



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**(Coram: Ojwang J.)**

**CIVIL SUIT NO.248 OF 2010 (O.S.)**

**IN THE MATTER OF: THE ESTATE OF THE LATE FESTUS GEORGE NDUNG’U (DECEASED)**

**IN THE MATTER OF: AN APPLICATION BY GEOFFREY KARIUKI KIMANI THROUGH HIS ATTORNEY JAMES THUO KARIUKI FOR HALF SHARE OF THE PROPERTIES KNOWN AS MOMBASA/BLOCK XVIII/328, 329, 330, 331, 332 & 374 POPULARLY KNOWN AS RUKIYA BUILDING ALONG KENYATTA AVENUE, MOMBASA**

**GEOFFREY KARIUKI KIMANI [suing through his attorney]  
JAMES THUO KARIUKI.....PLAINTIFF**

**-VERSUS-**

**1. PASQUALINA NYOKABI NDUNG’U  
2. BLUE BELT INVESTMENTS LIMITED .....DEFENDANTS**

**RULING**

The 2<sup>nd</sup> defendant moved the Court by Notice of Motion dated and filed on **17<sup>th</sup> November, 2010** brought under ss.1A, 3A and 80 of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Orders XI [Rules 1, 2] and XLIV [Rules 1, 2] of the earlier edition of the Civil Procedure Rules.

The prayers due for consideration herein are as follows:

- (i) that, there be an order of consolidation of this suit with HCCC No. 210 of 2003 [**Festus George Ndung’u v. Diamond Trust Bank (K) Ltd & Geoffrey Kariuki Kimani**];
- (ii) that, the consent order dated **17<sup>th</sup> September, 2010** be varied to its original form, and all rentals collected from **September, 2010** be deposited in Court pending the hearing and determination of the suit;
- (iii) that, the costs of this application be provided for.

The grounds for this application may be set out, in summary, as follows:

- (a) that, 2<sup>nd</sup> defendant purchased the suit property from 1<sup>st</sup> defendant, as a **bona fide** purchaser for value;
- (b) that, 2<sup>nd</sup> defendant has been in lawful possession of the property for more than one year – and this fact had not been disclosed to the Court;
- (c) that, the plaintiff's interest over the property has only been brought to the attention of 2<sup>nd</sup> defendant recently, when the suit was filed;
- (d) that, the plaintiff and 1<sup>st</sup> defendant, in the consent order of **17<sup>th</sup> September, 2010** concealed material facts from the Court:

- (a) **that, they did not disclose that 2<sup>nd</sup> respondent has been in possession of the property and has been collecting rent for over one year;**
- (b) **that, they did not disclose that the 1<sup>st</sup> defendant has so far received Kshs.43 million out of the agreed purchase price of Shs.74 million;**
- (c) **that, they did not disclose that the registration of transfers over the suit property in favour of 2<sup>nd</sup> defendant is pending registration and was only stopped by this Court's order of 20<sup>th</sup> August, 2010;**
- (d) **that, the material non-disclosures have caused the 2<sup>nd</sup> respondent grave injustice, as it has parted with Kshs.43 million to-date;**
- (e) **that, the consent of 17<sup>th</sup> September, 2010 is a sham, entered into as a conspiracy to defeat 2<sup>nd</sup> respondent's right over the suit property;**
- (f) **that, 2<sup>nd</sup> respondent will suffer irreparable loss and damage;**
- (g) **that, "it is absolutely necessary" that the order of 17<sup>th</sup> September, 2010 be reviewed and/or varied;**
- (h) **that, it is also fair and in the interest of justice that consolidation be allowed, so that the matter is adjudicated upon expeditiously.**

The Managing Director of 2<sup>nd</sup> defendant, **Alwi Shariff Ali**, swore a supporting affidavit on **17<sup>th</sup> November, 2010** deposing (in summary) as follows:

- (i) **the 2<sup>nd</sup> defendant purchased the suit property from 1<sup>st</sup> defendant for a consideration of Kshs.74 million, and the agreement for sale is exhibited;**
- (ii) **during the search conducted prior to the execution of the agreement for sale, no interests of the plaintiff's were found shown on the Registry records;**
- (iii) **the plaintiff had failed to register his interest, to inform the world, and he should in principle, only pursue 1<sup>st</sup> defendant for debt in contract;**
- (iv) **at the time of purchase of the suit property as aforesaid, the only encumbrances registered were charges in favour of Diamond Trust Bank, which 2<sup>nd</sup> defendant duly confirmed with the Bank, and the outstanding amounts agreed upon between the Bank and 1<sup>st</sup> defendant: payments to be made by 1<sup>st</sup> defendant out of the proceeds of sale;**
- (v) **it is 2<sup>nd</sup> defendant's good record of reduction of the purchase price, that led to 1<sup>st</sup> defendant handing over possession of the suit premises to 2<sup>nd</sup> defendant;**
- (vi) **2<sup>nd</sup> defendant proceeded with the good record of reduction of accrued payment of the price, by paying, in February, 2010 the sum of Kshs.2,999,997/= which was due to 1<sup>st</sup> defendant's Advocates;**
- (vii) **such progress in clearing the purchase-price was made even further, through payments to third parties at 1<sup>st</sup> defendant's request; so that, to-date, 2<sup>nd</sup> defendant has already paid Kshs.43 million**

*towards the purchase price for the suit property;*

*(viii) it is surprising in the circumstances, that 1<sup>st</sup> defendant, acting in collaboration with the plaintiff, is attempting to take rent-collection out of 2<sup>nd</sup> defendant's charge;*

*(viii) it is equally surprising that 1<sup>st</sup> defendant, who is aware, from first-hand information, of the sale transaction, is at this stage giving recognition to the plaintiff's proprietary claims on the suit property;*

*(ix) it is believed that 1<sup>st</sup> defendant's conduct is an informal endeavour to secure further payment, over and above the contractual purchase price;*

*(x) 2<sup>nd</sup> defendant, today, has in its favour (a) possession of the suit property; (b) original title deeds in his custody; and (c) duly-signed transfers;*

*(xi) all the transfers have been duly stamped and presented for registration – save that, as it turns out, a caveat was lodged by the plaintiff against the suit property, in May, 2009;*

*(xii) it is desirable that an order of consolidation of the two suits be made; such consolidation will enable the Court to hear all the parties concerned, and to determine the matter with finality.*

The plaintiff's reply to the depositions set out above came through learned counsel, **Mr. John Mugambi Njagi** (sworn on **15<sup>th</sup> February, 2011**). The focus of **Mr. Mugambi's** depositions is consent between the plaintiff herein, and 1<sup>st</sup> defendant; so the case being made by 2<sup>nd</sup> defendant is given a lower rank of priority. The salient elements in the replying affidavit may be thus set out:

**(i) this Court had made an order on 20<sup>th</sup> August, 2010, with Order No. 3 stating:**

***“That with effect from the beginning of September, 2010 the plaintiff shall deposit in Court all rents collected from the suit premises, failing an alternative agreement between the parties as to any other mode of banking the said proceeds of rent; parties have leave to apply in this respect.”***

**(ii) the plaintiff and the defendant in HCCC No. 210 of 2003 then made a consent agreement varying the orders of 20<sup>th</sup> August, 2010;**

**(iii) a different set of orders had also been made in HCCC No. 248 of 2010 (OS), in respect of which the deponent avers:**

***“contrary to the expectation of the parties in HCCC 210 of 2003, I was surprised to learn from Jithiada Agencies Ltd. (an agency contracted to collect rent from the suit property) that a stranger to HCCC 210 of 2003 (Blue Belt Investments Limited [2<sup>nd</sup> defendant/applicant herein]), had obtained adverse orders against bona fide parties to HCCC 210 of 2003, orders which were highly prejudicial and defeated the consent agreement earlier-on entered into by the said parties to HCCC 210 of 2003. The said agents were therefore unable to comply with the consent orders.”***

**(iv) in HCCC No. 248 of 2010 (O.S.) this Court made certain orders on 17<sup>th</sup> November, 2010, some of these Orders being as follows:**

***“2. THAT these Orders shall apply to both HCCC No. 248 of 2010 (OS) and HCCC No. 210 of 2003 at the same time.***

***“3. THAT the Deputy Registrar shall ensure that the said two files are held together and brought before the Court always at the same time for common Orders.***

***“4. THAT there shall be a stay of the ex parte Order made in HCCC No. 210 of 2003 dated 17<sup>th</sup> September, 2010.***

**“5. THAT this Court’s Orders of the 20<sup>th</sup> August, 2010 in HCCC No. 210 of 2003 are hereby reinstated pending the hearing and determination of [the Notice of Motion of 17<sup>th</sup> November, 2010].”**

**(v) the Orders listed under para. (iv) above “considerably affect parties to HCCC 210 of 2003 without according them an opportunity to be heard, which is quite contrary to the rules of natural justice...”**

**(vi) a search with the Kenya Revenue Authority has shown that Bluebelt Investment Limited “is not even registered with KRA...in the document of payment of stamp duty... The PIN number held out as A0024813291 belongs to one SHARIF ALI ALWY and not Blue Belt Investments...”**

**(vii) the deponent is aware that one Alwy Shariff Ali claims to have entered into a contract with one Pasqualina Nyokabi Ndung’u [1<sup>st</sup> defendant in HCCC No. 248 of 2010 (O.S.)] and had paid a deposit in respect of purchase of the suit property;**

**(viii) the deponent questions the authenticity of the said sale agreement, and of the signature of Pasqualina Nyokabi Ndung’u thereon;**

**(ix) the 2<sup>nd</sup> defendant in HCCC No. 248 of 2010 (OS) had not complied with the terms of the contract of sale of the suit land;**

**(x) the deponent questions the validity of the payments allegedly made by 2<sup>nd</sup> defendant in HCCC No. 248 of 2010 (OS), towards the purchase of the suit property;**

**(xi) the deponent avers that 2<sup>nd</sup> defendant in HCCC No. 248 of 2010 (OS) has come before the Court in bad faith, and has relied on false documents and forgeries.**

**M/s. Balala & Abed, Advocates** for 2<sup>nd</sup> defendant/applicant, urged that the evidence on file shows the plaintiff/respondent to be claiming no more than “a beneficial right over the properties, which right was not registered at the time when the applicant herein signed a contract with the administrator of the estate of **Festus George Ndung’u.**”

Counsel urged that the plaintiff’s claim presents no valid position in law, in view of the terms of s.28 of the Registered Land Act (Cap.300, Laws of Kenya), under which the property is registered; that section provides:

**“The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of the Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –**

**(a) to the leases, charges and other encumbrances and the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by Section 30 not to require noting on the register:**

**Provided that nothing in this Section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

Counsel submitted that, there was no doubt, the registered owner at the time of the agreement for sale was **Festus George Ndung’u** (deceased), and not the plaintiff; the searches conducted in the Lands Office did not show the plaintiff to have any interest in the suit land. The only encumbrances on record were the charges registered against the title to the suit property. Counsel relied on the authority of the Court of Appeal decision, **Javed Iqbal Abdul v. Bernard Alfred & Another**, C.A. No. 11 of 2001, in which the

importance of the registration record is underlined:

***“With respect, I do not agree with the learned Judge. The only way one can determine whether there is any inhibition on the title is to undertake a search on the title. As at the time the appellant bought the suit land there was no legal impediment shown in the register to stop the 1<sup>st</sup> defendant as proprietor from dealing with the title or evidencing the plaintiff’s alleged proprietary interest.”***

On the foregoing basis, counsel urged that 2<sup>nd</sup> defendant has a greater right over the suit properties than the plaintiff, whose alleged interest is unregistered.

Counsel submitted that 2<sup>nd</sup> defendant has a major interest in the suit premises, having paid in respect of it “colossal sums, part of which were used to discharge the suit premises from the banks.”

Counsel submitted that the plaintiff, as he has no registered interest in the suit properties, will have to process his case as a debt over the estate of ***Festus George Ndung’u***; in particular as there is “no allegation or evidence that the plaintiff contributed to the acquisition of the suit premises. The plaintiff’s claim is that he lent money to the deceased and in return he was to be registered as a co-owner in 1985/86.”

Learned counsel urged that the plaintiff had shown lack of diligence over his claims of rights, and so he is ***“now stopped from claiming such rights to the detriment of 2<sup>nd</sup> defendant.”*** Counsel submitted that ***“had the plaintiff secured his interest as required, by registration, 2<sup>nd</sup> defendant would surely have avoided this transaction, as he would have seen the plaintiff’s interest in the register....”*** Counsel urged that the plaintiff’s affidavit sworn by ***John Mugambi Njagi*** on ***15<sup>th</sup> February, 2011*** “does not provide any important or crucial evidence against the applicant.”

Learned counsel urged that the two cases be consolidated and heard together; and he asked that the rentals be deposited in Court, pending final determination of the dispute.

Learned counsel ***M/s. Munyao, Muthama & Kashindi, Advocates*** who appeared for the plaintiff/respondent, contended that the application was ***“incompetent, bad in law and an abuse of Court process and ought to be dismissed with costs.”*** Counsel submitted that the applicant ***“has failed to extract and annex the order he seeks to be reviewed, which renders this application fatally defective...”***

Counsel urged that the applicant had no *locus standi* to seek a variation of orders made under ***HCCC No. 210 of 2003***: ***“It is clear from the record the applicant was not a party in HCCC 210 of 2003. The law is very clear that for one to apply to have a consent order reviewed or set aside, then one must be a party to the consent.”***

Counsel relied on a High Court decision, ***Symon Gitari Munene Muchira v. Edward Njagi Muriithi & Another*** [2008] eKLR (***Kasango, J***), in which the following passage appears:

***“It should be understood that a consent is essentially a binding contract between the consenting parties. That being so, a stranger cannot seek to set aside such a consent, because such a stranger has no privity to such a consent, or, if you like, [such a] contract.”***

Counsel contended that 2<sup>nd</sup> defendant/applicant had not established any legitimate interest in the suit property, and so should not be granted the orders sought. Counsel’s reasoning entails a differentiation of parties – one ***Alwy Shariff Ali***, on the one hand, and Blue Belt Investments Limited [2<sup>nd</sup> defendant], on the other. In the words of counsel: ***“it is our submission that if at all there was an agreement as alleged, then the same did not confer any interest [upon] 2<sup>nd</sup> defendant, since 2<sup>nd</sup> defendant was not a party thereto. The agreement relied on shows that it was between Pasqualina Nyokabi Ndung’u as the vendor, and Alwy Shariff Ali as the purchaser.”***

Counsel expressed his doubts that ***“there was ever any agreement that was entered [into] as***

***alleged or at all.***” He submitted that since the property is still registered in the name of ***Festus George Ndung’u***, the instruments of transfer are of no legal consequence, ***“insofar as they are not properly executed or attested and [insofar] as 1<sup>st</sup> defendant lacked legal capacity to transfer the property because her grant in the succession cause had not been confirmed.”***

Counsel also submitted that his client had published a ***“caveat emptor”*** notice in the *Daily Nation* newspaper of 21<sup>st</sup> July, 2009: so any buyer was required to exercise caution in dealing with the property; and 2<sup>nd</sup> defendant should not, then, have “continued splashing a lot of money to various parties some of [whom] were not owners of the suit property.” Counsel urged that “the applicant did not exercise due diligence and [so], cannot come to claim it was a *bona fide* purchaser for value.”

Counsel submitted that the applicant had not met the conditions for setting aside a consent order, such conditions having been thus stated by the Court of Appeal in ***Brooke Bond Liebig (T) v. Maiiya*** [1975] EA 26:

***“Prima facie, any order made in the presence and with the consent of the counsel is binding on all parties to the proceedings or action and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to [the] policy of the Court...or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the Court to set aside an agreement.”***

Counsel cited also ***Hassanali v. City Motor Accessories Ltd & Others*** [1972] E.A. 423, in which the Court of Appeal held that (p.423) ***“the Court cannot interfere with a consent judgment except in circumstances which would afford good ground for varying or rescinding a contract between the parties.”***

On the basis of the foregoing authorities, counsel urged that ***“the order was made in the presence and with the consent of [counsel] of the parties and so it is binding.”***

Counsel urged that the prayer for consolidation be refused: ***“the matters of HCCC No. 210 of 2003 and HCCC No. 248 of 2010 cannot be consolidated and heard together since, though they touch on the same suit property, they seek radically different prayers. HCCC No. 248 of 2010 initiated by the plaintiff herein has been instituted by way of Originating Summons seeking....a quick determination of the plaintiff’s right [to] half-share of the suit property herein. [But] HCCC No. 210 of 2003...was initiated by way of plaint by Festus George Ndung’u who is now deceased, and the plaintiff herein was enjoined as 2<sup>nd</sup> defendant. The two matters cannot in law be consolidated because the circumstances have now changed...”***

***M/s. Mugambi & Co. Advocates*** made submissions on behalf of 2<sup>nd</sup> defendant in ***HCCC No. 210 of 2003 [Geoffrey Kariku Kimani]*** who appears again as the plaintiff [albeit suing through his Attorney, ***James Thuo Kariku***] in ***HCCC No. 248 of 2010 (O.S.)***.

An assessment of these submissions is made here – notwithstanding the obvious overlap of subject-matter and of parties.

Learned counsel, ***Mr. Mugambi*** who made these submissions, urges that the matter in both causes “involves the same suit property aptly described as Rukiya Building that rests on titles No. Mombasa/Block XVII/328, 329, 330, 331, 332 and 374 respectively.”

This acknowledgment must, in the end, be taken into account as this Court determines the application herein – and in particular, the applicant’s prayer regarding consolidation of a suit-by-plaint, on the one hand, and a suit by Originating Summons, on the other hand. I can see at this early stage that the determination of that question will be governed also by the Court’s perception of the prospect of ends of justice being met, where the two suits, though founded on the very same properties, are determined

separately.

**Mr. Mugambi** was contesting the applicant's several prayers, firstly, the prayer that there be a stay of the consent order obtained *ex parte* in **HCCC No. 210 of 2003**; that order, to which the **applicant herein is not a party**, thus states:

***"That with effect from the beginning of September, 2010 the plaintiff shall deposit in Court all rents collected from the suit premises, failing an alternative agreement between the parties as to any other mode of banking the said proceeds of rent; parties have leave to apply in this respect."***

In the absence of the applicant herein, the parties in **HCCC No. 210 of 2003** proceeded to make their own consent arrangement, on the basis of the following mutually-agreed guideline (as between those parties): "[Since] the subject property was a commercial building that requires to be managed day by day it was only prudent that the income generated by the said building be within the reach of both parties in **HCCC No. 210 of 2003.**" This was the basis of a new Court order made on **17<sup>th</sup> September, 2010.**

Counsel puts up a defence of such a possible *status quo*, in the face of the demands of a new party to **HCCC No. 210 of 2003**, namely the applicant herein. And his essential argument is that, **doctrine** protects consent agreements; in his words:

***"It is settled law that a consent order can only be set aside on the grounds that would justify the setting aside of a contract, e.g., fraud, mistake, or misrepresentation."***

For effect, counsel invokes the High Court decision in **Kanampiu M'rimberia v. Julius Kathanje** [2006] eKLR (**Lenaola, J.**) as well as other decisions (**Kenya Commercial Bank Ltd. V. Specialized Engineering Co. Ltd.** [1982] KLR 485; **Flora Wasike v. Destimo Waboko** [1982-88] 1 KLR 625; **Brooke Bond Tea Ltd. V. Mallya** [1975] E.A. 266), for the proposition that ***"a consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved it was obtained by fraud or collusion or by an agreement contrary to the policy of the Court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the Court to set aside an agreement."***

Although, however, **Mr. Mugambi** has set much store by the foregoing argument founded on recognized legal doctrine, it must be stated now that such a point is apt to mislead, and so, cannot be the basis for deciding the application herein: his argument will be valid for the parties in **HCCC No. 210 of 2003**, but not for the applicant herein, 2<sup>nd</sup> defendant in **HCCC No. 248 of 2010 (O.S.)** who, in effect, is seeking interlocutory remedies founded on **equity**, on the grounds that the parties in **HCCC No. 210 of 2003** are attempting, in collusion, to appropriate this party's rights in law. The consent in question is being, in effect, contested as a **collusive consent for the deprivation of a third party**. Insofar as the said third party (the applicant herein) is properly before the Court as 2<sup>nd</sup> defendant in **HCCC No. 248 of 2010 (O.S.)**, which this Court held must be viewed together with **HCCC No. 210 of 2003**, I will hold at this stage that the doctrine on the sanctity of consents reached between parties, is **inapplicable** in this matter.

Learned counsel has raised a second technicality: that since **HCCC No. 248 of 2010 (O.S.)** and **HCCC No. 210 of 2003** have been brought by differing suit-procedures, they ought not to be consolidated; in the words of counsel: ***"[The] present suit being HCCC No. 248/2010 is instituted by way of Originating Summons while HCCC No. 210 of 2003 is by way of plaint. The former is primarily seeking declaratory orders while the later is seeking for rectification of title by way of counterclaim, which orders are at great variance as between the parties. The causes of action being at variance, we submit that the two [files] should not be consolidated."*** On this point, counsel invoked High Court authority, **Serah Hersi Moghe v. National Bank of Kenya** [2005] eKLR (**Sergon, J.**): (i) that the procedure of Originating Summons is designed for the summary or **ad hoc** determination of points of law, construction or certain specific facts or for obtaining of specific facts or directions of the Court; (ii) that the procedure of Originating Summons is intended for simple matters and enables the Court to settle them without the expense of bringing an action.

Still another technical point raised by counsel is that “the purported agreement that is sought to be relied on as having been executed on **27<sup>th</sup> February, 2009** is by one **Alwy Shariff Ali** and not the applicant herein (**Bluebelt Investments Limited**) [who is] the 2<sup>nd</sup> defendant/applicant in the present suit. The 2<sup>nd</sup> defendant/applicant being a corporate body is in law distinct from [the] individual. Therefore, the applicant cannot allege that [it] has paid a sum of Kshs.43 million through a third party...”

Learned counsel **Mr. Abed**, who appeared for the applicant, submitted that the consolidation of the two files was essential, to enable the Court to determine the issues between the parties fairly: whereas the applicant was not a party to **HCCC No. 210 of 2003**, that suit, same as **HCCC No. 248 of 2010 (OS)**, touched on crucial issues of **ownership of the suit properties**; and, under **HCCC No. 210 of 2003**, several orders had been made which affected the applicant’s rights to property; the orders in **HCCC No. 210 of 2003** directly affected the applicant’s rights being asserted in **HCCC No. 248 of 2010 (OS)**; the plaintiff in **HCCC No. 248 of 2010 (OS)**, as a defendant in **HCCC No. 210 of 2003**, was fully aware of the applicant’s interests in the Court Orders made on **20<sup>th</sup> August, 2010**; therefore, in the interests of justice, the two suits should be consolidated; no prejudice would be occasioned to any party on account of a consolidation.

**Mr. Abed** urged it to be significant that the respondents after obtaining orders, in the applicant’s absence, for the rental-proceeds to be deposited in Court, proceeded between themselves to make a consent embodying a different arrangement, even when they were well aware of the applicant’s claim to such rental-proceeds. In counsel’s words: “**it is to the detriment of the applicant; the move had been done mischievously to cheat the applicant on the proceeds of the [suit] property.**”

Counsel objected to the long affidavit by learned counsel **Mr. Mugambi**, which carried factual statements regarding the status of the suit property.

**Why is it necessary to have two suits, involving the very same properties, running in parallel? The same Advocates are involved, for the most part, and they ask the Court to resolve the disputes in the two suits separately. Technical grounds are presented, justifying the separation of the two cases, even though, ultimately, the vital question is, who is the owner?** The applicant herein claims to be the owner; but in one of the two cases, the applicant is not enjoined as a party; and the parties therein conduct themselves as if they are the only persons with a claim to the property. The applicant says his ownership of the property is well known to the respondents, who, in his absence, are making a deal over the property, with grave ownership implications. The Court is being persuaded to continue handling the two cases severally, on the basis of certain trite doctrines: the Court is told, for instance, that one of the suits comes by the dressing of Originating Summons, while the other comes by the garb of the plaint; and therefore, they ought not to be consolidated!

This Court must endeavour to deliver substantial justice in this matter, and its thinking is already, I believe, emerging from the text of this Ruling. The **Constitution of Kenya, 2010**, in **Article 159**, thus provides:

“**159(1)...**

**(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles**

–  
**(a).....**

**(b).....**

**(c) .....**

**(d) justice shall be administered without undue regard to procedural technicalities; and**

**(e) the purpose and principles of this Constitution shall be protected and promoted.”**

A suit brought by plaint seeks judicial intervention, to resolve certain **questions in dispute**; and so it is, with a suit brought by Originating Summons. Therefore, where there is good cause, linked to the proper exercise of judicial discretion, or to the merits of the issues in dispute, then this Court will have the right, in law, to consolidate particular cases, regardless of the format in which they have been brought.

In the instant case, all questions being brought before the Court touch intimately on **ownership of the suit properties**; and the two suits herein are, at bottom, concerned with the **ownership** question. It is also clear to this Court that the parties in **HCCC No. 210 of 2003** are aware that ownership of the properties in question is **being claimed by a third party** to that suit, the applicant herein. In equity, therefore, the parties are not allowed to run away with ownership rights, under the cover of **HCCC No. 210 of 2003**, leaving the applicant herein, who is 2<sup>nd</sup> defendant in **HCCC No. 248 of 2010 (OS)**, high and dry.

The parallelism in the two cases entails mischief to the administration of justice, which this Court must set its face firmly against. The Court will, by that mischief, be placed in a position of ignorance as it issues orders from time to time, and some of these orders will stand in derogation from the rights and legitimate expectations of a particular party.

The respondents have raised the objection that the applicant's claim is not to be upheld, because it confounds corporate status with personal status. In my judgment, the justice of this matter rests more on the property-ownership question, than on the said legal technicality, in respect of which, indeed, *locus poenitentiae* would be given for any necessary amendment to the pleadings.

After considering the relevant issues, I have come to certain clear conclusions which I now set out as the Orders of this Court:

(1)HCCC No. 210 of 2003, **Festus George Ndung'u v. Diamond Trust Bank (K) Ltd & Geoffrey Kariuki Kimani** is hereby consolidated with HCCC No. 248 of 2010 (O.S.), **Geoffrey Kariuki Kimani** [suing through his Attorney] **James Thuo Kariuki v. Pasqualina Nyokabi Ndung'u & Bluebelt Investments Limited.**

(2)The consent Order dated **17<sup>th</sup> September, 2010** is hereby varied to its original form, and all rentals collected from **September, 2010** shall be deposited in Court, pending the hearing and determination of the consolidated suit.

(3)The applicant herein has the liberty to amend and re-file its pleadings within 21 days of the date hereof; and in the event such amendment is effected, the other parties, too, shall have the liberty to make amendments to their pleadings within 21 days of the date of receipt of service.

(4) The costs of this application shall be in the cause.

**SIGNED at NAIROBI .....**

**J.B. OJWANG**  
**JUDGE**

**DATED and DELIVERED at MOMBASA this 13<sup>th</sup> day of September, 2011.**

**H.M. OKWENGU**  
**JUDGE**