REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 529 OF 2002

RACHAEL NJOKI WAINAINA

Suing on her own behalf and on Behalf of all members of

Embakasi Fedha Self-Help Group)…PLAINTIFF/APPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUND

FUND BOARD OF TRUSTEES…..DEFENDANT/RESPONDENT

RULING

I. The Background

During the hearing of the main suit, in which the Defendant was the first to adduce evidence, and after the close of the Defence case, on 12th May, 2004 counsel for the Plaintiff applied informally in Court for the immediate hearing of the Plaintiff's Chamber Summons application of 8th July, 2003 filed on that same date. I was not able to appreciate why that application had not been disposed of much earlier, but it appears that there had not been any strenuous objection to its pendency.

Counsel for the Defendant strongly objected to the informal application for such an interruption to the main hearing, and I gave a Ruling as follows:

> "In this case the hearing had started with the examination of the Defence witnesses; and today this process has been completed.
>
> "Ordinarily, the Plaintiff and any of her witnesses would have been heard immediately thereafter. Counsel have advised that this *modus operand*i [of the Defendant's case coming first] was acquiesced in by the parties, and was approved by the Court.
>
> "However, on file is the Plaintiff's Chamber Summons application of 8th July, 2003 which has not been heard. It is for consolidation of the present suit with the Plaintiff's O.S. application HCCC No. 419 of 2003 which is pending.
>
> *"Today **Mr. Kibera** for the Plaintiff has informally applied for the hearing of the Chamber Summons application for consolidation, before the Plaintiff gives evidence and produces her witnesses in the main suit currently being heard.*

***"Mr. Kibera** argues that there is common cause between the Plaintiff's claim in the suit and in the O.S., and that it is desirable that the two be consolidated and heard together. His reasoning is that the O.S. is concerned with adverse possession in relation to the suit lands, and this again figures prominently in the substance of the Plaintiff's case in the main suit.*

***"Mr. Lubullelah** for the Defendant has opposed this application. He is concerned about the fact that the Plaintiff has at no time appeared in Court during the hearing of the main suit, and could very well be having some difficulty proceeding to give her evidence. Counsel sees an interruption of the main suit for the purpose of hearing the Chamber Summons, as lacking good faith.*

"With the benefit of hearing witnesses for the Defendant and both counsel in the current conduct of the main suit, I have concluded that the case has to be prosecuted diligently and disposed of with some urgency.

"If I were to act only on that basis I would have asked the parties to appear before the Duty Judge to fix a date for the taking of the Plaintiff's evidence.

*"But upon careful consideration, I think that a question of consolidation, and especially as in the present case, appears to be straightforward and can be accomplished within the shortest time possible. In the present circumstances it is clear that the Defendant is keen to have the case disposed of; and as for the Plaintiff, since this is **her** case, she will be required by this Court not to commit the mischief of creating unnecessary delay.*

*"In the circumstances I now order that counsel should immediately today, 12th May, 2004 appear before the Duty Judge for the **taking of a date for the hearing of the consolidation application in the Chamber Summons of 8th July, 2003**. This application should be heard and disposed of in the next week and, **within the shortest time possible thereafter, on a date to be assigned by the Duty Judge, the full hearing of the suit shall proceed**, commencing with the examination-in-chief of the Plaintiff herself."*

The Application for Consolidation of Suit-by-Plaint with suit-by-Originating Summons

The Plaintiff's Chamber Summons application was brought under Order XI of the Civil Procedure Rules, and Section 3A of the Civil Procedure Act (Cap. 21). The prayers are as follows:

(a) That, the Court be pleased to consolidate the suit herein with HCCC No. 419 of 2003 (O.S.);

(b) that, the Court be pleased to stay the proceedings of this suit pending the hearing and determination of the application;

(c) that costs be in the cause.

What grounds support this application? (i) That the two suits raise similar questions of law and fact and are concerned with the same subject matter. (ii) That the Plaintiff's claim to the suit premises can only be commenced by way of Originating Summons. (iii) That the Orders sought herein will assist the Court in determining the parties' respective rights to the suit premises once and for all. (iv) That the orders sought will not prejudice the Defendant/Respondent in any way.

The Plaintiff, ***Rachael Njoki Wainaina***, has attached her supporting affidavit of 8th July, 2003. She avers as follows:

(i) that, apart from the O.S. suit in HCCC No. 419 of 2003 she has also filed the main suit herein, HCCC No. 529 of 2002;

(ii) that, in the instant suit the deponent and Embakasi Fedha Self-Help Group are seeking an injunction against the Defendant/Respondent to restrain them from trespassing, evicting or in any

manner interfering with the Plaintiffs' quiet enjoyment of the suit premises;

(iii) that, the deponent was advised that the O.S. suit, HCCC No. 419 of 2003 was the only way of asserting the rights of the Plaintiffs;

(iv) that both suits relate to the same subject-matter and raise similar questions of fact and law.

The replying affidavit of ***Fredrick Ashimosi Shitambasi,*** dated 21st August, 2003 was filed on 2nd September, 2003. The most material averments by the deponent are as follows:

(a) that, in the instant suit, the Plaintiffs claim to be owners of a parcel of land in the Embakasi area, by virtue of a letter of allotment issued to the Embakasi Self-Help Group by the Commissioner of Lands, Ref. No. 31500/XVIII in 1987;

(b) that, the Defendant in its counterclaim asserts that it is the owner of the land purportedly comprised in the said letter of allotment and that it has been issued with 1312 titles enumerated in the Statement of Defence;

(c) that the main question in issue is, who holds proper title to the suit properties, i.e. whether the Plaintiff's aforesaid letter of allotment is proper title vis-à-vis the Defendant's titles;

(d) that the effect of HCCC No. 419 of 2003 (OS) is to contradict the Plaintiff's fundamental gravamen in the present suit;

(e) that, the causes of action in the two suits are different even though the parties are the same; and so they cannot be consolidated as they do not involve the same questions of law;

(f) that, consolidation of the two suits would greatly prejudice the Defendant – because it will create more opportunity for the Plaintiffs to avoid complying with existing Court Orders; different procedures apply to a suit filed by Plaint, and one filed by Originating Summons; the Plaintiffs are already wrongfully endeavouring to sell off the suit land notwithstanding their want of title.

II Submissions for The Plaintiff/Applicant

Mr. Kibera presented the application papers, and contended that the orders sought would assist the Court in determining the respective rights of the parties aver the suit lands.

Counsel submitted that in the case of ***Njuguna Ndatho v. Masai Itumo***, Civil Appeal No. 231 of 1999 the Court of Appeal had affirmed that a claim by way of adverse possession can only be commenced by way of Originating Summons under Order XXXVI and not by Plaint; and so the Plaintiff had no options in filing HCCC No. 419 of 2003 (O.S.). Counsel did not, however, explain why what the Plaintiffs saw as their legitimate claim based on valid official documents, and which they sought to assert by their suit, HCCC No. 529 of 2002 would now no longer be depended upon, and a later suit must be brought, HCCC No. 419 of 2003 (O.S.) whose essential legal proposition derogates from the assertion of lawful ownership as presented in HCCC No. 529 of 2002. This point is important, because it goes to ***bona fides*** in the conduct of litigation.

Mr. Kibera submitted that the Defendant had a misconceived belief that a suit by Plaint cannot be tried together with a suit by Originating summons. In his view, the claim under adverse possession was addressing the same matter as the one set out in the Plaint. He contended that it is only by resolving the claims in the two suits simultaneously, that the rights of the parties would be determined once and for all.

III. Submissions for the Defendant/Respondent

Mr. Luballelah for the Defendant opposed the consolidation application, firstly because there was no pleading in HCCC No. 419 of 2003 (OS) that was exhibited with the present application to enable the

Court to compare and match the resemblances claimed.

I have already noted that the two suits would on the face of the pleadings give the clear impression that the later one is taking away the very foundation of the earlier one. In the Plaint, I have formed the impression that a positive right, founded on certain legal principles, is being asserted; while in the Originating summons suit it is, in effect, being affirmed that ***there may not have been any legal rights in the first place.***

It would not be right for the Plaintiff to found her claims on approbation and reprobation at the same time, as this would then show a lack of ***bona fides***, and an abusive engagement of the resources of the judicial process. On this point I would, with respect, uphold the submission of counsel for the Defendant/Respondent.

Mr. Lubullelah submitted that, as the Originating Summons suit was commenced one year after the filing of the Plaint, "the Applicant had an opportunity of making an election of the appropriate procedure to use in this Court."

Counsel submitted that in the regular suit, the Plaintiffs had claimed ownership on the basis of ***allotment,*** and this was the basis upon which an injunction had been sought. In these circumstances, ***Mr. Lubullelah*** submitted, the Originating Summons suit was filed only as an afterthought. Counsel submitted that the possibility of a claim founded on adverse possession could not possibly have come to the Plaintiff's mind only after the regular suit had been filed. In these circumstances counsel raised questions as to the ***bona fides*** of the Plaintiff/Applicant in bringing the present application before the Court.

Counsel submitted that the Applicant, at the time of filing the Originating Summons suit in 2003, must have been aware of the provision of Section 6 of the Civil Procedure Act (Cap. 21), which places limitations on a second suit being pursued in relation to the same subject-matter. Proceeding with the two suits then later seeking their consolidation, counsel submitted, was an abuse of the process of the Court. Counsel urged, and quite persuasively, with respect, that the moment the Applicants found themselves with two suits which their counsel admits are on the same subject-matter, they should have applied to withdraw one of them since, if it is the same matter these suits were concerned with, then a just result would be obtained regardless of the one with which the Plaintiff proceeded.

Counsel argued that the claim in the depositions for the Applicants and in the submissions of their counsel, that the two suits raise the same issues in law and in fact, is simply not true. For, in the present suit, the Applicant's claim is based on a ***letter of allotment***, and on correspondence directly referring to a land parcel described as L.R. No. 1/39. The Plaintiffs are ***claiming a title.*** They are claiming that they are the registered owners. Counsel submitted that a claim based on adverse possession is a covert admission that the title is not registered in the name of the claimant, but because they have been in occupation for a certain period, the longevity of their stay entitles them to be registered. The applicable law in the two situations are different; and the causes of action are clearly different. Counsel referred to the same case invoked by counsel for the Applicant, ***Njuguna Ndatho v. Masai Itumo***, Civil Appeal No. 231 of 1999, and underlined the holding therein that a ***counterclaim founded on adverse possession could not be made in a regular suit***.

Mr. Lubullelah submitted that consolidation of the two suits as sought could not be allowed: because the manner of trial in an O.S. suit was different from that in a normal suit commenced by Plaint. Suits by Originating Summons can only be conducted after there has been an application for directions, and the Court has given directions. Counsel submitted that directions for the trial of an O.S. suit are given ***in the O.S. suit itself***, and not in a different suit; and in effect the Court lacked the jurisdiction at this point in time to give directions for the trial of the O.S. suit. By Order XXXVI rule 10, the Court can order that an Originating Summons be heard as if it was commenced by Plaint. Even if consolidation were possible, the Court would first have to entertain a separate application, under the O.S., and there, order that the O.S. may proceed as if by Plaint. Counsel submitted, and correctly, with respect, that no such Order had been made by the Court.

Mr. Lubullelah submitted that it was not true that the Defendant would suffer no prejudice if the Plaintiffs' application were allowed. His reasoning was that the current suit was already part heard, and all the witnesses for the Defendant have given their testimony and had been cross-examined and re-examined. Consolidation would lead to a recalling of witnesses, and would involve very considerable costs. Counsel considered it imprudent to consolidate the two cases only after the Defendant has already closed his case.

Counsel also doubted whether it was true that the cases sought to be consolidated indeed involved the ***same parties.*** He submitted that the parties in the O.S. suit could be totally different from the 74 on whose behalf the Plaintiff is suing in HCCC No. 529 of 2002.

Counsel submitted that this was a case in which the Courts discretion should be exercised to disallow the consolidation application. He relied on ***The Digest: Annotated British, Commonwealth and European Cases*** 37(2) (London: Butterworths, 1983), at para. 1520:

> *"Two libel actions were brought against the same defendants in respect of the same article. Plaintiff in the first action and plaintiff in the second action were represented by the same solicitors. In the first action defendants admitted that the words complained of referred to the plaintiff, denied that the words were defamatory, and pleaded an offer of an apology in mitigation of damage. In the second action the defendants denied that the words complained of referred to the plaintiffs, and denied that they were defamatory, but did not rely on any offer of an apology. At the hearing of the summons for directions in the second action defendants, after informing the solicitors for plaintiffs of their intention, applied for an order for consolidation of the two actions. No notice was given on summons issued in the first action. The judge in chambers ordered consolidation of the two actions on the ground that the omission to give notice in the first action was a mere technicality. On appeal by plaintiffs: Held (1) in the absence of any summons in the first action the court had no jurisdiction to make an order in the second action purporting to direct how the first action should proceed; (2) even if the court had jurisdiction, consolidation would not in the circumstances be ordered since* ***there were not common questions of law or fact in the two 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; (3) the proper order in the circumstances would be that the two actions be tried consecutively by the same judge and the same jury."*

Counsel relied on this passage to support the proposition that the judicial power in respect of consolidation is both original and discretionary, and it should not be used to assist a party in flagrant disobedience to Orders issued by the Court.

Counsel prayed that the application be dismissed with costs.

IV. Reply by Counsel for the Plaintiff/Applicant

Mr. Kibera submitted that the non-annexing of the O.S. to the present application is not fatal, because the O.S. has after all been acknowledged in the Defendant's replying affidavit.

Counsel further submitted that the O.S. was not filed as an afterthought as contended by counsel for the Defendant; that it is on record that the Plaintiff had claimed an overriding interest even though no O.S. suit had at that stage been filed.

Counsel prayed for the application of the Court's discretion under Section 3A of the Civil Procedure Act (Cap. 21) to effect the consolidation. He submitted that Order XI which deals with consolidation, does not state which suits cannot be consolidated, and only refers to suits; and Section 2 of the Civil Procedure Act says a suit is a suit, regardless of how it is originated.

Counsel also contended that the Defendant stood to suffer no prejudice if consolidation were allowed, because the Defendant was at liberty to recall witnesses, and that the Defendant was always aware the present application was before the Court.

V. Final Analysis and Orders

There was no steady start to the main suit and its applications. These came one or more times before as many as eight different Judges. This necessarily led to a failure of systematic follow-up on some of the main questions arising and, in the process, the application herein was not heard at the right time. It came before me at the wrong time when the Defendant's witnesses had all been examined. In principle this was not the right time to allow the Plaintiff's application for consolidation of two separate suits to be heard.

I have, however, been able to consider the application and the grounds stated, the depositions, and the submissions of counsel. The critical technical question of law is whether it is proper to consolidate a normal suit filed by Plaint, with a special suit filed by Originating Summons. In a case where this was only one of several issues to be considered, that is, in the Court of Appeal case, ***Njuguna Ndatho v. Masai Itumo & Others***, Civil Appeal No. 231 of 1999 the Court held as follows (P.8):

> *"The question that next arises is: were the respondents entitled to invoke the doctrine of adverse possession to claim title to the suit land by way of a counter-claim in the suit? The learned Judge, despite the provisions of Order XXXVI rule 3D of the Civil Procedure Rules, thought that they could so counter-claim. He did not see any injustice caused to the appellant in the circumstances. This court has on several occasions held that title by adverse possession is to be sought by way of an Originating Summons under Order XXXVI rule 3D of the Civil Procedure Rules.* ***The claim for title by virtue of adverse possession*** *by way of a cross-claim in a suit was in this case misconceived*.
>
> "*The sum total of all that we have said is that this appeal is allowed to the extent that orders made on the cross-appeal (counterclaim) are set aside."*

This is an important decision coming from the Court of Appeal, on the question whether adverse possession can at all be claimed within the framework of a normal suit. In my interpretation of the law, I have to state quite clearly that the Court of Appeal's decision would not allow a consolidation of a normal suit, such as the one which is the basis of this application, with a claim based on adverse possession. If, therefore, I dismissed the Plaintiff's application ***in limine*** at this point, I would have no apology that the law has in any way suffered.

However, I will proceed to consider the crucial point about the consolidation of cases which counsel have spoken about quite eloquently, namely, that the Court's discretion, aimed at achieving the full play of the ingredients in the quest for justice, is all important. The primacy of the Court's discretion is underlined in the authorities and, more importantly, in the governing legislation, and in this case Section 3A of the Civil Procedure Act (Cap. 21).

Discretion, it has to be emphasised, is not the same thing as arbitrariness, or fickle or unregulated decision-making. Discretion intrinsically means rational, disciplined and fair decision-making on the basis of the Court's inherent powers. Such an object cannot be achieved without constantly referring back to certain fixed points of validity. The constant point of validity will be found to be the ***facts*** and the ***realities*** of any given case.

The critical facts in the present case are as follows: (i) in the Tassia area, close to the reaches of Outer Ring Road to the East of Nairobi, there are large parcels of land which the Defendant claims as its own, thanks to title documents issued by the Commissioner of Lands; (ii) in occupation of considerable portions of the said lands, are the Plaintiffs who say those same lands were duly allocated to them and they have clear colour of right thereto; (iii) it is obvious that a quest for justice would entail the simple process of ascertaining the validity of the conflicting claims; (iv) it is the Plaintiffs who moved the Court, through HCCC No. 529 of 2002, to resolve this dispute and to declare them the true owners of the suit

land; (v) the Plaintiffs, on that occasion, moved the Court by Plaint, thus calling for a regular trial in which witnesses would be heard, cross-examined and re-examined; (vi) but one year later the Plaintiffs now contended that they want their claim to title established by presumption, on the basis of a new allegation of longevity of occupancy; (vii) the two types of claim are mutually opposed, and so it is difficult to resolve them together.

Assuming good faith on the part of the Plaintiffs, they were under a duty to choose which of the two claims they wanted to pursue. They did not do it. They came to Court without their witnesses when the normal suit was being heard, and an opportunity was, in the circumstances, created for the Defence rather than the Plaintiff to begin. The moment the Defence case was closed, counsel for the Plaintiff applied to have his application for consolidation of the on-going suit with an Originating Summons suit by which the Plaintiffs were claiming the suit lands on the basis of presumption.

I would, on the basis of these facts, be disinclined to allow the Plaintiff's application or Order a consolidation of two suits which, to my mind, lie in diametric opposition in terms of concept and principle.

Counsel for the Defendant has also raised a pertinent point which would not favour the consolidation of the two suits. The Civil Procedure Code has special procedures preliminary to the hearing of cases brought by Originating Summons. These procedures must be observed within the framework of the O.S. suit itself; and in this sense I would this time have no jurisdiction to make orders in relation to such preliminary matters, and therefore there is no possibility of consolidating the two cases.

Counsel has further submitted that one condition for the consolidation of cases is not satisfied. The parties in the two cases are not necessarily the same, and the Applicant has not addressed this point even after it was raised. I have to uphold the Defendant's submission, in the circumstances.

I will make the following Orders:

1. The Plaintiff/Applicant's second prayer, in the Chamber Summons of 8th July, 2003 that the present suit be consolidated with HCCC No. 419 of 2003 (O.S.) is refused.

2. The Plaintiff/Applicant's third prayer, in the Chamber Summons of 8th July, 2003 that the Court do stay the proceedings in this suit, is refused.

3. The present suit, HCCC No. 529 of 2002 which is a part-heard, shall be heard without any delay whatsoever, and counsel shall, ***on Tuesday 5th October, 2004 at 9.00 a.m. appear before the Duty Judge for mention and for the taking of the earliest possible hearing date*** which preferably should be in the ***morning hours***. On that occasion the Plaintiff and her witnesses shall give their testimonies and shall be cross-examined and re-examined.

4. The costs of this application shall be borne by the Plaintiff in any event.

DATED at Nairobi this 30th day of September, 2004.

J. B. OJWANG

Ag. JUDGE

DELIVERED at Nairobi this 1st day of October, 2004.

S. A. MAKHANDIA

Ag. JUDGE

Coram: Ojwang, Ag. J.

Court clerk: Mwangi

For the Plaintiffs/Applicants: Mr. Kibera, instructed by M/s Njoroge Nyagah & Co. Advocates

For the Defendant/Applicant, Mr. Lubullelah;

Mr. Ashimosi - instructed by M/s Lubullelah & Associates Advocates.