



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 563 OF 2015**

**PAUL S. LOORKIPONY.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**NAPOLEON W. MURENDE.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**MOLYN CREDIT LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**REGENT AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to a Notice of Motion Application dated 19<sup>th</sup> June, 2017, brought under the provisions of Section 1A, 1B and 3A of the Civil Procedure Act, (Cap 21) Laws of Kenya and Order 51 Rule 1 and 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of the Law. The Application is supported by the grounds on the face of it and the Supporting Affidavit dated 19<sup>th</sup> June, 2017 sworn by Mutundu W. Chege.

2. The Applicant is seeking for orders that;-

*(i) That the Honourable Court be pleased to transfer this suit from this Honourable Court to Kajiado Law Courts to hear and determine the suit;*

*(ii) That the costs of this Application be provided for.*

3. The Applicant avers that the Plaintiffs herein, filed this suit and an Application seeking for orders that the Defendants be restrained from auctioning all that piece of land known as *L.R. No. KAJIADO/KISAJU/10733* herein (“the suit property”) situate in Kajiado County. The Application was heard and dismissed by Hon. Justice Ogola on 8<sup>th</sup> July 2016, but the main suit is yet to be heard and determined.

4. Subsequently, the wife to the 1<sup>st</sup> Plaintiff has filed a suit together with an Application under a Certificate of urgency vide, *ELC No. 212 of 2017*, at Kajiado Law Courts, seeking for orders that the 1<sup>st</sup> Plaintiff be restrained from selling the suit property, for reasons that she never gave spousal consent for the property to be used as a security for money advanced by Molyln Credit Limited.

5. Further that the suit property is situate in Kajiado County and therefore this suit falls under the jurisdiction of Kajiado Law Courts, where it should be heard and determined, and given there is another suit *ELC No. 212 of 2017*, it is in the interest of justice that this suit be transferred to Kajiado Law Courts, to enable the Court make a just and fair decision and to avoid duplicity of orders involving the same suit property.

6. However, the Application was opposed, based on the Replying Affidavit dated 17<sup>th</sup> July, 2017, sworn by Napoleon Wakukha Murende, the 2<sup>nd</sup> Plaintiff/Respondent, deposed that the subject matter of this suit is a commercial facility and the subject land is only a collateral security to the subject lending. As such, the issues before the Court for determination are primarily of commercial nature and which this Court has jurisdiction to deal with.

7. That the Honourable Court has already granted orders in respect of this matter which have been disobeyed by the Applicant and therefore there are issues still pending in this Court. The Applicant having disobeyed the Court orders has no audience to seek for the prayers herein. He must first purge the contempt. That the Applicant intends to remove the matter from this Honourable Court to hide illegality of the purported sale by way of public auction. It is therefore in the interest of justice that this Honourable Court deals with the matter.

8. That the matter at Kajiado Environment and Land Court, Division dealing with issues related land use, as regards to, the environment, the use, or the occupation of and title to the suit property but the suit herein is not related to the same so as to warrant the transfer of the matter to the Environment and Land Court. The financial facility was offered within the jurisdiction of this Honourable Court and both Parties are situated in Nairobi and therefore this suit should be heard in this Court.

9. The 2<sup>nd</sup> Plaintiff/Respondent argued that this matter was filed in 2015 and there is no justification why the same should be transferred when the Court has already ordered that the same be set down for hearing. The Application is therefore intended to delay the hearing of the suit and amounts to abuse of the Court process and the same should be dismissed with costs.

10. The Parties agreed to dispose of the Application by filing written submissions. The Applicant invited the Court to compare the Plaintiff in this matter and the Plaintiff in *ELC No. 212 of 2017*, annexed to the Supporting Affidavit and marked as “annexture MWC02”. It was submitted that the Plaintiffs’ claim is primarily based on the “Charge” and the right to exercise the statutory power of sale under the said Charge as provided for in the Land Act. The claim is resisted on the grounds that the legality of the charge is challenged, there is lack of the charge document, the notice to sell the suit property is challenged, and no valuation was done.

11. That the Plaintiffs in Kajiado ELC No. 212 of 2017, on the other hand, challenges the validity of the Charge on the basis that the Charge was executed in secrecy as she did not give spousal consent to the charging of the suit property and that the signature on the spousal consent are forged. These allegations have been made against 1<sup>st</sup> Plaintiff herein who is her husband and that it is important to note that the Plaintiffs herein have failed to enter appearance in the Kajiado suit and therefore the Court is not in a position to clearly ascertain the allegations made therein considering that, the 1<sup>st</sup> Plaintiff herein and Plaintiff in Kajiado suit are husband and wife, who obviously are aware of the two suits. This suit should therefore be transferred to Kajiado Law Courts to be heard together with *ELC No. 212 of 2017*.

12. The Applicant relied on the case of; *Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others (2014) eKLR*, where, the Court adopted the principles of consolidation of suits as re-stated in *Stumberg & Another vs Potgeiter 1970 E.A. 323*. Further reliance was placed on the case of; *Umeed Ali Erhaj & Another vs Kwik Fit Tyres & Auto Care Limited (2011) eKLR*, where the Court addressed the issue of consolidation of suits and noted that where there is no prejudice on any party, the suits should be consolidated.

13. Further, the case of; *Hangzhou Agrochemical Industries Ltd vs Panda Flowers Limited (2012) eKLR*, was relied on where Hon. Odunga J, explained the Court’s power to transfer a suit and gave the circumstances under which a suit can be heard in a different place. These factors include, the motive, character of proceedings, nature of reliefs sought, interest of litigants, administration of justice, expense and balance of convenience.

14. The Applicant invited the Court to take judicial notice of the fact that the Applicant is involved in the two matters relating to the same subject matter in different jurisdictions and incurs the cost of coming to the Court, travelling to Kajiado which costs it should not bear.

15. The Respondent however, submitted that, the subject matter, the Parties and issues in both cases are not the same. The Environment and Land Court Matter as per the documents annexed by the Application is purely a land matter. That Article 162(2)(b) of the Constitution of Kenya, 2010 and Section 13(2) of the Environment and Land Court Act provides that, that Court shall hear and determine disputes;-

(a) *Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

(b) *Relating to compulsory acquisition of land;*

(c) *Relating to land administration and management;*

(d) *Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

(e) *Any other dispute relating to environment and land*

16. The Respondent submitted that the subject matter in this suit is primarily the contract between the Plaintiffs and the 1<sup>st</sup> Defendant. The land, is secondary and a collateral security. Thus the dispute is more of a commercial in nature than being land oriented. For suits to be consolidated, they must raise a common question of law and fact which is not the case herein. The dispute as regards charges and mortgages where title to land is used as security fall under commercial transactions and not disputes exclusive for determination by the Environment and Land Court Division. Where a pure contractual issue is to be determined, the High Court Commercial Division has exclusive jurisdiction as is the case herein.

17. Reference was made to the case of; *County Council of Nakuru vs Simon Ole Kaminta and 3 Others (2007) eKLR*, where the Court stated as follows;-

***“if the two are consolidated, it is obvious that it is not convenient for the determination of issues as one suit is challenging the ownership of the property while the other suit challenges the exercise of the power of the transfer. The suits are not also between the same Parties and consolidation would confuse the issues and further prolong the resolution of the matters in dispute.”***

18. The Respondent argued that the Plaintiff is likely to suffer prejudice if the application is allowed as the consolidation will not only confuse the issues but prolong the dispute. That both the Applicants and the Respondents and their advocates are situated in Nairobi and the contract was procured in Nairobi. The Plaintiffs will thus incur extra costs in having to travel to Kajiado. If the application was intended to save on costs, it will cause more costs to be incurred.

19. The case of; *Korean United Church of Kenya & 3 Others vs Seng Ha Sang (2014) eKLR*, was cited where the Court observed that;-

***“Consolidating of suits is done for purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of Civil disputes. The main purpose of consolidation of suits is to save costs, time and effort.”***

20. Similarly in the case of; *Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa (2004) eKLR*, was also cited where the Court held that;-

***“There was however situations where consolidation is undesirable....the other situation where consolidation is undesirable is where the Plaintiffs in two or more actions are represented by different advocates. In such a situation the hearing will be longer and the purpose of saving time will be defeated.”***

21. I have considered the submissions filed by the respective Parties and the issue that arises for consideration is; whether the Applicant has satisfied the Court that there is good and adequate reasons for this suit to be transferred as prayed. Basically, what I gather from the Affidavits in support of the Application is that, there is another suit namely *ELC No. 212 of 2017* filed by the 1<sup>st</sup> Plaintiff’s wife at Kajiado Law Courts, relating to the suit property herein. It is argued that the suit property falls under Kajiado Law Court’s jurisdiction and therefore the suit should be transferred.

22. However, before I venture into the issue raised, I wish to make observation as follows, that first and foremost, I note that, the Application herein is allegedly filed by the firm of; Muchoki Kangata Njenga & Company Advocates, “for the 1<sup>st</sup> Defendant/Applicant.” The 1<sup>st</sup> Defendant herein is Molyn Credit Limited. Surprisingly, at paragraph 4 of the Affidavit in support of this Application, the deponent states that, “the wife of the 1<sup>st</sup> Defendant, has filed a suit at Kajiado Law Courts being *ELC No. 212 of 2017*.” The question that arises is: Whether a Limited Liability Company is capable of having “a wife”. Secondly, I note that the Affidavit in support of this Application is sworn by Matundu W. Chege, who describes himself as “an Advocate of the High Court of Kenya”; practicing in the firm of Muchoki Kang’ata Njenga & Company Advocates, for the 1<sup>st</sup> Defendant/Applicant.” Does the deponent have the capacity and knowledge to depose to the matters stated in the Affidavit? Is he competent to depose to matters and/or issues, that there was no spousal consent for the suit property to be used as security; or even the facts informing the matter at Kajiado Environment and Land Court? In my considered opinion, the answer is in the negative.

23. Be that as it were, I note that the Supporting Affidavit alleges at paragraph 6 that;

***“there is another suit involving the same parties in ELC No. 212 of 2017, it is in the interest of justice that this suit be transferred to Kajiado Law Courts to enable the Court to make a just and fair decision and to avoid duplicity of orders involving the same suit property.”***

24. I have had the opportunity to consider the contents of the Plaint in relation to both matters and I note that, first and foremost, the Plaintiff one Vivian Naiponoi Kuya in Environment and Land Court *No. 212 of 2017, Kajiado*, is not a Party in this matter. This is contrary to the allegation in paragraph 6 of the Supporting Affidavit. To that extent the averments in that paragraph are not correct. She is neither a Plaintiff nor a Defendant or an Interested Party in this suit and on that point alone, the transfer of the suit may be defeated. That the Plaintiff Vivian Naiponoi Kuya has no locus standi to file this Application.

25. However, I note from the submissions of the Applicant that the Plaintiff in the Kajiado matter is a wife of the 1<sup>st</sup> Plaintiff in this matter. That the Plaintiffs herein have not entered appearance in that matter. It is therefore clear that these two suits have been filed by husband and wife in two different Courts. What then is the mischief?

26. Further, Article 162(2)(b) of the Constitution of Kenya and Section 13(2) of the Environment and Land Court Act, sets out the matters to be heard in the Environment and Land Court. By virtue of the fact that the matter at Kajiado is filed in the Environment and Land Court, then it follows that the matter at Kajiado is an Environment and Land matter.

27. The jurisdiction of the High Court is established under Article 165 of the Constitution of Kenya and can only hear matters outside the jurisdiction of the Environment and Land Court. Therefore, each Court has distinct jurisdiction. The matter herein can only be transferred to another High Court Division at Kajiado Law Courts.

28. All in all, I concur with the submissions by the Plaintiffs/Respondents that, the subject matter herein is purely contractual and therefore commercial in nature and this Court has the jurisdiction to hear and determine it. The Parties to the two suits are different and the issues raised too. The fact that, the suit property is situate in Kajiado is not sufficient reason for the transfer. More so, the address of both Parties herein is stated to be Nairobi, within the jurisdiction of this Court. Therefore the hearing of the matter in this Court will be less costly and more expeditious.

29. The upshot is that this Application lacks merit and I dismiss it with costs to the Respondents.

Dated, delivered and signed at Nairobi this 19<sup>th</sup> day of December 2017.

**G.L. NZIOKA**

**JUDGE**

**In the presence of:-**

Ms. Gathimbe for King'ara for the Plaintiffs/Respondents

No Appearance for the 1<sup>st</sup> Defendant/Applicant

No Appearance for the 2<sup>nd</sup> Defendant/Respondent

Teresia.....Court Assistant