



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. NO. 900 OF 2012**

**THE KOREAN UNITED CHURCH OF KENYA.....1<sup>ST</sup> PLAINTIFF**

**REV. JONATHAN KANG.....2<sup>ND</sup> PLAINTIFF**

**SAN HO KIM.....3<sup>RD</sup> PLAINTIFF**

**GEE YEON KIM.....4<sup>TH</sup> PLAINTIFF**

**VERSUS**

**SEUNG HO SONG..... DEFENDANT**

**RULING**

Coming up before me for determination are two applications, the Plaintiffs/Applicants Notice of Motion dated 27<sup>th</sup> November 2012 and the Defendant's Notice of Motion dated 22<sup>nd</sup> July 2013. I will address the Plaintiffs/Applicants application first before addressing that of the Defendant.

In their Notice of Motion dated 27<sup>th</sup> November 2012, the Plaintiffs/Applicants seek for orders of temporary injunction to be issued to restrain the Defendant from trespassing and entering into the 1<sup>st</sup> Plaintiff's parcel of land known as Land Reference 2/698 Oloitokitok Road, Kilimani, Nairobi (hereinafter referred to as the "Suit Property") which shares a common boundary with the Defendant's Land Reference No. 2/697 pending the hearing and determination of this Application and suit. The Plaintiffs/Applicants also seek an order of mandatory injunction to compel the Defendant to remove the illegal gate he has constructed along the permanent common boundary fence between the Suit Property and the Defendant's Land Reference No. 2/697. The Plaintiffs/Applicants also seek that the Officer Commanding Kileleshwa Police Station to assist in the enforcement of the order and they seek that the costs of this Application be borne by the Defendant.

That Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 2<sup>nd</sup> Plaintiff, Reverend Jonathan Kang, sworn on 27<sup>th</sup> November 2012 in which he

averred that the 1<sup>st</sup> Plaintiff is a registered society under the Societies Act and is the registered proprietor of the Suit Property. He also stated that he together with the 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were the Chairman, Secretary and Treasurer of the 1<sup>st</sup> Plaintiff. He also stated that the Defendant is the registered proprietor of Land Reference No. 2/697 which is adjacent to and shares a common boundary with the Suit Property. He further stated that the two parcels of land were originally one parcel of land known as Land Reference Number 2/250 before subdivision into two subplots. He disclosed that the 1<sup>st</sup> Plaintiff and the Defendant jointly purchased Land Reference No. 2/250 in the year 2002 and the same was registered in the name of the Plaintiff as trustee for both the 1<sup>st</sup> Plaintiff and the Defendant before subsequently subdividing it into the Suit Property and L.R. No. 2/697. He further stated that immediately after the subdivision, the 1<sup>st</sup> Plaintiff and the Defendant contributed to and erected a permanent fence/wall marking the common boundary between their respective plots. He further intimated that the 1<sup>st</sup> Plaintiff applied for and obtain a development plan for the Suit Property approved by the then City Council of Nairobi and thereafter constructed a church hall, a Sunday school minor hall and a parking lot on the Suit Property. He also stated that the Defendant also developed his parcel of land L.R. No. 2/697 by putting up a building from which he operates a garage and a restaurant. He further stated that he had subsequently filed several suits against inter alia the Defendant for various transgressions, one of which was trespass into the Suit Property to build an illegal sewage connection for the Defendant. Another transgression he highlighted was that the Defendant unlawfully interfered with the common boundary between the Suit Property and L.R. No. 2/697 by demolishing a portion of the perimeter wall forming the boundary between the two plots, trespassing onto the Suit Property and building a gate, thereby exposing the 1<sup>st</sup> Plaintiff's worshippers to eminent security risk. He further disclosed that on 22<sup>nd</sup> November 2012, the Defendant in the company of 20 youths carrying crude weapons entered the Suit Property, dropped building materials and attempted to start digging trenches and were only stopped when he called the police.

The Application is contested. The Defendant, Seung Ho Song, filed his Replying Affidavit sworn on 15<sup>th</sup> November 2013 in which he made averments similar to those he made in his Supporting Affidavit sworn on 22<sup>nd</sup> July 2013 in support of his Notice of Motion of even date set out below.

In response thereto, the 2<sup>nd</sup> Plaintiff filed his Supplementary Affidavit sworn on 30<sup>th</sup> December 2013 which sets out the same averments as are set out below. He agreed that there are two conveyances for the two plots duly registered by the Commissioner of Lands with distinct titles and the act of the Defendant to enter into the Suit Property is an act of trespass as it abuses the sanctity of title as provided for in the Constitution.

In his Notice of Motion dated 22<sup>nd</sup> July 2013, the Defendant sought for the following orders:

1. Spent
2. Spent
3. That CMCC No. 3662 of 2012 and CMCC No. 3136 of 2012 be transferred to the High Court for hearing and determination.
4. That ELC No. 536 of 2012, CMCC No. 3662 of 2012 and CMCC No. 3136 of 2012 be consolidated with the suit herein for hearing and disposal.
5. That in the interest of justice and in order to avert undue suffering by the Defendant and his family, the court do exercise its inherent jurisdiction to grant the Defendant permission to construct and or erect storm water and sewerage drainage within the 3 metre drainage way leave as approved by the Nairobi City Water & Sewerage Company and the Director of City Planning on 15<sup>th</sup> July 2013.
6. Any other order that the court may deem appropriate to grant in the circumstances.
7. Costs of this Application.

That Application was premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Defendant, Seung Ho Song, sworn on 22<sup>nd</sup> July 2013 wherein he averred that it is true that he and the 1<sup>st</sup> Plaintiff jointly purchased all that property known as Land Reference No. 2/250 which

was registered in the name of the 2<sup>nd</sup> Plaintiff as a trustee for both himself and the 1<sup>st</sup> Plaintiff. He stated that though the property was owned by the two of them, his portion/share/interest of the property was 60% while that of the 1<sup>st</sup> Plaintiff was 40%. He further stated that in the year 2002, they agreed to demarcate the property in order for each party to identify their portion and that whereas no formal professional subdivision was done, the 2<sup>nd</sup> Plaintiff erected a perimeter fence along the perceived boundary and each party developed their property. He further disclosed that he constructed a residential house and a garage while the 1<sup>st</sup> Plaintiff constructed a church hall. He further averred that when they engaged the relevant authorities for the formal subdivision of the property, they realized that in February 1997, the original owner had submitted a subdivision scheme to the Director of City Planning and Architecture with a proposal to subdivide it into six subplots which scheme and plan was approved subject to conditions inter alia that *“225mm diameter sewers to Nairobi City Council standards to be extended to serve all subplots. Plans to be submitted to the City Council for approval ... a 3 metre way leave to be provided as shown on the deposited plan and to be surrendered to the City Council free of cost”*. He further stated that since they intended to subdivide the property into two subplots and not six, they merged four subplots into one and two subplots into the second and submitted the amended version to the Director of City Planning who approved the same vide a letter dated 3<sup>rd</sup> December 2007. He further disclosed that on 20<sup>th</sup> January 2009, the Commissioner for Lands approved the surveyed subdivision of the plot into two subplots. He also stated that the Director of Survey approved the Survey Plan with subplot A (L.R No. 2/697) and Subplot B being the Suit Property. He further stated that when professional beacons were put in place, it was realized that part of the developments undertaken by the Plaintiffs fell on the way leave. He further stated that the 3 metre way leave was not surrendered to the Government free of charge as earlier required forcing him to construct a temporary septic tank to serve his property L.R. No. 2/697 which had no connection to the sewer. He admitted that a dispute arose between him and the 1<sup>st</sup> Plaintiff over the construction of the sewer and he therefore petitioned the then City Council of Nairobi, the Nairobi Water and Sewerage Company Ltd and the Lands Department to resolve the issue. He then stated that on 15<sup>th</sup> January 2013, the City Council of Nairobi wrote to the Commissioner of Lands stating that one of the approval conditions for the subdivision, which was that a 3 metre drainage way leave be provided and surrendered to the Nairobi City Council, was not fully implemented. Further he stated that the Nairobi City Council wrote to the Plaintiffs on 20<sup>th</sup> February 2013 informing them that their building plan was disapproved after it was established that during the time of approval they did not disclose the existence of a sewer way leave on which their development encroaches. He further stated that on 21<sup>st</sup> May 2013, the National Land Commission wrote to the Director of Surveys directing him to amend the Survey Plan to provide for the 3 metre way leave. He also stated that on 18<sup>th</sup> July 2013, the Director of Survey duly amended the Survey Map by providing for the 3 metre way leave. He then stated that he subsequently applied to the Nairobi City Water and Sewerage Company Ltd for sewer connection in view of the amendments to the Survey Map which approval was given on 15<sup>th</sup> July 2013. He further stated that in the said approval, he was given 6 months to construct the sewer line. He further disclosed that he preferred to resolve the issue in court because the Plaintiff had since filed a total of 4 cases against him and he feared that if he were to start construction of the sewer lines, either a fresh suit would be filed against him or some application would be filed alleging contempt of court.

That Application was contested by the Plaintiffs who filed the Replying Affidavit of Jonathan Kang, the 2<sup>nd</sup> Plaintiff, sworn on 2<sup>nd</sup> December 2013 in which he averred that the conditional approval to subdivision issued by the then City Council of Nairobi dated 3<sup>rd</sup> December 1997 which contained a requirement that a 3 metre way leave be provided for did not apply to them as they purchased the property in 2002 which is 5 years later. He further contended that that letter of approval does not state that the way leave if any was to be constructed along the boundary of the two parcels on the side of the Suit Property. He further averred that the whole subdivision exercise was undertaken by the Defendant who forged some of the documents with the intention of stealing party of the Suit Property. He further contended that the main sewer for the two plots and other surrounding plots is at the boundary between the former L.R. No. 2/250 and 2/249 which runs through the lower party of the Suit Property and L.R. No. 2/697 and that both the 1<sup>st</sup> Plaintiff and the Defendant were supposed to construct their sewages from their respective plots to connect directly to the main sewer yet the Defendant has always insisted on constructing his sewage

through the Suit Property. He further intimated that the Defendant had induced everybody including the Director of City Planning, the Chairman of the National Land Commission to change all previously approved plans and nullify the title deeds issued by the Commissioner of Lands in an attempt to fraudulently excise the Suit Property in his favour and further stated that he needed the court's intervention to protect the church from the aggression of the Defendant in his expansionist tendency and greed for land. He further averred that all the cases which he has filed have been filed in courts with competent jurisdiction and the Defendant has participated in all of them and filed defences without raising the question of jurisdiction.

In response thereto, the Defendant filed his Further Affidavit sworn on 16<sup>th</sup> December 2013 wherein he averred that the 2<sup>nd</sup> Plaintiff's allegations that his exhibits were a forgery are not true. He further averred that the 2<sup>nd</sup> Plaintiff is the one who was in charge of the subdivision exercise since the property was initially in his name and that he made all the relevant applications for purposes of subdivision. He further averred that the issue as to where the 3 metre way leave is situated and its approval has already been adjudicated by the Ministry of Lands, Survey of Kenya and the Nairobi City Council and a determination done and that none of those agencies were induced or influenced.

From the foregoing, the genesis of the relationship between the parties to this suit is quite clear. The parcel of land the subject matter of this suit is the Suit Property, currently owned by the 1<sup>st</sup> Plaintiff. It is common ground that the Suit Property was initially part of a larger parcel of land being L.R. No. 2/250 which was bought in the name of the 2<sup>nd</sup> Plaintiff before the same was subdivided into two unequal plots of land. This was the Suit Property and L.R. No. 2/697. At first, it emerges clearly that there was much trust between the 2<sup>nd</sup> Plaintiff and the Defendant as the 2<sup>nd</sup> Plaintiff held the larger parcel of land in his name in trust for the 1<sup>st</sup> Plaintiff and the Defendant. At that time, it would appear that the relationship between the two was quite cordial. After the subdivision into the two unequal subplots, a problem emerged in the L.R. No 2/697 whereby it was realized that the same was not connected to the main sewer. This problem was not encountered in the Suit Property as it seems to me that there was a main sewer on this parcel. The Defendant sought to connect to the main sewer located in the Suit Property but this request was rebuffed by the Plaintiffs who now held their title document to the Suit Property. That is the genesis of this and several other law suits all revolving over this predicament.

Having been rebuffed by the Plaintiffs, the Defendant was forced to establish a temporary septic tank on his subplot as he sought the assistance of the relevant government authorities which comprised the then City Council of Nairobi, the National Land Commission, the Nairobi City Water & Sewerage Company and the Director of Surveys. All these bodies made the necessary assessment of the predicament facing the Defendant and made the necessary consultations among themselves and finally made the decision to amend the survey map of the Suit Property to allow the Defendant to connect to the sewer line located there. This decision has been resisted by the Plaintiffs who have refused to allow the Defendant to proceed with the connection. In their effort to keep the Defendant out of the Suit Property, the Plaintiffs have sought a temporary injunction against the Defendant to prevent him from trespassing onto the Suit Property to conduct any business thereon including trying to establish a connection to the sewer line located there. In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Have the Plaintiffs made out a prima facie case with a probability of success? There is no doubt in my mind that the 1<sup>st</sup> Plaintiff is the duly registered proprietor of the Suit Property. However, the dimensions of the Suit Property appear to have been altered by the Director of Surveys to allow for a 3 metre way

leave to permit the Defendant to connect to the sewer line located in the Suit Property. This alteration appears to have been done under the provisions of Section 16(1) of the Land Registration Act which states as follows:

***“The office or authority responsible for the survey of land may rectify the line or position of any boundary shown on the cadastral map based on an approved subdivision plan, and such correction shall not be effected except on the instruction of the Registrar in writing in the prescribed form and in accordance with any law relating to the subdivision of land that is for the time being in force.”***

It was demonstrated that the decision arrived at by the Director of Surveys was in consultation with the Ministry of Lands as well as the City Council of Nairobi. That being the case, at least on a prima facie basis, I find that the Defendant has the authority to connect his subplot to the sewer line located on the Suit Property as indicated by the stated government authorities. To that extent therefore, I find that the Plaintiffs have not established a prima facie case with high chances of success at the main trial. That being my finding, I see no need to further interrogate whether the other two conditions in the **Giella** case cited above have been met. Further, I will not grant the mandatory injunction requested for by the Plaintiff for the reason that such an order is final in nature and is not suited to the circumstances of this case. I therefore dismiss the Plaintiff’s Notice of Motion dated 27<sup>th</sup> November 2012. Costs shall be in the cause.

Now turning to the Defendant’s Notice of Motion dated 22<sup>nd</sup> July 2013, the Defendant has requested for the following orders:

1. That CMCC No. 3662 of 2012 and CMCC No. 3136 of 2012 be transferred to the High Court for hearing and determination.
2. That ELC No. 536 of 2012, CMCC No. 3662 of 2012 and CMCC No. 3136 of 2012 be consolidated with the suit herein for hearing and disposal.
3. That in the interest of justice and in order to avert undue suffering by the Defendant and his family, the court do exercise its inherent jurisdiction to grant the Defendant permission to construct and or erect storm water and sewerage drainage within the 3 metre drainage way leave as approved by the Nairobi City Water & Sewerage Company and the Director of City Planning on 15<sup>th</sup> July 2013.

Can this court transfer the two suits from the subordinate court to the High Court? In the present circumstances in this suit, this court has to take into account the overriding objectives set out in sections 1A and 1B of the Civil Procedure Act of providing just, expeditious, proportionate and affordable resolution of the civil disputes. Further, this court has inherent jurisdiction under section 3A of the Civil Procedure Act to make such orders that are necessary in the interests of justice. Section 18 (1) (b) of the Civil Procedure Act states that;

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

I therefore hereby order that CMCC No 3662 of 2012 and CMCC No 3136 of 2012 be transferred to this

court for hearing and determination.

Further, the law on consolidation is well settled. Consolidation of suits is done under the inherent powers of the Court and for purposes of achieving the overriding objective of the Civil Procedure Act that is for expeditious and proportionate disposal of civil disputes. Therefore, the main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. It is also ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. However, such consolidation can only be ordered within the known parameters of the law. In the case of **Ean Kenya Limited versus John Sawers & 4 Others [2007] eKLR**, Waweru J stated this on consolidation,

***“...the test to be applied is not whether the parties are the same but whether the same or similar questions of law or fact are involved in the suits”.***

It is therefore imperative that there must be similar facts and issues of law raised for determination to warrant the consolidation of the suits. I have had opportunity to peruse the complaints in the following cases: **ELC No. 536 of 2012, Milimani CMCC No. 3662 of 2012 and MILIMANI CMCC No. 3136 of 2012** and this present suit and find that they involve the same parties and the same cause of action being the effort of the Defendant to connect his subplot to the sewer line located on the Suit Property. It is my opinion that since there are common questions of law and facts in the four cases, it is desirable that these matters should be disposed of at the same time and hereby order that they be consolidated with this file being the lead file.

In light of the foregoing, I allow the Defendant’s application dated 22<sup>nd</sup> July 2013 in terms of prayers 3 and 4. I decline to grant prayer no. 5 of that

Application for the reason that it will amount to the final and full determination of this suit even before the same has been set down for hearing of the main suit. Costs shall be in the cause.

**SIGNED AND DELIVERED AT NAIROBI THIS 21<sup>st</sup>      DAY OF February \_\_\_\_\_  
2014**

**MARY M. GITUMBI**

**JUDGE**