



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 664 OF 2009

EUNICE NYAIRUNGU.....PLAINTIFF

VERSUS

LIBEY NJOKI MUNENE1ST DEFENDANT

JAMES CHEGE MUNENE..... 2ND DEFENDANT

EIGHTY FOUR INVESTMENTS LTD..... 3RD DEFENDANT

RULING

The Plaintiff/Applicant by a Notice of Motion dated 14th April 2011 brought under Order 11 Rule 3 (h) Order 54 Rule 2 of the Civil Procedure Rules and Sections 1A, 1B, 1C and 3A of the Civil Procedure Act seeks orders that:

1. This suit be consolidated with **HC ELC NO. 197 of 2010: Balwant Singh –vs- Libey Njoki Munene & 3 others** which is pending before this court, for hearing and final determination.
2. The costs of this application be provided.

The application is grounded on the grounds that:-

- i. Both suits touch on all that property described as **L.R. NO. 7575 (L.R. NO. 769912)** situated in Thika.
- ii. Both suits raise similar questions of law and fact.
- iii. Consolidation will help to deal with the matter expeditiously.

The application is further supported on the annexed affidavit of **Wanja G. Wambugu Advocate** for the plaintiff sworn on 14th April 2011 in which she reiterates the grounds set out above.

The 1st Defendant opposes the consolidation of the two suits and filed grounds of opposition dated 3rd May 2011 and inter alia states that the two suits in respect of which consolidation is sought are founded on separate causes of action and there is likely to prejudice if the suits are consolidated.

The 3rd defendant, Eighty Four Investments Ltd, through its director **Dr. James Njogu Kiarie** has sworn a replying affidavit dated 29th April 2011 in opposition to the application for consolidation. The 3rd Defendant avers that in the present suit the Plaintiff/Applicant alleges to be entitled to the suit land **L.R.NO.7699/2** as a purchaser pursuant to an agreement for sale dated 25th November 2004 or thereabouts and seeks the specific performance of the terms of that agreement to vest the said parcel of

land in the plaintiff. The 2nd Defendant in the present suit is the plaintiff in **HC ELC NO. 197 of 2010** where as such plaintiff he alleges to have been a co-owner of land parcel **L.R.NO.7699/2** with one **James Flavian Chege Munene (deceased)**.

In **HC ELC NO. 197 of 2010** the 1st Defendant herein filed a defence where they allege the 2nd Defendant (plaintiff in **HC ELC NO. 197 of 2010**) had executed a charge in favour of the deceased to secure a sum of **Kshs.518,000/-** together with interest thereon which he failed to pay whereupon the administrators of the deceased estate became entitled to exercise their statutory power of sale to realize the security. It is further averred in the defence that the administrators of the estate of the deceased exercised the power of sale conferred under the charge resulting in the sale of the property to the 4th Defendant, **Eighty Four Investments Limited** named in the present suit as the 4th Defendant.

The 3rd Defendant therefore contends the issues in the two suits are fundamentally different and cannot be conveniently tried together. In the present suit the issues relate to the performance of the alleged agreement of sale dated 24th November 2004 and whether there was breach on the part of the plaintiff which entitled the 1st Defendant to rescind the agreement as pleaded by the 1st defendant in their defence. In **ELC 197 of 2010** there is the issue whether the 2nd Defendant herein was a co-owner of the suit land with the deceased represented therein by the 1st to 3rd Defendants as administrators. Additionally there is the issue whether there was a charge in favour of the deceased which the 2nd Defendant failed to redeem or discharge so that the 2nd Defendant's interest in the suit property was sold in exercise of the charge's power of sale conferred under the charge.

The parties filed written submissions to canvass the application dated 14th April, 2011. The Applicants contention in the submissions filed on 14th April 2015 is that both suits raise similar issues which are not separable and that essentially the evidence and the witnesses in both cases will likely be the same and therefore it would be in the interest of justice if both cases are tried together. The applicant further argues the facts and legal issues that stand to be determined in both cases are similar and hence it would be efficient and expeditious if the two suits are tried together. To buttress her submission the applicant refers the court to the ruling by this court in the case of **Kenya Anti-corruption Commission –vs- Wilson Gachanja & 2 others (2014) eKLR** where the court in considering an application for consolidation referred to its own ruling in the case of **HC ELC NO. 223 of 2011** (unreported) where the court stated:-

“In my view the various actions in the separate suits touch and concern the same subject matter and although there are different plaintiffs and different defendants, the plaintiff in ELC NO. 347 of 2013 can be said to be common as they claim the parcels of land that even the other plaintiffs in the other suits claim and the issue to be determined is who of the various claimants is entitled to the suit land or portion of the suit land. I am satisfied that the issue for determination in the various suits is common and in my opinion it would be expedient and time saving to try all the 5 cases together to obviate the necessity of having conflicting decisions on the same subject matter being rendered by different courts which could lead to “Judicial Confusion”.

The 3rd Defendant in their submissions contend that the issues arising in the two suits are not similar notwithstanding the fact that the land the subject matter in the two suits is the same. The 3rd Defendant contended the issues, which the court has highlighted herein above are not common in both suits and hence there ought to be no consolidation of the two suits. The 3rd Defendant referred the court to the case of **RMG –VS- NG Interested Party SP Limited & MD Limited (2013) eKLR where Musyoka, J** while considering the application of the previous Order XI of the Civil Procedure Rules as relates to the consolidation of suits referred to the case of **Stumberg & another –vs- Potgieter (1970) EA 323** where the court stated the broad principle in regard to consolidation of suits thus:-

“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 matters should be disposed of at the same time, consolidation should be ordered”.

Honourable Maraga, J (as he then was) in the case of Nyati Security Guards & Services Ltd –vs- Municipal Council of Mombasa (2004) eKLR aptly captured what consolidation is all about when he stated:-

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action”.

The Honourable Judge went on to outline some of the situations where consolidation may be ordered and these include where there are two or more suits or matters pending in the same court where:-

1. Some common question of law or fact arises in both or all of them; or
2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. For some other reason it is desirable to make an order for consolidating them.

The judge further went on to state:-

“There are however situations where consolidation is undesirable like where in two actions a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counter-claim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different Advocates. In such situation the hearing will longer and the purpose of saving time will be defeated”.

Applying the principle upon which consolidation may be ordered to the facts and circumstances of the two suits sought to be consolidated I am not persuaded consolidation would be feasible. The issues and the applicable law in respect of the issues in the two suits are different. The facts are not common and neither does any common questions of law arise in the two suits. The facts giving rise to the rights or reliefs claimed by the respective parties do not arise out of the same transaction and/or series of transactions common to all the parties. A plaintiff in one of the suits is a defendant in the other suit and his claim cannot be treated as a counterclaim in the other suit. I hold that the issues in each of the suits are separate and distinct and the same cannot be conveniently tried in one suit. To do so would be to introduce a measure of confusion which would prejudice a fair trial of the suits. In one of the suits the plaintiff is claiming co-ownership while in the other suit a different plaintiff is claiming to be a purchaser not from the person claiming co-ownership but from another party. Clearly the two suits raise separate and distinct issues and separate causes of action which in my view are not at all related.

In the premises I decline to order consolidation of the suits and plaintiff Applicants application dated 11th April 2015 is hereby dismissed. I direct that the costs of the application shall be in the cause.

Ruling dated, signed and delivered this.....28th.....day of.....August.....2015.

J. M. MUTUNGI

JUDGE

In the presence of:

.....For the Plaintiff

..... For the Defendants