



REPUBLIC OF KENYA



KENYA LAW
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**Njoroge v Ndichu & 27 others (Environment & Land Case
190 of 2017) [2022] KEELC 13531 (KLR) (6 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13531 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 190 OF 2017**

JG KEMEI, J

OCTOBER 6, 2022

BETWEEN

REGINA NJERI NJOROGE PLAINTIFF

AND

LILIAN WANGUI NDICHU 1ST DEFENDANT

GRACE WANGUI NGUJIRI 2ND DEFENDANT

ESTHER WACEKE KIBARI 3RD DEFENDANT

ANN NDATA NJOROGE 4TH DEFENDANT

CHARITY WAMBUI MUNUHE 5TH DEFENDANT

MONICA WANJIKU KARIGI 6TH DEFENDANT

ELIZABETH KABERI 7TH DEFENDANT

MARGARET WANJIRU MWAURA 8TH DEFENDANT

ESTHER WANGARI WACHIRA & 19 OTHERS 9TH DEFENDANT

RULING

1. This Application is brought under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 11 Rule 3(h) and Order 40 Rule 1 2 & 3 of the *Civil Procedure Rules*, 2010 and other enabling provisions of the law.
2. The Application dated 29/10/2021 is filed by the 2nd, 17th, 19th and 20th Defendants/Applicants seeking the following orders;
 - a. This suit be consolidated with ELC No 141 of 2017.



- b. Spent.
 - c. Once the suits are consolidated the Defendants be granted leave to amend the defence and include other Defendants in line with the attached amended statement of defence marked A.
 - d. Thereafter both matters be referred back for pretrial for purposes of filing and service of witness statements and other documents.
 - e. Costs be in the cause.
3. The Application is based on the grounds; that the parties as well as the advocates representing them in both suits are the same; common questions of law and facts touching on the suit properties are the same and arise from similar facts; the rights and reliefs claimed in both suits are in respect of and arise from the same transaction and finally that it is desirable to consolidate the two suits as no party shall suffer prejudice.
 4. The Application is supported by the Affidavit of Zakayo Kimani Maina, the Learned Counsel for the Applicants in which he deposed that both suits concern similar parties and common questions of law and fact as the subject matters are the same and that further there are other purchasers of the same subject property residing on the suit lands who are desirous of joining the suit as Defendants as per the amended annexed defence. That the intended Defendants stand to suffer prejudice if they are denied the opportunity to be heard. All in all, he urged the Court to grant the prayers to prevent an injustice and expedite the hearing of the two suits.
 5. The Application is opposed by the Plaintiff vide her Replying Affidavit deposed on the 15/11/2021 wherein she deposed that the cause of action in ELC No 141 of 2017 is not similar as this suit is parcel No Ruiru/Ruiru/East Block 2 /3583 while parcel 3584 is the subject matter in ELC 141 of 2017. That parcel 3584 in ELC 141 of 2017 was sold to the Defendant by John Kingora Nduati trading as Transcentre Holdings Co. Limited, while parcel No 3583 was sold to the Defendants by Gatu Holdings after subdivision. Further that it is unclear how the vendors acquired the properties before selling to the Defendants and it is fair that the two suits are heard separately in order to establish the truth. In addition, she deposed that each of the subject properties have been put into different uses, for example parcel 3584 is being used for the excavation and mining of stones while as for parcel 3583, the Defendants have put up permanent and semi-permanent structures on it. Further that whilst the relief of vacant possession is the dominant prayer in both suits, there is an additional relief in ELC 141 of 2017, in the nature of special damages in the sum of Kshs 1,025,000/- and mesne profits against the 1st Defendant. That the cause of action arose from different transactions, the parties and subject matters are different and the more reason that consolidation should not be allowed.
 6. The parties canvassed their arguments by way of written submissions.
 7. It was submitted by the Applicants that the Plaintiff sued the 1st Defendant, Lilian Wangui Ndichu in ELC 141 of 2017 on the 17/2/2017 seeking inter alia a permanent injunction, special damages and mesne profits. The subject matter is RUIRU/RUIRU EAST BLOCK 2/3584. 7 days later on the 24/2/2017 she filed the second ELC 190 of 2017 suit against the 1st Defendant and 20 others seeking vacant possession of parcels 3583 and 3584 from the Defendants, general damages and costs of the suit. The cause of action is alleged to be trespass just like in ELC 141 of 2017. That on the 8/2/2018 the Plaintiff filed an Application seeking leave to amend the plaint in ELC 141 of 2017 to include 29 other Defendants as well as parcel 3583 which Application was allowed.
 8. The Applicants submitted that the parties are the same, save that there are more Defendants in ELC 141 of 2017, the subject matter is similar and the advocates acting for the parties are the same, the suits



arise from the same cause of action as seen in the 1st Respondents replying Affidavit in ELC 141 of 2017 which alluded to the fact that she, with other Defendants not before the Court purchased the property, a position that was confirmed by the Plaintiff in her amended plaint in ELC 141 of 2017 when she sought to include the parties as additional Defendants.

9. Further the Applicants urged the Court to allow the joinder of the additional Defendants so that the matter may be determined once and for all and to avoid multiplicity of cases.
10. The 1st, 3rd - 16th, 18th and 21st Defendants did not oppose the Application.
11. The Plaintiff/Respondent submitted that that the subject matter of the two suits are different and although both are registered in the name of the Plaintiff they are alleged to have been acquired by the Defendants from two different parties to wit parcel 3584 was purchased by Lilian Wangui Ndichu from John Kingora Nduati while parcel 3583 was allegedly purchased by the 1st, 8th and 18th Defendants from Gatu Properties who in turn acquired the land from Francis Wakahu Theuri. That save for the 1st 8th and 18th Defendants contention on how they acquired the property the rest of the Defendants contend that they purchased the property from Transcentre Holdings Limited. It was her submissions that it is unclear whether the two companies belong to the same person or whether they both acquired the property from the original allottee/owner that is Ms Wanjiru Giichi. That Lilian Wangui Ndichu is in possession of the parcel 3584 while parcel 3583 is occupied by the 1st Defendant and the other Defendants.
12. The Plaintiff submitted that whilst the gist of the two cases goes to the root of ownership of the properties by the Plaintiff, the facts giving rise to the ownership are different.
13. On the reliefs being sought in the two suits, the Plaintiff submitted that though she has sought orders of eviction in both suits, she has also sought for special damages and mesne profits as the land is being used for excavation of building stones.
14. Relying in the case of *Eunice Nyairungu Vs Libey Njoki Munene & 2 Others* (2015) eKLR the Plaintiff urged the Court to disallow the Application as she is likely to face possible prejudice and hardship in prosecuting the suits on account of the many Defendants involved and that there is the likelihood of confusion arising in prosecuting the suits. That for the reasons given and the circumstances of the two cases, it is highly undesirable to consolidate the two cases.
15. The Court has considered the Application, Affidavits and rival submissions together with the legal framework governing consolidation of suits and the Court finds that the singular issue for determination is whether the two suits should be consolidated and if the answer to the first question is in the positive, whether the 28th – 34th Defendants should be enjoined to this suit.
16. Order 11 Rule 3(1) (h) of the *Civil Procedure Rules* provides as follows;
 - “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;”



17. In the case of the *Law Society of Kenya – Vs- Centre for Human Rights & Democracy & 12 others* [2014] eKLR the Supreme Court gave the purpose of consolidation 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.”
18. Factors that the Court must satisfy itself before allowing consolidation of suits were set out in the case of *Chesinende Farmers’ Cooperative Society Limited -Vs Joel Bett (being sued on his own behalf and on behalf of Chesinende Rurl Craft) & 25 Others) & Another* [2018]eKLR in which the Court quoted the case of *Nyati Security Guards & Services Limited Vs Municipal Council of Mombasa* (2000)eKLR where the Court held as follows; “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 question of law or fact arises in both or all of them;
 - b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;
 - c) For some other reason, it is desirable to make an order for consolidating them.”
19. The main purpose of consolidation is to achieve procedural justice in the resolution of disputes and save the parties the rigmarole of prosecuting multiplicity of suits arising from the same facts transactions and involving more or the same parties. The benefits of consolidation includes saving costs, time and effort and to conveniently try several actions by treating them as one action. Consolidation of suits is one of the many ways of achieving the overriding objectives of the Court as set out in the *Civil Procedure Act*. See the case of *Korean United Church of Kenya & 3 others Vs Seng Ha Sang* (2014) eKLR.
20. I have perused ELC No 141 of 2017 where the Plaintiff is the same as in the current suit. It is submitted by the Applicants that the suit in ELC 141 of 2017 was amended to include 29 Defendants. It is on record that the Plaintiff filed a notice of motion dated the 5/2/2018 seeking to amend the plaint to include 29 Defendants. It is noted that the Plaintiff annexed the amended plaint in ELC 190 of 2017 where she sought to enjoin the 22nd – 30th Defendants. I have perused the file and failed to find any orders of the Court allowing the amendment. The last this matter appeared in Court was on the 2/7/2019 when the Plaintiff was directed to serve the Application upon the Defendants. It is not clear to the Court, at least from the record before the Court, whether the Application to amend the plaint aforesaid was prosecuted to its logical conclusion. That said and for the purposes of this Application, it suffices to note that the intention to amend the plaint to include other Defendants was contemplated by the Plaintiff as can be seen in the said unprosecuted Application. If the Applicant’s submissions that the Application was indeed allowed by the Court then it would mean that to the extent that the Defendants in both cases are the same, the parties are equally the same and the logical conclusion will be that consolidation will be an unnecessary exercise.
21. Having said that even if the parties in ELC 141 of 2017 remain as the Plaintiff and the 1st Defendant in this case, it is to be noted that in her defence the Defendant pointed out that the suit land being 3584 is being occupied by other purchasers who have constructed on the land and who have not been



enjoined in the suit. This confirms the Applicant's position that the parties are the same in both suits with the current suit having more Defendants.

22. Of importance is that the subject matter in the current suit is parcel 3583 and 3584 while in ELC 141 of 2017 it is disclosed as parcel No 3584. In my considered view the determination of ELC 190 of 2017 as pleaded save for the prayers of special damages and mesne profits will resolve the issues raised in ELC 141 of 2017.
23. The reliefs sought are common in the two suits except for special damages and mesne profits sought in ELC 141 of 2017. These are reliefs which can be tried together and I see no prejudice that the parties will suffer if the cases are consolidated. It has been contended that some parties acquired land from different parties and therefore trying the cases together will cause hardship for the Plaintiff. To the contrary the Plaintiff's cause of action is predicated on ownership of the two suit lands. It is her case that she is the owner of the two parcels having inherited them from her late mother. This is the gist of the suits before the Court and the parties are expected to lead evidence and convince the Court who among them is the valid and legal owner of the lands.
24. Ultimately the main issue as stated above is the ownership of the plots and it will not be an efficient use of judicial time and resources for the Court to hear the two suits separately. Having held that the parties are the same, suit lands are similar and that the cause of action is the same having arisen from one or the same transaction or series of transactions and that no party will be disadvantaged or prejudiced nor be conferred undue advantage, it is my considered view that this is a proper case for consolidation.
25. In the end I find the Notice of Motion dated the 29/10/2021 is merited and I make the following orders;
 - a. This suit and ELC 141 OF 2017 are hereby ordered consolidated for purposes of hearing and determined together with the lead file being ELC 190 of 2017.
 - b. The joinder of the 22nd – 28th Defendants be and is hereby allowed.
 - c. Parties to file and serve their amended pleadings within a period of 45 days and expedite the hearing of the suit.
 - d. I make no orders as to costs.
26. It is so ordered.

DELIVERED, DATED AND SIGNED AT THIKA THIS 6TH DAY OF OCTOBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Mugo HB Karanja Kaguri

Gitau HB Njoroge Nganga for 1st Defendant

Ms. Ihuo HB Kimani for 2nd – 7th Defendants

Gitau HB Njoroge Nganga

Ms. Ihuo HB Kimani for 9th – 17th Defendants

Gitau HB Njoroge Nganga for 18th Defendant



Ms. Ihuo HB Kimani for 19th – 21st Defendants

Court Assistant – Phyllis Mwangi

