



**Nakumatt Holdings Limited v Board of Trustees National Social Security Fund & another
(Environment and Land Case 1170 of 2014) [2023] KEELC 17858 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 1170 OF 2014
OA ANGOTE, J
JUNE 8, 2023**

BETWEEN

NAKUMATT HOLDINGS LIMITED PLAINTIFF

AND

**BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY
FUND 1ST DEFENDANT**

CHINA JIANG XI INTERNATIONAL KENYA LTD 2ND DEFENDANT

RULING

1. The Plaintiff/ Applicant has filed a Notice of Motion application dated 30th May 2022 in which it has sought for the following orders:
 - a. An order do issue consolidating the instant suit with Environment and Land Case No. E063 of 2020 Nakumatt Holdings Limited versus The Board of Trustees of NSSF.
 - b. Upon consolidation, the Plaintiff/Applicant be granted subsequent leave to amend its Plaint dated 28th August 2014 in terms of the draft Amended Plaint annexed herewith.
 - c. Upon granting orders of amendment, the Plaintiff/Applicant be at liberty to file and serve additional documents.
 - d. The Honourable Court do make such orders and further orders as it may deem fit, necessary and expedient in the interest of justice.
 - e. The costs of this application be provided for.
2. The application is based on the grounds on its face and the Supporting Affidavit sworn by the Plaintiff's Advocate, who deposed that the Plaintiff entered into a lease agreement with the 1st Defendant on 1st



January 2014 regarding the business premises of Nakumatt Lifestyle located at Hazina Trade Centre on LR 209/6708.

3. It was deposed that the Plaintiff operated a retail supermarket at the leased premise; that on 23rd December 2013, the 1st Defendant/ Respondent, through its contractors, took possession of the leased premises with the objective of redeveloping the building by constructing an extension of 36 floors and that on 28th August 2014, the Plaintiff sued the 1st Defendant and the contractor seeking special damages of Kshs. 1,620,148,504 for loss of business as a result of the reconstruction.
4. The Plaintiff's counsel deposed that as a result of the continued loss of business due to the 1st Defendant's reconstruction during the subsistence of the lease agreement, the Plaintiff experienced difficulties in payment of rent and that on 30th March 2018, the 1st Defendant unlawfully evicted the Plaintiff by breaking into the premises and recklessly and negligently removing all items from the leased premises.
5. It was deposed that on 11th August 2020, the Plaintiff instituted a suit against the 1st Defendant, Environment and Land Court Case No. E063 of 2020, for unlawful eviction seeking damages of Kshs. 118,174,657.00 among other reliefs and that the 1st Defendant's Counterclaim in ELC E063 of 2020, filed together with its Statement of Defence relates to this suit.
6. According to counsel, prosecuting the said counterclaim in a different court might result in conflicting determinations on the same subject matter, which will waste this court's resources and embarrass the judicial process and that the parties to the two cases are the same and are represented by the same advocates with the exception of the 2nd Defendant.
7. In addition, the Plaintiff's advocate averred that it is important for the Plaintiff to amend the Plaint in this matter to enable it narrow down issues before it as some facts and prayers sought have been overtaken by events; that the intended amendments will not change the subject matter of the suit and do not introduce any new facts and that no prejudice will be occasioned if the application is allowed.
8. The 1st Defendant opposed the application vide a Replying Affidavit sworn by the Legal Manager of the National Social Security Fund, the 1st Defendant, who deposed that ELC 1170 of 2014 and ELC No. E063 of 2020 are based on two different causes of action; that ELC case No. 1170 of 2014 is based on the Plaintiff's purported right to property, fair administrative action and the 1st Defendant's use of land and that the cause of action in ELC No. E063 of 2020 is based on the alleged unlawful eviction and destruction of property.
9. The 1st Defendant averred that the application is an improper attempt to amend the Plaint to claim for the alleged loss of gross profits in sales and net loss rental income; that consolidation is prejudicial to the Defendant as it will only increase the cost and time in litigation as this suit is awaiting hearing; that the amendment of the Plaint eight years after filing the Plaint would return the parties to the pre-trial stage and that consolidation would hinder the expeditious disposal of the suits.
10. The 2nd Defendant filed Grounds of Opposition dated 4th July 2022 in opposition to the application. The 2nd Defendant averred that the two suits have no common issues; that this suit relates to the construction on LR No. 209/6708 while ELC No. E063 of 2020 relates to the alleged wrongful eviction of the Plaintiff from the suit premises and that consolidation is not appropriate as the 2nd Defendant is not a party in ELC No. E063 of 2020.
11. It was averred by the 2nd Defendant that the proposed consolidation will lead to significant delays in concluding this suit and the 2nd Defendant will incur further litigation costs and that no remedies are sought against the 2nd Defendant in ELC E063 of 2020.



Submissions

12. Counsel for the Plaintiff submitted that the power of this court to issue orders for consolidation stems from Order 11 Rule 3(1) (h) of the Civil Procedure Rules which provides that courts can consider consolidation of suits in a view of furthering expeditious disposal of suits.
13. Counsel relied on the case of Nyati Security Guards and Services v Municipal Council of Mombasa cited in Joseph Okoyo v Edwin Dickson Wasunna (2014) eKLR where the court enumerated the factors to be considered in consolidation suits.
14. The Plaintiff's Counsel submitted that as the grounds of the application are matters to be determined by counsel from the pleadings in both matters, counsel swore the Supporting Affidavit and merely laid out the grounds for consolidation of the two suits and that nothing in Rule 9 of the Advocates Practice Rules prevents an advocate from swearing an affidavit in the suit they appear.
15. Counsel for the 2nd Defendant submitted that it is not proper for the Plaintiff's advocate to have sworn the supporting affidavit and that this court ought to disregard the affidavit sworn by Mumbembe David or in the alternative, little weight should be given to the affidavit.
16. The 2nd Defendant's counsel submitted that there are no common issues of law or fact in the two suits as they originate from different transactions; that ELC No. E063 of 2020 seeks damages for unlawful eviction while ELC No. 1170 of 2014 seeks for orders stopping the Defendants from constructing on the suit land during subsistence of the lease.
17. Counsel relied on the cases of Nyati Security Guards & Services Ltd v Municipal Council of Mombasa [2004] eKLR, Law Society of Kenya v Center for Human Rights & Democracy & 12 others [2014] eKLR, Barclays Bank (K) Ltd v Simons Muruchi Thiga [2006] eKLR and Kariuki v Kiore & 4 others [2022] eKLR.

Analysis and Determination

18. Having considered the application dated 30th May 2022, the responses and submissions filed by the parties, the following issues arise for this court's determination:
 - a. Whether the Plaintiff's Counsel Supporting Affidavit is properly on record.
 - b. Whether the court should allow the consolidation of ELC 1170 of 2014 to ELC E036 of 2020.
 - c. Whether the court should allow the Plaintiff to amend its Plaint.
1. The first issue raised by the Respondent is whether the Plaintiff's advocate Supporting Affidavit is properly on the record. Order 19 Rule 3 of the Civil Procedure Rules provides that:

“3.

- (1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof.”



20. The 2nd Respondent’s Counsel has sought to rely on the Court of Appeal’s decision in *Gerpbas Alphonse Odhiambo v Felix Adiego* [2006] eKLR where it held as follows:

“An affidavit, by definition, is evidence given on oath and is subject to the provisions of the *Evidence Act*, Cap 80 – see section 2(2). Admissibility of hearsay evidence must therefore be shown to comply with the provisions of that Act. Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to section 2(2) of the *Evidence Act*, as it is in interlocutory proceedings under the Civil Procedure Rules, Order 18 rule 3(1), the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded. This Court interpreted that provision in *Kenya Horticultural Exporters [1977] Ltd v Pape (trading as Osirua Estate)* [1986] KLR 705 where it stated:

“Order XVIII rule 3(1) of the *Civil Procedure Rules* is not to be understood to provide that an affidavit in interlocutory proceedings may be sworn by a deponent who is unable of his own knowledge to prove facts, or that such an affidavit may be confined entirely to statements of information and belief even if the sources and grounds are shown. The words “may contain” suggest that the main body of such an affidavit has to be confined to facts which the deponent is able of his own knowledge to prove.”

...I see no reason, as none is stated, why the court clerk who had personal knowledge of the disappearance of the court file could not swear the supporting affidavit as required under our rules. I will disregard the affidavit in that regard.”

21. In the matter before this court, the Plaintiff’s Advocate has sworn an affidavit in support of the application for consolidation of the two suits and amendment of the Plaintiff. In the affidavit, Counsel deposed that the parties entered into a lease in respect of the suit property; that the lease was frustrated due to the construction of the 2nd Respondent and that the Plaintiff was unlawfully evicted from the suit premises.
22. The Plaintiff’s Counsel further deposed that the Plaintiff filed this suit and later filed ELC No. E063 of 2020 with respect to their claim for unlawful eviction.
23. Indeed, the facts as to the lease that was entered into by the parties herein cannot be said to be within the knowledge of the Plaintiff’s Counsel. However, the facts as to the two suits before this court, in which Counsel is representing the Plaintiff, are well within her knowledge. To the extent that Counsel is seeking for the consolidation of the two suits, whose facts have been pleaded by the parties, I find that the Supporting Affidavit is properly on record.
24. Consolidation of suits is provided for under Order 11 Rule 3(1)(h) of the *Civil Procedure Rules* as follows:
- “(1) With a view to furthering expeditious disposal of cases and case management 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”

25. The *Black’s Law Dictionary* (8th Edition) defines consolidation 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...”

26. The essence of consolidation is to ensure efficient and expeditious disposal of suits. This was held by the Supreme Court in *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR as follows:

“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. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.”

27. The test for consolidation, as contended in *EAN Kenya Limited v John Sawers & 4 others* (2007) eKLR, is whether the same or similar questions of law or fact are involved in the suits:

“But of course the test to be applied is not whether the parties are the same but where the same or similar questions of law or fact are involved in the suits. I am satisfied that similar issues of law and fact arise in both suits. For reasons of expediency both suits will be best heard together.”

28. The court in *Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 Others* [2014] eKLR persuasively articulated the test for consolidation as follows:

“The *Civil Procedure Rules* mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-

1. Do the same question of law or fact arise in both cases?
2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?
3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?”

29. In *Kimani Waweru & 28 Others v Law Society of Kenya & 12 Others* [2014] eKLR, the court stated thus:

“Consolidation of suits does not, unlike the principles of sub judice and res judicata, depend on the parties in the different suits being the same or litigating in the same capacity. Consolidation only requires that the same or similar questions of law and fact be present in two or more suits to be consolidated.”



30. This court is guided by the above decisions. In considering whether to grant the order for consolidation of suits, this court is to consider whether there are common questions of law or facts in the suits. In this suit, ELC No. 1170 of 2014, the Plaintiff has sued the 1st Defendant and the contractor seeking special damages of Kshs. 1,620,148,504 for loss of business as a result of the reconstruction of the suit premises. In ELC No. E063 of 2020, the Plaintiff has sued the Defendant for unlawful eviction from the suit premises, and is seeking for damages of Kshs. 118,174,657.00 among others.
31. It is clear that both suits arise from the lease between the 1st Defendant and the Plaintiff, the action of the 1st Defendant to engage the 2nd Defendant to undertake construction during the Plaintiff's lease and the eventual eviction of the Plaintiff from the lease premises. While the 2nd Defendant has argued that they will be prejudiced if these suits are consolidated, this court finds to the contrary. Consolidation of these two suits will save judicial time and resources.
32. This court is therefore persuaded that the Plaintiff has satisfied the test for consolidation of ELC 1170 of 2014 and ELC E063 of 2020. The consolidation will avoid the embarrassment that may be occasioned if the court adopts conflicting findings to similar facts.
33. Section 100 of the *Civil Procedure Act* accords a court the general power to amend any defect or error in any proceeding in a suit. Order 8 Rule 3 of the *Civil Procedure Rules* provides as follows:
- “(1) ...Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
- (3) ...
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”
34. The purpose of amendments of pleadings is to facilitate the determination of the real issue in dispute between parties. This position was restated in *Halsbury's Laws of England*, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76 as follows:
- “...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the



proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

35. The annexed draft amended Plaintiff seeks to update the Plaintiff’s suit to account for circumstances that had been overtaken by events, such as the appointment of an administrator over the Plaintiff; the eviction of the Plaintiff from the suit premises and to seek special damages of Kshs 2.288 billion being loss in gross profits and rental income.
36. The amendment of the Plaintiff will facilitate the determination of the real questions in controversy between the parties to these proceedings. For those reasons, the court allows the Plaintiff’s application dated 30th May 2022 as follows:
 - a. An order is hereby issued consolidating the instant suit with Environment and Land Case No. E063 of 2020, Nakumatt Holdings Limited versus The Board of Trustees of NSSF.
 - b. The Plaintiff is hereby granted leave to amend its Plaintiff dated 28th August 2014 in terms of the draft Amended Plaintiff, within 14 days from the date hereof.
 - c. The Plaintiff is at liberty to file and serve additional documents and statements within 14 days.
 - d. The Defendants are at liberty to amend their Defences and file additional documents and statements within 14 days from the date of service.
 - e. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 8TH DAY OF JUNE, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Opera for Kiragu Kimani for 2nd Defendant

Ms Ouma holding brief for Olunya for Plaintiff/Applicant

Mr. Adano for 1st Defendant

