the Defendant under the provisions of Order 25 Rule (1) of the Civil Procedure Rules. On 20th December 2022 the Plaintiff filed before the ELC Garissa ELC No. E 11 of 2022. The Defendant filed a Notice of Appointment of Advocate on 13th January 2022 and on 31st January 2023 filed the Notice of Motion application which the Court decided on 15th June 2023 as earlier indicated.
9. The Plaintiff contends that the two suits ELC 4A of 2023 and ELC E011 of 2022 are on the same subject matter and involve the same parties and therefore would be efficacious and convenient to have them consolidated and tried together. The Plaintiff cited the Case of Nyati Security Guards and Services Ltd –vs- Municipal Council of Mombasa (2001) eKLR and the Case of Law Society of Kenya –vs- Centre for Human Rights & Democracy and 12 Others (2014) eKLR to support the submissions.
10. Mr. Nyipolo Counsel for the Defendant submitted that on the basis that ELC No. 011 of 2022 was held to be subjudice, consolidation was inapplicable. To support this submission Counsel relied on the Case of Republic –vs- Paul Kihara Kariuki, AG & 2 Others Exparte LSK (2020) eKLR where Mativo, J (as he then was) stated thus:-

“...the issues at hand are crystal clear, namely whether this suit offends the question of subjudice and whether it is an abuse of the court process. If the answers are in the affirmative, then consolidation would be impermissible because it was never meant to cure or cover the doctrine of subjudice or abuse of the Court process. Put differently, a plea for consolidation is not permissible in circumstances whereby it is evident it is being used to evade the wrath of the subjudice rule as opposed to serving the settled principles of consolidation laid down in the above authorities.”

11. The sole ground upon which the Defendant is opposed to consolidation of the suits is that he contends ELC No. E011 of 2022 is subjudice in the sense that there was the earlier suit MELC No. 022 of 2022. In real sense can ELC No. E011 of 2022 be said to be subjudice on account of MELC No. E022 OF 2022 (now ELC No. 4A of 2023)? I pose the question in view of the peculiar circumstances surrounding the two suits. In ELC No. 4A of 2023 the Plaintiff having withdrawn the Plaintiff has no pleadings while the Defendant is yet to file a defence in ELC No. E011 of 2022.
12. The Plaintiff confronted with the Preliminary Objection taken by the Defendant in the Lower Court matter opted to withdraw his suit wholly against the Defendant merely 10 days after filing the same. The Plaintiff within 5 days of withdrawing the suit before the Magistrate’s Court filed in ELC Court ELC No. 11 of 2022. As matters stand, the Plaintiff having withdrawn his Plaintiff in MELC No. E22 of 2022 has no pleadings in that suit.
13. Under Order 25 Rule 1 of the Civil Procedure Rules pursuant whereof the Plaintiff withdrew his suit, the discontinuance or withdrawal of the suit cannot be used as a defence to any subsequent action. Order 25 Rule 1 provides as follows:-

“25(1) At any time before the settling down of the suit for hearing the Plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or



any of the Defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

14. In my view the Plaintiff having withdrawn his suit was not barred from instituting a fresh action against the Defendant subject only to an order for payment of costs as maybe made by the Court under Order 25 Rule 3 and 4 respecting the withdrawn suit.
15. The Defendant from the record has not filed a defence in ELC No. E011 of 2022 and appears to have focused on having this suit declared to be subjudice in regard to the earlier suit in the Magistrate’s suit. I have observed that the Plaintiff presently has no pleadings in ELC 4A of 2023 having earlier wholly withdrawn his Plaint as against the Defendant. In the Plaint filed by the Plaintiff in ELC No. E011 of 2022 the Plaintiffs seek a declaration that they are the legal and rightful owners of the suit property and further seek an order of permanent injunction. These are the same orders the Defendant prays for in his Counterclaim in ELC No. 4A of 2023. It does appear to me the Defence and Counterclaim filed by the Defendant in the earlier suit before the Magistrate’s Court would sit as an appropriate defence and Counterclaim by the Defendant in the subsequent suit filed by the Plaintiff.
16. It is not lost to the Court that the Defendant had before the Magistrate’s Court challenged the competency of the suit and the jurisdiction of the Court and in that regard, I do not find it objectionable for the Plaintiff to have made a tactical retreat to withdraw the suit and to file what he considered a compliant suit. I do not consider the Plaintiff to have acted in abuse of the Court by filing the fresh action. The Rules permit him to do so.
17. Having regard to the circumstances of the two highlighted matters, I am satisfied an order of consolidation of the two suits would serve the ends of justice. It will enable the matters to be conveniently handled and will result in expeditious resolution of the dispute. The parties in the two suits are the same and the subject matter is the same and the issues that arise in the two matters are the same. Basically the singular issue is the ownership of the land the subject matter. I therefore order Garissa ELC No. E011 of 2022 to be consolidated with Garissa No. ELC No. 4A of 2023. File No. E011 of 2022 will be the lead file and proceedings and filings will be on that file. The matter is fixed for mention on 27/5/2024 to take directions.
18. Costs shall be in the cause.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 29TH DAY OF APRIL 2024.

J. M. MUTUNGI

ELC - JUDGE

ELC NO. 4A OF 2023	0
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