



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 275 OF 2009

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

WILSON GACANJA 1ST DEFENDANT

JOTHAM C KILIMO 2ND DEFENDANT

BEACON TOWERS LIMITED 3RD DEFENDANT

RULING

The plaintiff by a Notice of Motion application dated 26/6/2013 expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Act, order 11 rules 3 (1) (g) and order 51 rule 1 of the Civil Procure Rules seeks the following orders:-

- a. Civil suit numbers **197, 198, 273, 274 and 275 all of 2009**, be consolidated and be heard together.
- b. The file in respect of the suit herein, **HCCC NO. 275 of 2009, KACC –VS- Wilson Gacanja and 2 others**, be designated as the pilot file for purposes of taking evidence and writing judgment.
- c. Costs be provided for.

The application is premised on the following grounds that appear on the face of the application.

- i. The land allocated to the third defendant in all the cases mentioned was one undivided whole.
- ii. All the companies have common ownership.
- iii. All the companies are represented by one advocate
- iv. The 1st and 2nd Defendants are common in all the suits.
- v. The advocate on record for the 1st Defendant in all the cases is the same.
- vi. All the transactions leading up to the issuance of title to the companies was done simultaneously and by the same persons.
- vii. The issues involved are the same.
- viii. It would be in furtherance and in line with the overriding objective of the court.

The application is further supported on the grounds and facts contained in the annexed supporting affidavit sworn by **Dedan O. Okwama**, on 26th June 2013. Principally it is the contention by the plaintiff that in all the 5 suits that are sought to be consolidated the subject matter(s) is parcels of land that were hived out of land that had initially been set aside for the Metrological Department and in respect of which the Department was in actual use of before the replanning and subdivision that resulted in the subtitles

being allocated and transferred to the 5 companies which the plaintiff claim are all related in circumstances that the plaintiff claim indeed form one transaction and/or a series of transactions that are not separable and that it would be in the interest of justice for all the 5 cases to be tried together since the evidence in regard to each of the cases will essentially be similar and the witnesses the same. The plaintiff claims the 5 companies were virtually represented by the same persons while the allocating authority was one and the allocations related to subplots hived out of the same original title (**property**). The facts and legal issues that stand to be proved and determined in the 5 cases are similar and that it would be efficient and expeditious if the 5 cases were tried together.

The 3rd Defendant in the instant suit has through **Pritibala Shah** sworn a replying affidavit dated 28th August 2013 in opposition to the plaintiff's application to consolidate the suit with **HCCC NOS. 197 OF 2009, 198/2009, 273 of 2009 and 274 of 2009**.

The 3rd Defendant further filed grounds of opposition dated 28th August 2013 as follows:-

- a. **That these five cases mentioned in the plaintiff's application all relate to different parcels of land held under individual titles which were procedurally allocated individually.**
- b. **The five cases contain allegations of fraud as against each of the five separate companies which the plaintiff is required to prove;**
- c. **The companies and their shareholders are distinct personalities in law and**
- d. **Each of the five companies has a constitutional right to property which cannot be taken away and/or deprived without following the due process of the law which requires amongst others a fair hearing and a right to be heard.**

Mr. Pritibala Shah the deponent of the replying affidavit under paragraphs 11, 12, 13, 14 and 15 of the affidavit depones that he is a director of the various companies sued in the suits sought to be consolidated as the 3rd Defendant in each of the cases and states that each of the companies is separate and distinct from the other and that each holds its separate and individual title to specific parcels of land which were separately acquired by the respective companies in varying circumstances.

In all the 5 cases sought to be consolidated the plaintiff is the same in all the cases and the 1st and 2nd Defendants are equally the same. The 3rd Defendant (s) however are different in the 5 cases but it is the plaintiff's contention in all the 5 cases that the separate parcels of land allocated and alienated to the 5 companies formed and/or were part of Government land that had been alienated and reserved for use by the Meteorological Department and was at the time of the alleged allocation and alienation to each of the 3rd Defendants in the separate suits not available for alienation. The plaintiff's contention in each of the suits is that allocation and alienation to each of the 3rd Defendants in the 5 suits was fraudulent, illegal, null and void to all intents and purposes. The particulars of fraud and illegality alleged against each of the 3rd Defendants in the respective suits are similar and alike in all the 5 cases. Save for any variance on the date of registration of the titles and the particulars of the respective titles made to the 3rd Defendant the reliefs sought against the 1st and 2nd and the 3rd Defendants are similar in all the 5 suits.

The 3rd Defendant's in each of the cases have filed a like defence and a similar counterclaim save for any reference to the specific parcels of land which carry different land parcel numbers. The defences entered for and on behalf of the 1st Defendant are alike in the 5 suits. The 1st and 2nd Defendant were at the material time relevant to the suit serving as the Commissioner of lands and a Lands Officer respectively at the lands office and it is in each of the cases alleged that they acted in excess of their authority and therefore ultravires in allocating and processing the respective titles to the parcels of land the subject matter in the 5 cases.

While I agree with the 3rd Defendants counsel that the 5 suits relate to 5 different parcels of land which were acquired by the 3rd Defendant (s) separately in each case I find that there is a common nexus in that each of these individual parcels is said to have been part of a larger parcel of land that was reserved by the Government for use by the Metrological Department. The allegation by the plaintiff in regard to each of

the allocations is that they were fraudulently executed at the instance of the 1st and 2nd Defendants on the one part and the 3rd Defendant(s) in each of the individual cases. While a company has a separate individual identity it is alleged that all the five companies have common directors and shareholders such that the companies can be stated to have acted in concert to perpetrate the fraud if indeed there was any fraud as alleged by the plaintiff.

The issue that stands to be determined is whether the suits are between the same parties litigating on the same subject matter where common issues of fact and law stand to be determined. Having regard to the pleadings in the five suits it is evident that the plaintiffs and the 1st and 2nd Defendants are common in the 5 suits and the issue that arise for determination is whether the 1st and 2nd Defendants indeed were acting or acted within their authority in alienating and processing title to the 3rd Defendants in respect to the five parcels of land which are now registered in the name of the 3rd Defendants and thus there is a common issue of law and fact as to whether there was fraud involved in the processing of each of the five titles to the parcels of land. The 3rd Defendant's it is evident each dealt with the 1st and 2nd Defendants in processing their individual titles and thus the question whether or not there was fraud in the processing of the individual titles is a common issue in all the five suits. The fact that the five companies (3rd Defendants) have shared directors would give some credence to the assertion that the five titles issued to the 3rd Defendant was as a consequence of one transaction and/or a series of transactions with a common denominator where the 1st and 2nd Defendants were the officers who were charged with and/or facilitated the allocation and alienation. The circumstances surrounding the allocations would appear to have been similar and the same and hence the evidence to be led to prove the allegations of fraud would be the same and most probably from the same source.

In a recent ruling of this court in **HCEL NO. 347 OF 2012 and ELC NO. 223 of 2011** (unreported) while considering an application for consolidation I observed as follows:-

“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 to hear the same evidence time and again in every suit and further to prevent the prospect of having conflicting decisions on the same subject matter being rendered by different courts which could lead to “judicial confusion”.

I would apply the same analogy to the situation in the present matter where I consider the circumstances of the allocation and alienation of the suit properties in the 5 suits to have been similar and the issue is whether or not the allocations were fraudulently procured and therefore null and void. The allegations of fraud carry a common thread such that it would be expedient, convenient and appropriate to have the issue determined at one hearing rather than have 5 trials at which the same evidence will be adduced. In the 5 cases the plaintiff is seeking to recover land that it claims was fraudulently acquired and the 3rd Defendants in their individual counterclaims claim they acquired the parcels of land lawfully.

I would therefore in the interest of justice direct the five suits sought to be consolidated be so consolidated and that the instant suit **HCC ELC NO. 275 of 2009** be the control file. In my considered opinion separate trials would be unnecessary and would merely serve to delay the conclusion and finalization of the matters in contention. I agree with the plaintiff that it would be in the interest of justice to have the 5 suits consolidated and heard together in furtherance of the overriding objective of the courts as provided under sections 1A and 1B of the Civil Procedure Act, Cap 21 Laws of Kenya. The plaintiff's Notice of Motion dated 26th June 2013 has merit and the same is granted in terms prayers (a) and (b) thereof.

Costs of the application will be in the cause.

Ruling dated, signed and delivered this...20th day of May 2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... for the Plaintiff

..... for the Defendants