



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 63 OF 2008

IDOW TRADING COMPANY LIMITED.....PLAINTIFF

VERSUS

MOHAMMUD JIMALE.....1ST DEFENDANT

OSMAN ALI MOHAMMED.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

RULING

1. Before me is a Notice of Motion application dated 28th June 2021 filed by the 2nd Defendant seeking the following orders:

i. THAT this Honourable Court be pleased to consolidate this suit with ELC NO 037 of 2020 Osman Ali Mohamed vs Board of Governors Kamukunji Technical and Vocational College and 4 others which is pending before this Honourable Court for hearing and final determination.

ii. THAT this Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice.

iii. That the cost of this application be provided.

2. The application is premised on the grounds on its face together with the supporting affidavit of Wanja G. Wambugu dated 28th June 2021. The Applicant contends that the disputes in this current suit and **ELC No. E037 of 2020** arise from the same property being LR No. 36/1/1034. The two suits raise similar questions of law and facts regarding property LR No. 36/1/1034, hence consolidation of the two suits is necessary to avoid duplication of proceedings and multiplicity of suits, will reduce the costs incurred by the parties and will save on judicial time.

3. The Plaintiff has opposed the application via its Grounds of Opposition dated 6th September 2021, where it is averred that the Plaintiff is not a party in **ELC No. E037 of 2020**, that the cause of action in the two suits does not arise from the same transaction, that this suit was filed in 2008 while **ELC No. E037 of 2020** was filed 12 years later and that the two suits do not have common issues of law. The consolidation of the suits will therefore prejudice the Plaintiff's cause of action, hence the application should be dismissed. However, the Plaintiff concedes that the two cases can be heard together as opposed to being consolidated.

4. The parties canvassed their arguments by way of written submissions.

5. It was submitted for the Applicant that the two cases involve the same parcel of land known as LR No. 36/1/1034 and that **Order 11 Rule 3 (i) (h)** of the **Civil Procedure Rules 2021** gives the Court powers to consider consolidation of suits. The applicant also relied on the following case laws that discuss the issue of consolidation of suits. ***Chesinende Farmers Cooperative Society Limited v Joel K. Bett (being sued on his own behalf and on behalf of Chesinende Rurl Craft) & 25 others) & another*** which quoted the case of ***Nyati Security Guards & Services Ltd V Municipal Council of Mombasa (2000) eKLR*** where the court held that:

“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;

Further, the court in arriving at the decision as to whether or not to consolidate two or more suits considered the following;

i. Do the same questions of law or fact arise in both cases?

ii. Do the rights or the reliefs claimed in the two or more cases arise out of the same transaction?

iii. Will any party be disadvantaged or prejudiced or will consolidation confer any undue advantage to the other party?"

6. Reference was also made to the case of Transcend Media Group v The Standard Group Limited [2021] KLR which cited Korean United Church of Kenya & 3 others v Seng Ha Sang [2014] eKLR where the court held that:

"Consolidation of suits is done for the purposes of achieving the overriding objective of the Civil Procedure Act that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action."

7. Further, the case of Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020] eKLR was cited where the court held:

"The principles of consolidation of suits are settled. They were best explained in Stumberg and another v Potgeiter as follows:- "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 Supreme Court Case of India in Prem Lala Nahata & v Chandi Prasad Sikaria stated: "...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose 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 to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions, or that for some other reason it is desirable to make an order consolidating the suits"

8. For the Plaintiff, submissions were advanced on the following three issues:

i. Parties to the suit;

ii. Issues of the suit;

iii. Cause of action.

9. On the issue of parties to the suit, it was submitted that the Plaintiff was not party to the suit **E037 of 2020** which was filed by the 2nd Defendant without joining the Plaintiff. That an important element in consolidation of suits is that parties should be the same, but in this case they are not. It was submitted that in the current suit, consolidation was undesirable, and on this point, the case of Nyati Security Guards & Services Ltd v Municipal Council of Mombasa (2004) eKLR was cited where it was held:

"There are however situations where consolidation is undesirable like where in two action a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other."

10. On the issues of the suit, it was submitted that whereas the suits relate to the same property, the issues of law are not common since the current suit seeks vacant possession of the property from the 2nd Defendant while in **E037 of 2020**, the 2nd Defendant was challenging a notice to vacate the property issued to them by National Land Commission. As such the court cannot determine the two issues since one is on trespass and the other one is on the powers of the National Land Commission. To this end, reference was made to the case of Fabian Esemai & another v Priscilla Jeserek Teliyen 2021] eKLR.

11. On the third issue of cause of action, it was submitted that the causes of action in the two suits were different and did not arise from the same transaction since one was on trespass and another one was questioning the *quasi-judicial* functions of the National Land Commission and subsequent actions by third parties which does not involve the Plaintiff. As such, consolidating the two suits would prejudice the Plaintiff's case. On this point, the Plaintiff relied on the case of Fabian Esemai (*supra*) where the court held that:

"It is trite that the purpose of consolidation of suits is to save courts time and effort in matters that arise from the same transaction with similar issues of law and fact, but the same cannot be applied if the court is of the opinion that consolidation will cause prejudice and will cause delay and not the aim of expeditious disposal of the case. If the issues and the claim is different then, it would not be in the interest of justice to consolidate suits which will obscure the real issues for determination in either case."

12. In conclusion, the Plaintiff cited the case of *Eunice Nyairungu v Libey Njoki Munene & 2 others [2015] eKLR* where the court held that:

“Applying the principle upon which consolidation may be ordered to the facts and circumstances of the two suits sought to be consolidated I am not persuaded consolidation would be feasible. The issues and the applicable law in respect of the issues in the two suits are different. The facts are not common and neither does any common questions of law arise in the two suits...”

Analysis and determination

13. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The court finds that the single issue for determination is: ***Whether the criteria for consolidation of suits has been met.***

14. Order 11 Rule 3 (1) (h) of the Civil Procedure Rules 2010 provides that:

“3. (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—

(h) consider consolidation of suits”

15. The Supreme Court of Kenya in the *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR* stated that:

“...According to Black’s Law Dictionary (8th Edition), to consolidate is “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.....”

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.”

16. The first ingredient that ought to be determined in consolidation of suits as described above is the issue of parties. In the matter at hand are the parties the same? This court having looked at the amended plaint for **E037 of 2020** notes that the only common party in both suits is the 2nd Defendant (Osman Ali Mohammed) who is the Plaintiff in **ELC No. 037 of 2020**. Neither the Plaintiff nor the 1st and 3rd Defendants herein are parties in that suit.

17. The other ingredient for consideration is whether the issues are the same or whether the cause of action arises from the same transaction? In the current suit, the Plaintiff is seeking vacant possession of LR No. 36/1/1034 claiming that he is the registered owner, while in suit **ELC No. 037** the Plaintiff (2nd Defendant in current suit) seeks *inter-alia* declaration that he is the registered owner of LR No. 36/1/1034 which title was apparently revoked by the National Land Commission vide a declaration dated 28th April 2017 (as stated in paragraph 12 of the 2nd Defendant’s amended plaint). Based on this, both parties claim ownership of the same property which would mean the issue is the same.

18. Additionally, the court finds that whereas the cause of action in both suits did not arise from the same transaction, the question of the lawful owner of the suit property is a pertinent question that need to be addressed. In order to avoid a situation where there are conflicting decisions, it would be prudent for the cases to be heard by one court at the same time.

19. The power to order consolidation of suits is discretionary and in this regard the court finds that in the interest of justice and due to the complexity of the issues of ascertaining the lawful owner of the suit property, noting that one case was filed 13 years ago while another one is a fresh case and noting that only the applicant herein is a common party in the two suits, I decline to order consolidation of the two suits. Instead, I proceed to give the following orders;

i. ELC Case No. 63 of 2008 and ELC Case No. E037 of 2020 shall not be consolidated but shall be heard and determined concurrently on the basis of the pleadings already filed in the two suits subject to any subsequent amendments.

ii. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Anzala for the Plaintiff

Mr. Macharia for the 3rd Defendant

Menge for 4th and 5th defendants in E037/2020

Court

Assistant:

Eddel