



REPUBLIC OF KENYA



**Waiguru v Kihingo Village (Waridi Gardens) Limited; Kabiro & another (Interested Parties)
(Environment & Land Case 256 of 2019) [2024] KEELC 1826 (KLR) (11 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 1826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 256 OF 2019**

OA ANGOTE, J

APRIL 11, 2024

BETWEEN

ANNE MUMBI WAIGURU PLAINTIFF

AND

KIHINGO VILLAGE (WARIDI GARDENS) LIMITED DEFENDANT

AND

CHRIS KABIRO INTERESTED PARTY

JAMES NDUNG’U GETHENJI INTERESTED PARTY

RULING

1. Vide a Motion dated 2nd September, 2022, brought pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act* and Orders 11 Rule 3 and 51 Rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant seeks the following reliefs;
 - i. That an Order do hereby issue consolidating the instant suit with HCC Commercial No 350 of 2012-Kihingo Village (Waridi Gardens) Limited vs Chris Kabiro and HCC Commercial No 355 of 2012 Chris Kabiro vs Kihingo Village(Waridi Gardens) Limited & Another.
 - ii. That the Costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Anne Waiguru, the Plaintiff/Applicant dated 31st August, 2022, who deposed that she filed the present suit as against the Defendant, seeking orders compelling it to transfer to her House number 1D constructed on LR Number 27754 also known as Kihingo Village (hereinafter the suit property).
3. According to the Plaintiff, when the Defendant filed its Defence, it alluded to the existence of HCCC Number 355 of 2012, Chris Kabiro Versus Kihingo Village (Waridi Gardens) Limited & Another in



- which orders were issued in favour of the 1st Interested Party herein; that the suits relate to the suit property, House 1D and that this is the proper Court before which this dispute should be litigated.
4. It is the Plaintiff's case that unless the suits are consolidated, there is a risk of another Court making contradictory orders; that no prejudice will be suffered as the parties in the Commercial Division are all before this Court and that no progress has been made towards the hearing of the suits in the Commercial Division.
 5. In response, the Defendant/Respondent filed Grounds of Opposition as well as a Replying Affidavit. The Grounds of Opposition dated 28th February, 2023 are premised on the following grounds;
 - i. The issues and witnesses in the three suits are not the same hence the rights of the parties cannot be determined in one action.
 - ii. HCC 350 of 2012 and HCC 355 of 2012 are commercial matters while ELC 256 of 2019 is a land matter.
 - iii. HCC 350 of 2012 and HCC 355 of 2012 revolve around the payment of legal fees while ELC 256 of 2019 revolves around the issue of ownership of property.
 - iv. The Plaintiff in ELC 256 of 2019, Anne Waiguru is not a party to either HCC 350 of 2012 or HCC 355 of 2012 and is not privy to the issues in the commercial matters therein.
 - v. The Plaintiff is guilty of a long, inexplicable, and inordinate delay in seeking consolidation considering that ELC 256 of 2019 was filed in 2019.
 - vi. The Application is a belated and desperate attempt by the Applicant to delay the conclusion of this case.
 6. The Defendant, through its Director, Gitahi Gethenji, deponed that contrary to the Plaintiff's assertions, the issues in HCC 350 of 2012, HCC 355 of 2012 and ELC 256 of 2019 are not the same and as such, the rights of the parties therein cannot be determined in one action; that HCC 350 of 2012 and HCC 355 of 2012 are commercial matters pertaining to legal fees while ELC 256 of 2019 is a land matter raising the question of alleged ownership of property and that the Plaintiff herein is not a party to HCC 350 of 2012 or HCC 355 of 2012, neither is she privy to the issues in the aforementioned matters.
 7. Mr Gethenji deponed that the Plaintiff is guilty of inexplicable, and inordinate delay in seeking consolidation considering that the suit was filed in 2019; that the application is an afterthought meant to delay the progress of this suit; that nonetheless, the parties in the commercial suits willingly entered into a consent to have the file closed, which consent is valid and has not been disputed by the relevant parties and that the Plaintiff, a stranger to the commercial suits, has no legal capacity to challenge a consent whose makers are not contesting its validity.
 8. The 1st Interested Party filed a Replying Affidavit in which he deponed that the Plaintiff's application is mischievous, deliberately misleading and based on fraudulent misrepresentation and non-disclosure of material facts and that the parties in the three cases are different.
 9. It was deposed by the 1st Interested Party that whereas in the instant case, the parties are Anne Mumbi Waiguru vs Kihingo Village (Waridi Gardens) Limited and Chris Kabiro, HCC 355 of 2012 is between Chris Kabiro T/A Kabiro Ndaiga and Company Advocates vs Kihingo Village (Waridi Gardens) Limited, Wagemu Limited and Muganda Wasilwa T/A Keysian Auctioneers, and HCC 350 of 2012 is between Kihingo Village (Waridi Gardens) Limited vs Chris Kabiro.



10. Mr Kabiro deponed that the subject matter in the three cases is different; that whereas the instant case is a land matter, HCC 350 and 355 of 2012 are for claims for money received and/or held in respect to a commercial transaction; that HCC 355 of 2012 was settled by a consent which was adopted by the Court on 27th June 2023 and that the settlement arose after parties had taken accounts pursuant to a Ruling by Hon Justice Eric Ogolla dated 5th December, 2013.
11. According to Mr Kabiro, in the circumstances, consolidating the matters will militate against the overriding interest in dispute resolution as the same will constitute re-opening the cases and re-litigating issues therein with the instant suit in which parties are yet to undergo pre-trial discoveries; that notably, HCC 350 of 2012 is no longer in existence having been dismissed on 19th June, 2015 and that as such, the same cannot be consolidated with HCC 355 of 2012 and the present suit.
12. The 2nd Interested Party filed a Replying Affidavit in support of the Motion. He deponed that he is aware of the matters sought to be consolidated herewith; that the 1st Interested Party wants to unlawfully pay himself Kshs 130,000,000; that the consent in HCC 355 of 2012, is unprocedural and in breach of Company Law and the Memoarts of the Defendant and that no resolution was passed by the company consenting to the same.
13. Mr Gethenji deponed that having read the pleadings by the parties in respect of the three suits in issue, it is clear that the issues in litigation are the same; that the allegations that the Interested Party and the Defendant met and reached a consent in HCC 355 of 2012 is untrue; that the 1st Interested Party forged his signature in the agreement for sale and took possession of the suit property without payment or consent of the Defendant, which fact has been confirmed by the DCI forensic document examiner and that the 1st Interested Party filed HCC 355 of 2012 after he ceased to be in possession of the suit property.
14. The 2nd Interested Party contends that despite having received orders to undertake accounts in 2012, the 1st Interested Party did not take up the same; that the 1st Interested Party had already relinquished the claim to the suit property and the suit was an afterthought, inspired by his co-directors, being his brothers with whom he has had several family disputes and that this is the only Court permitted by the Constitution to inquire into land disputes hence a consolidation will give this Court an opportunity to conclusively determine the matters.
15. The Plaintiff/Applicant filed a Further Affidavit. She deponed that from the outset, the 1st Interested Party joined these proceedings on account of his claim filed under HCC 355 of 2012; that after obtaining interim orders in the proceedings, he failed to prosecute his claim for over 11 years and then filed an application to join the present proceedings and that it is only after she filed the present application that the 1st Interested Party decided to enter into a consent with the Defendant.
16. The Plaintiff deponed that the consent is fraudulent, invalid, and was entered into without the authority of the Defendant's third Director, James Gethenji, contrary to the Memoarts of the company; that it is non-sequitor to claim that HCC 355 of 2012 is no longer in existence yet it was consolidated by the Court in HCC 350 of 2012 and that the 1st Interested Party's failure to inform the Court that he recorded a consent before consolidation is fraudulent.

Submissions

17. The Plaintiff's Counsel submitted that the power of the Courts to make orders for consolidation stems from the provisions of Order 11 Rule 3(1) (h) which mandates the Court to consider consolidation of suits with a view to furthering their expeditious disposal.



18. Counsel relied on the case of Joseph Okoyo vs Edwin Dickson Wasunna [2014] eKLR, which cited with approval the case of Mombasa HCC No 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa which set out the factors to be considered for consolidation as follows: common question of law or fact arises in both or all of them; or the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or for some other reason it is desirable to make an order for consolidating them.
19. It was submitted that in Law Society of Kenya vs Center for Human Rights and Democracy and 12 Others [2014] eKLR, the Supreme Court set out the essence of consolidation as being to facilitate the efficient and expeditious disposal of disputes, without causing any undue advantage/disadvantage to any party. Reliance in this regard was also placed on the cases of Salama Beach Hotel Limited & 2 Others vs Director of Public Prosecutions & 2 Others; Hans Jurgen Langer & another (Interested Parties) (2021) eKLR.
20. According to Counsel, the 1st Interested Party joined these proceedings claiming to be a necessary party because he was claiming to own the suit property; that as stated by the Court in Law Society of Kenya vs Center for Human Rights & Democracy & 12 Other(supra), the interests of justice dictate that matters be consolidated where though worded differently, the central issue is the same and that in this case, the question of the lawful ownership of the suit property is a pertinent question that needs to be addressed in order to avoid a situation where there are conflicting decisions.
21. Counsel submitted that it is only after the Plaintiff filed the present application that the Defendant and the 1st Interested Party entered into a consent to defeat justice; that as averred by the 2nd Interested Party, the same is clearly fraudulent and that the Court of Appeal in Brooke Bond Liebig vs Mallya 1975 E.A. 266 affirmed that a consent may be set aside for fraud, collusion, or for any reason which would enable the Court to set aside an agreement. Reliance in this regard was placed on the case of Paul Kiplangat Keter vs John Koech [2021] eKLR.
22. The Defendant's Counsel submitted that the principles guiding the Courts in considering whether or not to allow the prayer for consolidation were set out by the Court in Joseph Okoyo vs Edwin Dickson Wasunna [2014] eKLR, which cited with approval the case in Mombasa HCC No. 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa.
23. It was submitted that in the present case, the issues raised in HCC 350 of 2012 and in HCC 355 of 2012 are not similar to the ones raised in Milimani ELC 256 of 2019; that HCC 350 of 2012 and HCC 355 of 2012 are commercial matters that pertain to legal fees while ELC 256 of 2019 is a land matter raising questions of ownership of land and that similarly, the reliefs claimed by the Plaintiff in HCC 355 of 2012 do not arise from a similar series of transactions and consolidating the files would be muddling the issues in question.
24. Counsel submitted that the Plaintiff herein is guilty of unexplained, inordinate delay; that the application has nonetheless been overtaken by events given that the parties in Milimani HCC 355 of 2012 have entered into a consent to have the file closed and that the Plaintiff herein, who is a stranger to the commercial suits, has no legal capacity to challenge a consent whose makers are not contesting its validity.
25. The 1st Interested Party's Counsel submitted that the Plaintiff seeks to consolidate the instant suit with HCC 350 of 2012 which is no longer in existence as the same was dismissed on 19th June, 2015 and that by consolidation, the Plaintiff seeks to revive the dismissed suit through the back door.



26. It was submitted that in a similar vein, the Plaintiffs quest to consolidate the instant suit with HCC 355 of 2012 is misguided and seeks to surpass the consent willingly entered into by the parties therein and that as stated by the Court in *Shakhalaga Khwa Jirongo & Another vs Board of Trustees of the National Social Security Fund*[2015]eKLR, quoting the *Flora Wasike vs (1982 -1988) /KAR 625*, a consent judgement or order has contractual effect and can only be set aside on grounds justifying setting aside a contract, to wit, fraud, mistake or misrepresentation.
27. The 2nd Interested Party did not file submissions.

Analysis and Determination

28. Having considered the Motion, Affidavits and submissions, the sole issue that arises for determination is whether the prayer for consolidated is merited. According to Black’s Law Dictionary (8th Edition), consolidation is defined as;
- “ to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment, or sometimes, separate judgments... .”
29. The law applicable with regard to consolidation of suits is found under Order 11 Rule3 (1) (h) of the Civil Procedure Rules which states as follows;
- “ 3. With a view to furthering expeditious disposal of cases and case management
(1) the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall-
- (a)
- (h) Consider consolidation of suits”
30. Speaking to the essence of consolidation, the Indian Supreme Court in *Prem Lala Nahata & Another vs Chandi Prasad Sikaria* [2007] 2 Supreme Court Cases 551, held thus;
- “It cannot be disputed that the Court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”
31. Closer home, the Supreme Court of Kenya in *Omoke vs Kenyatta & 83 Others* (Petition 11 (E015) of 2021) [2021] KESC 27 (KLR) (Civ) (9 November 2021) (Ruling) held thus;
- “When considering an application for consolidation, this court will bear in mind the guiding principles it pronounced in the case of the *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others*, SC Petition No 14 of 2013, [2014] eKLR, that: “The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”



The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”

32. Dissecting the parameters for consolidation, the Court in *Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa* [2000] eKLR, stated;

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where: -

- a. Some common questions of law or fact arises in both or all of them.
- b. The rights or reliefs claimed in them are in respect of the same transactions;
- c. For some other reasons, it is desirable to make an order for consolidating them.”

33. It is clear from the foregoing that consolidation will be ordered if there is a common question of law or fact in the suits; the reliefs or rights sought arise from the same or similar series of transactions; or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the *Civil Procedure Act*.

34. In the present case, the Plaintiff contends that this suit is suitable for consolidation with HCC 350 and 355 of 2012. It is her case that the Defendant herein instituted a suit against the 1st Interested party claiming Ownership of House No 1D on L.R No 27754 (hereinafter the suit property); that the 2nd interested Party similarly filed a suit against the Defendant claiming beneficial interest and/or ownership in the suit property and that vide the present suit, she is claiming ownership of the suit property as against the Defendant.

35. The Plaintiff maintains that common questions of law and facts arise in the three suits; that the said questions arise from the same series of transactions and that the greater interests of justice dictate that the matters be consolidated. The 2nd Interested Party supports this position.

36. The Defendant and the 1st Interested Party are opposed to the application. They assert that the suits do not meet the criteria for consolidation as the parties in the three suits are different; that the subject matter in the three cases are different and that the matters in the High Court are commercial in nature while the present one is a land matter.

37. They contend that nonetheless, HCC No. 350 of 2012 has been dismissed whereas HCC No. 355 of 2012 was settled by consent adopted on 27th June 2023 and that it would be an abuse of the court process and contra to the overriding objective in dispute resolution to re-open and relitigate the same by consolidating them with the instant suit.

38. The Court has considered the Pleadings in HCC No. 350 of 2012, HCC No. 355 of 2012 and the present suit. HCC No. 350 of 2012 is between Kihingo Village Waridi Gardens vs Chris Kibiro. The Plaintiff therein seeks inter-alia to be declared the lawful proprietor as lessee of the suit property; orders declaring that there is no agreement capable of conferring any interest in the property to the Defendant and injunctive orders restraining the Defendant from interfering with the suit property.

39. The case by Kihingo Village Waridi gardens in HCC No. 350 of 2012, the Defendant herein, is that it entered into an agreement with Chris Kibiro, the Plaintiff in HCC No. 350 of 2012, its then Advocate



for the sale of the suit property in which Chris Kibiro would pay the purchase price by way of credit notes paid against the legal fees due to him from services rendered under the project.

40. According to the Defendant herein, Chris Kibiro, who is the 1st Interested Party herein, fundamentally changed the designs of the suit property leading to a substantial increase in the value of the suit property and that the company incurred heavy construction costs and that Chris Kibiro forged the agreement for Lease in respect of the suit property and that the aforesaid forged agreement was incapable of conferring any interest in the suit property.
41. HCC 355 of 2012 is between Chris Kibiro vs Kihingo Village Waridi Gardens, Wagemu Limited & Keysian Auctioneers. In the said suit, Chris Kibiro seeks an order for the taking of accounts as between himself and the Defendant herein, a declaration that he has met and fully discharged his obligations under the agreement for sale in respect of the suit property and that he is entitled to exclusive possession thereof.
42. The said Chris Kibiro also seeks for permanent injunctive orders restraining interference with the suit property, specific performance compelling the 1st and 2nd Defendants to execute the lease with respect to the suit property and in the alternative the Deputy Registrar be empowered to so execute.
43. In this case, Chris Kibiro, as an Interested Party, asserts that the suit property was allocated to him in lieu of legal fees and a sale agreement was entered into as per those terms; that he has fully complied with his obligations and it is the Defendant who owe him money; that in recognition of the fact that he has fully complied with his obligations as a purchaser, he was granted possession of the suit property and that the Defendant has nonetheless failed to discharge its obligations under the agreement by transferring the property to him.
44. Vide the present suit, the Plaintiff seeks for an order of specific performance directing the Defendant to complete the sale over the suit property. It is the Plaintiff's case that she purchased the suit property from Kihingo Village Waridi Gardens, the Defendant, vide an agreement of lease dated 25th September, 2015 and that she paid part of the purchase price and procured a financier who undertook to pay the balance of the purchase price to be secured by a legal charge over the suit property.
45. Before delving into the merits of whether the aforesaid matters meet the parameters of consolidation, the court notes that the 1st Interested Party has stated that HCC N0. 350 of 2012 has been dismissed whereas HCC No. 355 of 2012 has been settled by consent and that on that basis, there are no suits to be consolidated with the present suit.
46. The Defendant has adduced an extract of the e-filing portal which shows that HCC 350 of 2012 was dismissed on 19th June, 2015. The Plaintiff disputes this asserting that the matters were consolidated and as such one suit cannot be said to have been dismissed. A matter which has been dismissed is not a going concern and as such cannot be consolidated with live matters. Doing so would be akin to re-opening the case.
47. As regards HCC No. 355 of 2012, the Defendant adduced into evidence the consent dated 27th June, 2023. The consent reads thus;
 - i. That the 1st and 2nd Defendants jointly and severally owe the Plaintiff the sum of Kshs 130,000,000/= in lieu of his fees for professional services rendered in various matters.
 - ii. That the parties undertake to continue with negotiations with respect to outstanding issues in this suit with a view to an amicable solution.



48. It is noted that strenuous objections have been made to the validity of the aforesaid consent with allegations of fraud and/or collusion. The Court cautions itself against wading into this issue at this juncture, save to say that until the said consent is set aside, this Court considers the same valid.
49. So has it, as the Defendant and 1st Interested Party allege, settled the matter. The Court thinks not. The consent only deals with the outstanding legal fees. Undertaking to continue negotiations with respect to “other outstanding issues” cannot be equated to the matter being settled. The issue of ownership of the suit property and damages for eviction remain outstanding in that suit.
50. A critical analysis of the present suit vis HCCC No. 355 of 2012 reveals that the question in issue in both suits is the ownership of the suit property and the process leading thereto. Both the Plaintiff herein and the 1st Interested Party in HCC 355 of 2012 lay claim to the suit property by virtue of being purchasers. They both seek to have the Defendant transfer the suit property to them.
51. Indeed, it appears the consent dealt with the question of accounts/ outstanding legal fees. However, the prayers sought in HCC No. 355 of 2012 revolve around ownership of the suit property, and not whether or not the 1st Interested Party herein is owed legal fees. The issues with respect to ownership of land and allegations of illegal eviction fall within the jurisdiction of this court and not the High Court.
52. Indeed, the main reason why the 1st Interested Party applied to be joined in this suit is because he is claiming the same land in HCC No. 355 of 2012 that the Plaintiff herein is claiming. This court will therefore have to make a determination as to who between the two is entitled to the land, which is a preserve of this court.
53. In view of the foregoing, the Court finds the argument that the series of transactions leading to the reliefs claimed in HCC No. 355 of 2012 are commercial in nature while the Plaintiff’s claim herein is for land is superfluous. Whereas indeed the Plaintiff is not a party in HCC No. 355 of 2012, this cannot in itself be a bar for consolidation of the two suits especially in light of the Court’s discussion above on the issue of ownership of the suit property.
54. As succinctly expressed in *Stumberg & Another vs Potgeiter* 1970 EA 323;

“Where there are common questions of law or facts 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. ...the object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”
55. Ultimately the main issue two suits in the will be the ownership of House No 1D on L.R 27754 also known as Kihingo Village. That being so, it will not be an efficient use of available judicial and administrative resources for two Courts to determine that issue differently. Indeed, either Courts will open themselves up to embarrassment should conflicting decisions issue.
56. The Defendant states that the prayer for consolidation has been brought too late in the day and will prejudice the parties. While the application has indeed been brought a bit late in the day, the Court does not believe this delay will prejudice any party or cause undue advantage to another. None of the matters has proceeded for hearing.
57. In the end, the Court finds the Motion to be merited and proceeds to issue the following final orders;
 - a. This suit is hereby consolidated with HCC No 355 of 2012, Chris Kabiro vs Kihingo Village (Waridi Gardens) and 2 Others.



- b. The two consolidated matters will be heard and determined by this court.
- c. The present file will be the lead file where all the proceedings will be recorded henceforth.
- d. Costs of the application will be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mrs Wangui for Plaintiff/Applicant

Mrs Wachuka holding brief for Kihara for Defendant

Mr. Nyaribo for 2nd Interested Party

Ms Otieno for Koyoko for 1st Interested Party

Court Assistant: Tracy

