



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

COMMERCIAL CASE NO. 81 OF 2018

ABSALOM PETER O. AYANY.....PLAINTIFF

VERSUS

AFRICAN BANKING CORPORATION LTD.....1ST DEFENDANT

LANDSCAN ASSOCIATES CO. LTD.....2ND DEFENDANT

ATTORNEY GENERAL (on behalf of the Kisumu County Registrar and Kisumu County Survey,

Ministry of Lands, Housing and Urban Development).....3RD DEFENDANT

RULING

The 1st and 2nd Defendants filed the application dated 2nd April 2019, seeking the withdrawal and consolidation of this suit, (being **ABSALOM PETER O. AYANY Vs AFRICAN BANKING CORPORATION LIMITED & 2 OTHERS, ELC NO. 53 OF 2018**) with the case of **AFRICAN BANKING CORPORATION LIMITED Vs ABSALOM P. O. AYANY, ELC NO. 7 OF 2018 (O.S)**.

1. At this early stage it is important to take note of the fact that although the 2 cases in issue are both cited as cases which are before the **Environment & Land Court**, the reason why the application herein is before the High Court is that on 23rd September 2019, Ombwayo J. transferred the cases to the High Court.
2. On 2nd February 2021 Mr. Yogo, the learned Advocate for the Plaintiff, told this Court that his client was asking for the transfer of the case, to the Land Court.
3. However, learned counsel also pointed out that there was some confusion on the question concerning jurisdiction of the court which ought to hear and determine the case.
4. When canvassing the application the Applicants submitted that the suits ought to be consolidated because;
 - (i) *The 2 suits raise the same or common substantive issues of law and facts.*
 - (ii) *Consolidation would avoid the multiplicity of suits, and thus obviate the possibility of 2 courts arriving at inconsistent decisions.*
5. It is noted that the Applicants did not make any submissions on the issue concerning jurisdiction.
6. However, in answering the application, the Plaintiff submitted that the Court ought to first determine the question about jurisdiction, before it can delve into the question about whether or not the 2 cases should be consolidated.
7. Whether or not it would have been prudent for the Court to first determine the issue of jurisdiction before giving consideration to the question about the proposed consolidation of the 2 cases, is not a matter that falls for determination in the application that is before me currently.
8. Meanwhile, as pointed out by the Plaintiff, on 4th October 2018 Cherere J. ordered that the case which had initially been lodged at the

High Court, be transferred to the **Environment & Land Court**. The said Order was made after all the parties expressed concurrence, that the predominant issue in the case was Land.

9. However, on 23rd September 2019, Ombwayo J. ordered that the case be transferred back to the High Court.
10. In order to avoid the possibility of any further transfers of the case between the High Court and the Environment & Land Court, I direct that if any of the parties had concerns about the jurisdiction of the High Court to hear the case, such party should bring an appropriate substantive application before the Court.
11. As regards the quest for consolidation, the plaintiff submitted that jurisdictional issues made it inappropriate to consolidate the suits.
12. But the Plaintiff conceded that the 2 cases originate from the same facts.
13. Nonetheless, the Plaintiff considers the issues arising from the said 2 cases as being diametrically different.
14. I have given due consideration to the application. I note that the subject matter of both suits is **L.R. NO. KISUMU/KASULE/4642**.
15. The said property was charged by the Plaintiff, in favour of the **AFRICAN BANKING CORPORATION LIMITED**, as security for financial facilities which the bank accorded to the Plaintiff.
16. In **ELC NO. 7 OF 2018**, the bank sought orders directed at the Plaintiff, seeking to have him compelled to deliver vacant possession to the bank, so as to facilitate the exercise of the bank's statutory powers of sale.
17. Meanwhile, Absalom Ayany, has asserted that the bank had colluded with the other 2 Defendants in **ELC NO. 53 OF 2018**, to alter the Registry Map so that the physical position of **L.R. NO. 4642** was moved to the position of **L.R. NO. KISUMU/KASULE/4590**.
18. The effect of the alleged movement of the physical location of parcel No. **4642** was that parcel No. **4590** ceased to exist altogether, on the map.
19. As the two parcels of land belonged to the Plaintiff, Absalom Ayany, it was his case that the actions of the Defendants had dispossessed him of parcel No. **4590**.
20. Although the land which the Plaintiff had offered as security is parcel No. **4642**, the bank was now in the process of taking steps to sell-off parcel No. **4590**.
21. To my mind, if the bank was allowed to get vacant possession of parcel No. **4642**, before the correct physical location of that property was verified, there was a real possibility that the bank might end up selling the wrong property.
22. In his submissions, Absalom Ayany has said;

“We intend to have the matter for vacant possession stayed until the correct parcel of land is determined by having the RIM Map corrected, to avoid hardship and injustice being meted to the Respondent.”
23. To my mind, that constitutes a concession by Absalom, that the issues in the two cases are so intertwined that the determination of the physical location of the parcel No. **4642** must be verified before the bank can know that they were taking possession of the correct property, that had been given to them as security.
24. If the two cases were handled by different courts, and if the matters proceeded simultaneously, there is a possibility of the courts granting orders which were inconsistent.
25. Secondly, it is prudent that the issue about vacant possession of parcel No. **4642** be dealt with after the court had determined whether or not its physical location had been altered.
26. And once the issue concerning the said physical location had been determined, the 2nd and 3rd Defendants would have nothing more to do, as the issue concerning vacant possession and also the exercise of the bank's statutory powers of law are limited between Absalom and the bank.
27. Consolidation of the two suits would tie up the 2nd and 3rd Defendants to the suit even when they had nothing more to do with the case, after the physical location of parcel No. **4642** was ascertained.
28. Therefore, I find that although there are some matters of fact that were similar in the 2 cases, there were also other matters of fact as well as issues of law that were not common to the said cases.
29. And whereas the consolidation of the cases was unlikely to confer any undue advantage to one party, against the other parties, I also find that two of the parties would be prejudiced if they had to remain as parties to the case, after the determination of the one issue which was common to all the parties.

30. Neither the bank nor the chargor (Absalom) would require the presence of **LANSKAN ASSOCIATES COMPANY LIMITED** or **THE ATTORNEY GENERAL**, to be parties to the case when the issue pertaining to the bank's statutory powers of sale was being determined.

31. I therefore decline to order the consolidation of the 2 cases. But as already alluded to earlier in this Ruling, it would be prudent to proceed with **COMMERCIAL CASE NO. 81 OF 2018** first, whilst the other case was put on hold.

32. As the application, although unsuccessful, has led to the issuance of directions on how best to proceed with the 2 cases, I order each party to bear his own costs of the said application.

DA0TED, SIGNED and DELIVERED at KISUMU

This 27th day of **July** 2021

FRED A. OCHIENG

JUDGE