



**Malika & another v Bidii International Company Ltd & another  
(Petition 5 of 2018) [2023] KEHC 21394 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21394 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA**

**PETITION 5 OF 2018**

**DK KEMEL, J**

**JULY 28, 2023**

**IN THE MATTER OF THE COMPANIES ACT CAP 486 LAWS  
OF KENYA**

**IN THE MATTER OF THE COOMPANIES ACT CAP 486  
LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE PROVISIONS OF SECTION 211  
OF THE COMPANIES ACT CAP 486 LAWS OF KENYA**

**BETWEEN**

**CATHERINE AYUMA MALIKA ..... 1<sup>ST</sup> PETITIONER**

**HEZEKIAH FRANCIS MALIKA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**BIDII INTERNATIONAL COMPANY LTD ..... 1<sup>ST</sup> RESPONDENT**

**MILE HIGH ENTERPRISES LTD ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Before me is a notice of motion application dated February 20, 2023 and filed on even date by the Petitioners herein respectively, seeking an order consolidating this matter with Petition No. E016 of 2022 Bungoma High Court and thereafter this court do give directions stipulating Petition No. E016 of 2022 be the main Petition whilst Petition No. 5 of 2018 be deemed as a cross Petition and finally, that the costs of this application be in the cause.



2. The application is supported by the affidavit of Otinga Ochume Patrick sworn on even date as well as grounds on the face thereof. The applicant's gravamen is inter alia; that the main petition in Petition No. 5 of 2018 was withdrawn and what remained for hearing is a cross petition; that a fresh petition being Bungoma High Court Petition No. E016 of 2022 has been filed and served upon the Respondents; that all the two Petitions before this Court involve the same subject matter, raise similar issues of law, involves the same parties and arise from the same set of facts; that consolidating the two petitions will save time and justice will be dispensed with expeditiously; that the consolidation will ensure that the decision reached will be a single one thereby avoiding a possibility of two decisions on same subject matter which will be an embarrassment to the judicial system.
3. The application was opposed by the respondents through a replying affidavit dated March 20, 2023, by Mr. Kennedy Mukhwana Ambundo, Director and Chairman of both the Respondents, wherein he deponed inter alia; that the application is an afterthought, an abuse of the Court process, unmeritorious and that the same ought to be dismissed; that the respondents have not been served with the contentious Court Petition No. E016 of 2022 to enable them instruct their Counsels to respond thereto; that both the Petitions are before different High Courts in Bungoma where directions on their respective disposal are yet to be issued and that the petitioners/applicants have not furnished this Honourable Court with good reasons to warrant the consolidation of the two Petitions; that once served with the Petition No. E016 of 2022, the Respondents intend to file a Notice of Preliminary Objection as the suit is sub judice; that this instant application is made with the sole intention to further delay the matter and is an act of malice on the part of the petitioners who had participated in Petition No. 5 of 2018 and had withdrawn their petition leaving the respondents cross petition to be heard; that the attempt at consolidation is akin to asking the court to validate the abuse of its process.
4. In response, the Petitioners filed a further affidavit dated March 28, 2023 sworn by Otinga Ochume Patrick. In a nutshell, he averred that the application is meritorious and well anchored in our legal process, and that the Respondents were duly served with the pleadings in the Bungoma High Court Petition No. 16 of 2022 through the emails of its directors to be precise, Kennedy Mukhwana Ambundo. Counsel proceed to attach a copy of the affidavit of Service to that effect. He further deponed that the petitioners, upon withdrawing their petition, were at liberty to file a fresh one especially when the cross petition had not been heard.
5. The parties were directed to file their written submissions which they have complied. I have given due consideration to the application, rival affidavits and submissions. Basically, they are pulling on their respective corners and all that they state is reiterating what is contained in the various affidavits outlined above.
6. The primary objective 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. In the matter at hand, this Court would have to be satisfied that the Petitions sought to be consolidated turn upon the same or similar issues. In addition, this Court must be satisfied that no injustice would be rendered to the Respondents if consolidation is ordered as prayed.
7. In the case of *Republic v Paul Kihara Kariuki ex parte Law Society of Kenya* [2020] eKLR where the court set into detail the consideration when it comes to consolidation, in the following manner: -

“ 11. The principles of consolidation of suits are settled. They were best explained in *Stumberg and another v Potgieter* [1] 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.”

12. The Supreme Court Case of India in *Prem Lala Nahata & v Chandi Prasad Sikaria* [2] had this to say: -

“...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”

13. In *Law Society of Kenya v The Centre for Human Rights and Democracy*, [3] 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.” (Emphasis added)

14. From the above jurisprudence, a broad principle emerges relating to consolidation of suits. That is, where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered. However, it is succinct position of law that precedential verdicts are to be followed where the facts of the case are almost identical in nature or the question of law involved is identical.

15. The plea to consolidate the cases was raised in response to the courts invitation to the parties to address the existence of an identical suit filed by the Law Society of Kenya, Nairobi branch based on the same set of facts seeking similar orders as sought in this case. As the Supreme Court observed in the above cited case, 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. If the instant cases are examined in the light of the above settled legal propositions, then it becomes clear that the plea for consolidation cannot stand judicial scrutiny in this case. The issues at hand are crystal clear, namely, whether this suit offends the question of sub judice and whether it is an abuse of court process. If the answers are in the affirmative, then consolidation would be impermissible because its application was never meant to cure or cover the doctrine of sub judice or abuse of 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 sub judice rule as opposed to serving the settled principles of consolidation laid down in the above authorities.”

8. From this clear principle of the law, this court is now called upon to examine the cases filed by the parties and which are before this Court, to find out whether they fall within the scope as stated herein above.
9. In Petition No. E016 of 2022 which was filed at the High Court Civil Registry at Bungoma, the Petitioners are seeking: an order for the cancellation of all transactions and decisions leading to the transfer of the 1<sup>st</sup> Respondent’s assets known as Bungoma/Kiminini/1942 to the 2<sup>nd</sup> respondent; A declaration that the Petitioners share worth in the asset Bungoma/Kiminini/1942 at the time of acquisition to the tune of USD 10,000 or an equivalent of two acres and that the same be valued as such and be paid into them together with the accrued appreciation in the value of the asset and costs of the suit. In Petition No. 5 of 2018, the petitioners seek for three reliefs namely; an order for the cancellation of all the transactions and decisions leading to the transfer of the 1<sup>st</sup> Respondent’s assets known as Bungoma/Kiminini/1942 to the 2<sup>nd</sup> Respondent; an order for the valuation of the Petitioners share worth in the 1<sup>st</sup> Respondent’s assets and thereafter the Petitioners be paid off or that such other order may be made in the premises shall be just; costs of the suit. Looking at the two petitions, it is thus clear that the claim and the parties are similar in all respects in both suits.
10. In the Petition No. 5 of 2018 which was filed at the High Court Civil Registry at Bungoma, the Respondents are seeking orders inter alia: the dismissal of the Petitioners suit with costs; an order compelling the Petitioners to surrender property belonging to the 1<sup>st</sup> Respondent in their possession, in particular, the title deed and land purchase agreement in respect to LR. Bungoma/Kiminini/1942, minute books, financial records (both in hard and soft copy) and cheque books; render accounts for queries raised in the audit report, in default a refund of USD 8, 202/=; costs of the counter claim and interest.
11. It is noted that the Respondents are yet to file a response to the new suit filed by the petitioners namely Petition No. E016 of 2022. There has been a disagreement regarding service of the said pleadings upon the respondents with the petitioners claiming that they effected service while the Respondents deny the same. Obviously, their rival sentiments will have to be captured in Petition E016 of 2022 once the parties appear before the court for directions.
12. As noted from the foregoing authorities, the two petitions are suitable for consolidation. However, the record herein indicates that the matter in Petition No. 5 of 2018 had proceeded substantially on 16/11/2022 wherein this court expunged the petitioners list of witnesses and documents which then compelled the Petitioners to withdraw their Petition dated 15/3/2018 thereby paving way for the respondents’ cross petition for hearing as there was then no petition in existence. Indeed, the respondents cross petition proceeded partly and it was rescheduled to 25/1/2023 after the petitioners claimed that they had not been served with the respondents list of documents. Come the 25/1/2023, the petitioners indicated that they had filed a new Petition No, E016 of 2022. This then necessitated the matter to be taken out of the hearing cause list for the day. The petitioners subsequently filed the present application seeking for consolidation of the two suits.
13. It is instructive that at the time the petitioners filed the latest Petition No. 16 of 2022, they were fully aware of the existence of Petition No. 5 of 2018 which had been partly heard and that it was to come for the further hearing of the Respondents cross petition and were further aware of the circumstances which led to the withdrawal of their claim in the petition. It is thus clear that the Petitioners conduct in filing a fresh petition seeking similar reliefs as in Petition 5 of 2018 is out to countermand the orders of this court made on 16/11/2022 and thereby resuscitate their petition that they had withdrawn under



the back door. Indeed, this court had expunged the petitioners witness statement and list of documents which forced them to withdraw their petition. The order of this court has not been vacated and hence it is still in force in that the status quo currently obtaining is the prosecution of the Respondent's cross petition. The opportunity to present the petitioners case in Petition No. 5 of 2018 was lost when the petitioners withdrew their petition and are now barred by the doctrine of sub judice to bring in a new suit seeking similar reliefs. In proper circumstances, the first suit should be decided first so that the decision becomes binding on the issues which need not be raised again. This would then prevent duplication of evidence and avoid the courts giving conflicting decisions on the same subject matter.

14. Due to the circumstances leading to the withdrawal of the petition by the petitioners, I find that the consolidation sought by the petitioners must be declined because of the operation of the sub judice rule. Consolidating the matters will greatly prejudice the Respondents and give the Petitioners another bite at the cherry even after they had been denied a chance to present their documents during the hearing of the matter on 16/11/2022. As long as the orders of 16/11/2022 are still in force and have not been vacated or set aside, i find that Petition 5 of 2018 is still the suit currently being heard and that the new Petition No. 16 of 2022 is sub judice. The Petitioners must wait for Petition No.5 of 2018 to be concluded first before embarking on the new petition. The petitioners should not be permitted to use the consolidation as a means of solving the debacle they had faced on 16/11/2022 wherein they were compelled to withdraw their petition. Iam guided by the Supreme Court decision in the case of *Law Society of Kenya v, The Centre for Human Rights and Democracy (Supra)* when it held as follows:
- “ 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.”

It is obvious that the Petitioners are out to beat the orders made by this court on the 16/11/2022 and hence I find the present application is but an abuse of the court process as the same is meant to steal the thunder from under the respondents with a view to coming back through the back door and to prosecute their petition as if the same had not been withdrawn and that the issue of compliance with Order 11 of the *Civil Procedure Act* had not been dealt with by this court. The petitioners should not be allowed to leave in the middle of the hearing in Petition No. 5 of 2018 and go and institute a fresh Petition (No. 16 of 2022) raising the same issues the court is already seized of. They cannot have their cake and eat it as it were as the respondents are likely to suffer prejudice in the process.

15. In view of the foregoing observations, it is my finding that the petitioners application dated 20/2/2023 lacks merit. The same is dismissed with costs to the respondents.
- 16 Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 28TH DAY OF JULY 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of:**

**Otinga for Petitioners**

**Makota for Respondents**

**Kizito Court Assistant**

