



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MALINDI**  
**HCCC NO. 135 OF 2011**

MWALIMU KALUME.....1<sup>ST</sup> PLAINTIFF/APPLICANT

FRANCIS TSALWA.....2<sup>ND</sup> PLAINTIFF/APPLICANT

**=VERSUS=**

KIFALU KARISA.....DEFENDANT/RESPONDENT

**R U L I N G**

**Introduction**

1. The Application before me is the one dated 20<sup>th</sup> June 2013 in which the Plaintiff is seeking for the following orders:
  - a. **That Kilifi SRMCCC NO. 11 of 2009 Kifalu Karisa -VS- Mwalimu Kalume & Another be stayed pending the hearing and determination of Malindi HCCC No. 135 of 2011 (OS) between 1) Mwalimu Kalume Charo, 2) Francis Tsalwa Washiali. In the alternative the said Lower court suit be transferred to the High Court Malindi for consolidation and hearing with the instant suit.**
  - b. **That the cost of the Application be provided for.**
2. The Application is premised on the grounds that there is pending before the High Court an originating summons (this suit) for cancellation of title; that the land in issue actually belongs to the Plaintiff and that the lower court suit is for injunctive orders seeking in effect to evict the Plaintiffs from the suit premises.

**Applicants' case**

3. The Applicants' Application is supported by the affidavit of the 1<sup>st</sup> Plaintiff who has deponed that sometimes in May 2009, him, together with the 2<sup>nd</sup> Plaintiff were sued by the Defendant in Kilifi SRMCC NO. 211 of 2009

4. It is the 1<sup>st</sup> Plaintiff's deposition that they commenced the current suit for cancellation of the title in respect to the suit property and that he is not aware how a grant of letters of administration was obtained in respect to his father's Estate and how the suit property was registered in favour of the Defendant herein.
5. The 1<sup>st</sup> Plaintiff finally deponed that issues dealing with the rights in property and cancellation of title are in the province of the High Court; that the suit in the lower court should be stayed pending the hearing and determination of this suit and that the lower court does not have the requisite jurisdiction to hear the dispute herein.

### **Respondent's case**

6. The Respondent filed a Replying Affidavit on 17<sup>th</sup> July 2013 and deponed that the prayers he is seeking in Kilifi SRMCC No. 211 of 2009 are not for cancellation of title; that the lower court in Kilifi has jurisdiction to entertain the claim and that it is not for the applicants, who are Defendants in SRMCC No. 211 of 2009 to move this court for the transfer of SRMCC No. 211 of 2009 to the High Court.
7. The Respondent further deponed that the Applicants made a similar Application for stay of proceedings before the court in Kilifi, which Application was dismissed with costs and that the Applicant should have lodged an appeal against the Ruling of the court instead of filing a similar application in this court and finally that he has already testified and closed his case in SRMCC No. 11 of 2009.
8. The learned counsels for the Plaintiffs and the Respondent filed their written submissions which I have considered.

### **Analysis and findings**

9. The Plaintiffs commenced this suit (HCCC No. 135 of 2011 (O.S) by way of an Originating Summons on 18<sup>th</sup> August 2011. In the suit, the Plaintiff is seeking for an order of cancellation of the title in respect to Kilifi/Mtondia 115 which is currently registered in favour of the Defendant. The Plaintiffs' main ground for an order of cancellation of the title is that they are the beneficial owners of the suit property.
10. The other ground that the Originating Summons is premised on is that the Plaintiffs have been in occupation of the suit property for over 25 years and that the Defendant fraudulently obtained the title in respect to the suit property.
11. The Defendant has objected to the Originating Summons by filing a Replying Affidavit sworn on 13<sup>th</sup> December 2011.
12. The Defendant in this matter sued the Plaintiffs herein in Kilifi SRMCC No. 211 of 2009. In the Plaintiff, the Defendant has alleged that the Plaintiffs wrongfully entered and took possession of the suit property and have remained in possession thereof.
13. The Plaintiff in Kilifi SRMCC No. 211 of 2009 is praying for a declaration that he is the rightful owner of the suit property and for a permanent injunction as against the Defendants.
14. The Defendants (the Plaintiffs herein) filed their joint defence in Kilifi SRMCC No. 211 of 2009 in which they alleged that they have been in the suit premises since 1960 to date and that the 1<sup>st</sup> Defendant's father, Kalume Kecheru, was allocated the suit property by the Settlement Fund Trustees as the first allottee.
15. The perusal of the Originating Summons before me and the Replying Affidavit together with the Plaintiff and Defence in Kilifi SRMCC No. 211 of 2009 clearly shows that the cause of action in this suit is the same. Indeed, the Plaintiffs in the two suits are both claiming for a declaratory order that they are the owners of the suit property. That is the finding that the lower court and this court must make. In the circumstances, the two suits cannot proceed simultaneously. The two

suits cannot be consolidated because they are not in the same court.

16. The suit in the lower court was filed in the year 2009 while the Originating Summons was filed in this court in the year 2011.
17. The suit property, Kilifi/Mtondia/116 is registered under the repealed Registered Land Act, Cap 300. Under the said Act, the subordinate courts have jurisdiction to deal with any dispute in which the value of the land does not exceed 300,000.00. I have perused the Plaint and the Defence in Kilifi SRMCC NO. 211 of 2009 and noted that the pleadings do not indicate the value of the suit property. However, the Defendants have averred in their defence that the lower court does not have jurisdiction to deal with the dispute.
18. Having raised the issue of jurisdiction in their defence, and considering that the Plaintiff has testified and closed his case in the lower court, it is my view that the Defendants should proceed with their case and prove on the required standard that they are the beneficial owners of the suit property and that in any event, the lower court does not have jurisdiction. They can only come to this court on appeal once the subordinate court makes a determination of those issues in SRMCC No. 211 of 2009. The stay of the proceedings in SRMCC No. 211 of 2009, in which the Plaintiff has already testified and closed his case is prejudicial to the said party and is an abuse of the court process.
19. The Plaintiff herein filed an Application similar to the current Application in SRMCC No. 211 of 2009 which was dismissed by the trial magistrate on 10<sup>th</sup> April 2013. The Plaintiff should have appealed against the Ruling of the learned Magistrate instead of filing a similar Application in this court.
20. In the circumstances, and for the reasons I have given above, I find that the Plaintiff's Application dated 20<sup>th</sup> June 2013 is unmeritorious and I dismiss it with costs.

Dated and delivered in Malindi this **19<sup>th</sup>** day of **December**, 2013

**O. A. Angote**

**Judge**



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