



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 771 OF 2016

MAESTRO CONNECTIONS HEALTH SYSTEMS LTD.....PLAINTIFF

VERSUS

RILEY SERVICES.....1ST DEFENDANT

UNITED STATES INTERNATIONAL UNIVERSITY.....2ND DEFENDANT

DPS INTERNATIONAL LIMITED.....3RD DEFENDANT

NDUNGU NJOROGE & KWACH ADVOCATES.....4TH DEFENDANT

NDUNGU PAUL NDERITU.....5TH DEFENDANT

CHIEF LAND REGISTRAR.....6TH DEFENDANT

DIRECTOR OF SURVEY.....7TH DEFENDANT

H.E.DANIEL TOROITICH ARAP MOI.....8TH DEFENDANT

TRIPLE OKLAW ADVOCATES LLP.....9TH DEFENDANT

AND

ELC SUIT NO. 840 OF 2016

UNITED STATES INTERNATIONAL UNIVERSITY.....PLAINTIFF

VERSUS

MAESTRO CONNECTIONS HEALTH

SYSTEMS LTD.....1ST DEFENDANT

H. E. DANIEL TOROITICH ARAP MOI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....5TH DEFENDANT

BALOZI HOUSING CO-OPERATIVE SOCIETY

LIMITED.....6TH DEFENDANT

AND

ELC SUIT NO. 1040 OF 2016

MUTHAIGA LUXURY HOMES LIMITED.....PLAINTIFF

VERSUS

UNITED STATES INTERNATIONAL UNIVERSITY.....1ST DEFENDANT

MAESTRO CONNECTIONS HEALTH

SYSTEMS LTD.....2ND DEFENDANT

H. E. DANIEL TOROITICH ARAP MOI.....3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

DIRECTOR OF SURVEYS.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

AND

OMWANZA OMBATI.....7TH DEFENDANT IN THE

3RD DEFENDANT'S COUNTER-CLAIM

ANDREW SUNKULI.....8TH DEFENDANT IN THE

3RD DEFENDANT'S COUNTER-CLAIM

RULING

The three suits before the court namely, ELCC No. 771 of 2016, ELCC No. 840 of 2016 and ELCC No. 1040 of 2016 are related in that they concern the same subject matter and same parties. The property which is in dispute in the three suits is L.R No. 12422/19 (hereinafter referred to only as “the suit property”). In ELCC No. 771 of 2016, MAESTRO CONNECTIONS HEALTH SYSTEMS LTD. (“Maestro”) has claimed that it is the owner of the suit property. Maestro has claimed that it purchased the suit property from H. E. DANIEL TOROITICH ARAP MOI (“Arap Moi”) on 27th January, 2016 and that the property was transferred to it on 17th June, 2016. TRIPLE OKLAW ADVOCATES LLP (“TRIPLE OKLAW”) is said to have acted for Arap Moi in the sale of the suit property to Maestro.

In ELCC No. 840 of 2016, UNITED STATES INTERNATIONAL UNIVERSITY (“USIU”) has claimed that Arap Moi who was the owner of L.R No. 12422/18 (“Plot No. 12422/18”) and L. R No. 12422/19 (“the suit property”) consolidated the two parcels of land in 1984 which consolidation gave rise to L.R No. 12597 (“Plot No. 12597”). USIU has claimed that Arap Moi transferred Plot No. 12597 to DPS International Limited (“DPS”) on 18th November, 1988. USIU has claimed further that on 27th February, 1990, DPS transferred Plot No. 12597 to Insurance Company of East Africa Limited (“ICEA”). USIU has claimed that on 7th May, 1999, ICEA transferred L.R No. 12597 to USIU. USIU has claimed further that in 2001, it subdivided L.R No. 12597 into two portions namely, L.R No. 12597/1 and L.R No. 12597/2 (“Plot No. 12597/1” and “Plot No. 12597/2”). USIU has claimed that it transferred Plot No. 12597/1 to BALOZI HOUSING CO-OPERATIVE SOCIETY LIMITED (“Balozi”) and remained with Plot No. 12597/2. USIU has claimed that L.R No. 12422/19 (suit property) is non-existent as the same was amalgamated with L.R No. 12422/18 to give rise to L.R No. 12597 which was subsequently subdivided in 2001 to give rise to Plot No. 12597/1 and Plot No. 12597/2 owned by Balozi and USIU respectively.

In ELCC No. 1040 of 2016, MUTHAIGA LUXURY HOMES LTD. (“Muthaiga Luxury”) has claimed that it purchased the suit property from Arap Moi on 23rd February, 2012. Muthaiga Luxury has claimed that the suit property was transferred to it on 2nd May, 2012 and that it is the registered owner of the suit property. OMWANZA OMBATI is an advocate. He is said to have acted for Arap Moi in the sale of the suit property to Muthaiga Luxury. ANDREW SUNKULI is said to have acted as an agent of Arap Moi in the sale of the suit property to Muthaiga Luxury.

On his part, Arap Moi has claimed that he is still the owner of L. R. No. 12422/18 (“Plot No. 12422/18”) and L.R No. 12422/19 (“the suit property”) which he acquired on 30th March, 1982. Arap Moi has denied that he amalgamated the two parcels of land in 1984 to give rise to L.R No. 12597 (“Plot No. 12597”). Arap Moi has denied that it sold the alleged consolidated Plot No. 12597 to DPS International Limited (“DPS”) on 18th November, 1988. Arap Moi has also denied selling the suit property to Maestro and Muthaiga Luxury.

The Chief Land Registrar, Director of Surveys and the Attorney General (hereinafter together referred to as “the A.G”) were joined in the three suits in their official capacities as custodians of survey and land records.

ELCC No. 771 of 2016 and ELCC No. 840 of 2016 were consolidated on 2nd August, 2016 with ELCC No. 840 of 2016 as the lead file. On 5th October, 2016, the court ordered that ELCC No. 1040 of 2016 which was filed last shall be heard together with ELCC No. 771 of 2016 and ELCC No. 840 of 2016. The order of 5th October, 2016 was made before OMBATI and ANDREW SUNKULI joined ELCC No. 1040 of 2016. OMBATI and ANDREW SUNKULI sought to be joined in ELCC No. 1040 of 2016 when Arap Moi in his counter-claim associated them with what he claimed to be a well-orchestrated fraudulent scheme to divest him of the suit property. The two were joined in ELCC No. 1040 of 2016 as 7th and 8th defendants in the counter-claim by Arap Moi on 18th January, 2017. They filed their reply and defence to Arap Moi's counter-claim on 19th April, 2017.

What is now before the court is the Notice of Motion application dated 18th October, 2019 brought by ANDREW SUNKULI (hereinafter referred to only as "the applicant"). In the application, the applicant has sought the following orders;

1. That ELCC No. 1040 of 2016 be consolidated with ELCC No. 771 of 2016 and ELCC No. 840 of 2016 for trial and disposal.
2. That ELCC No. 771 of 2016 being the first in time be the lead file.
3. That the court be pleased to give any other or further directions as it may deem fit, just and necessary for the conduct of the consolidated action.
4. That the costs be in the cause.

The application was brought on the grounds set out on the face thereof and on the affidavit of KATWA KIGEN K.J advocate. The application was brought on the following grounds; the three suits relate more or less to the same land parcel(the suit property), the three suits substantially and crucially relate to title emanating from the same party namely, Arap Moi, the three suits seek the determination of the bona fide purchaser of the suit property from Arap Moi and who holds a valid title over the suit property, parties would call more or less the same witnesses in the three cases, it would serve no purpose to call the said witnesses to appear at the hearing of each case, the advocates for the parties met on 15th August, 2018 and agreed that the three cases be consolidated, no party would suffer prejudice if the three cases are consolidated, and that consolidation of cases is resourceful, convenient and expedient as it avoids multiplicity of proceedings and court attendance. In his affidavit in support of the application, KATWA KIGEN K.J advocate annexed among others; a copy of a letter dated 16th August, 2018 by K.A FRASER S.C of Hamilton Harrison & Mathews Advocates which acts for ICEA addressed all the advocates who were acting for the parties in the three suits. In the letter, K.A FRASER S.C confirmed what was discussed and agreed on at a meeting that was held on 15th August, 2018 by the said advocates. From the said letter, the advocates for the parties in the three suits agreed that the same be consolidated and heard together. The parties also agreed on the order in which each party was going to tender evidence at the trial and on other pre-trial issues.

The applicant's application was served on all the parties and none of them filed either grounds of opposition or a replying affidavit in opposition thereto. When the application came up for hearing on 21st April, 2021, Mr. Fraser S.C who appeared for ICEA told the court that since the advocates for the parties had a meeting and agreed on consolidation, he had no objection to the application. Mr. Okatch and Mr. Ashitiva who appeared for Maestro and USIU respectively agreed with the observations by Mr. Fraser S.C and told the court that they had no objection to the application. Mr. Githara who appeared for Muthaiga Luxury told the court that he had no objection to the application. Mr. Kamau for the A.G and Ms. Nyaga who appeared for Arap Moi opposed the application although they had not filed notice of preliminary objection, grounds of opposition or replying affidavit as required under Order 51 Rule 14 of the Civil Procedure Rules. Mr. Kamau and Ms. Nyaga argued that the three suits should be heard side by side instead of being consolidated for hearing together. Mr. Kamau and Ms. Nyaga did not tell the court what prejudice if any would be suffered by their clients if the three cases were consolidated. They did not also comment on the agreement that was reached by the advocates for the parties on 15th August, 2018 on consolidation of the suits that was alluded to in the letter by K.A Fraser S.C that I have referred to earlier.

In Law Society of Kenya v Center for Human Rights and Democracy and 12 Others [2014] eKLR, the Supreme Court stated as follows:

"the essence of consolidation of suits 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 Stumberg and Another v Potgeiter 1970 E.A. 323, the Court stated 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."

In Allahabad High Court of India case of P.P. Gupta v East Asiatic Co., Air 1960 All 184, the Court stated as follows:

"The very nature of the principle of consolidation implies that there is a similarity or identity of the matter in issue in different suits between the same parties which should be decided by the court once and for all. 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."

In Joseph Okoyo v Edwin Dickson Wasunna [2014] eKLR, the Court cited with approval Korean United Church of Kenya & 3 Others v Seng

Ha Sang [2014] eKLR, and observed that:

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

In John Gakure & 148 Others v Dawa Pharmaceuticals Company Limited & 7 Others, Civil Application No. 299 of 2007, Waki JA expressed himself as follows on the overriding objective:

“jurisdiction of the Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the Court’s view, dealing with a case justly includes inter-alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively including the granting of appropriate interim relief in deserving cases.”

I have at the beginning of this ruling set out the claims by various parties in the three suits sought to be consolidated. I am satisfied that this is an appropriate case in which to order consolidation. The property in dispute in the three suits is the same. The parties in the three suits are to a large extent the same. The parties would to a large extent call the same witnesses in proof of their respective claims and in their defences. The suits to a large extent involve common questions of law and fact and it would be convenient and efficient in my view to have the suits heard together as a consolidated suit. This would save cost and expedite the disposal of the suits in accordance with the overriding objectives of the Civil Procedure Act. I am not persuaded that the consolidation will cause any prejudice to the parties who are opposed to the same or that it will confer any undue advantage to those in support thereof. I have also noted that two of the suits are already consolidated and in allowing the present application, I will only be adding ELCC No. 1040 of 2016 that was filed last. I have also observed that most of the advocates had agreed to the consolidation. It is not clear to me why the A.G and the advocates for Arap Moi had a change of heart. For the foregoing reasons, I will allow the application for consolidation.

With regard to directions on the conduct of the trial of the consolidated suit that has also been sought in the applicant’s application, I have considered the agreement that was reached by most of the parties on the order in which each party shall present his evidence. I will adopt the same and give few other directions.

In conclusion, I hereby make the following orders;

1. ELCC No. 1040 of 2016, Muthaiga Luxury Homes Limited v United States International University & others is consolidated with, ELCC No. 771 of 2016, Maestro Connections Health Systems Limited v Riley Services & others and ELCC No. 840 of 2016, United States International University v Maestro Connections Health Systems Limited & others (already consolidated) for trial and disposal together.

2. ELCC No. 840 of 2016, United States International University v Maestro Connections Health Systems Limited & others shall remain the lead file.

3. The parties to the consolidated suits shall present their evidence and shall be cross-examined in the following order;

- a) United States International University shall give evidence as 1st Plaintiff.
- b) Muthaiga Luxury Homes Limited shall give evidence as 2nd Plaintiff.
- c) Maestro Connections Health Systems Limited shall give evidence as 3rd Plaintiff.
- d) The Administrators of the estate of H.E Daniel Toroitich Arap Moi shall give evidence as 1st Defendant.
- e) The Chief Land Registrar, Director of Surveys and the Attorney General shall give evidence as 2nd, 3rd and 4th Defendants respectively.
- f) ICEA Lion Life Assurance Company Limited shall give evidence as 5th Defendant.
- g) Balozi shall give evidence as 6th Defendant.
- h) Omwanza Ombati shall give evidence as 7th Defendant.
- i) Andrew Sunkuli shall give evidence as 8th Defendant.
- j) Triple OKLaw Advocates LLP shall give evidence as 9th Defendant.
- k) Riley Services shall give evidence as 10th Defendant should it decide to participate in the proceedings.
- l) DPS international Limited shall give evidence as 11th Defendant should it choose to participate in the proceedings.

m) For ease of reference, the parties shall be referred to by their names instead of how they have been referred to in the pleadings.

4. The parties who do not intend to use the bundles of documents on record and who wish to file separate bundles and have not done so shall do so within 30 days from the date hereof in default of which they shall not be permitted to produce any document at the trial. The bundles of documents shall be indexed and paginated and shall be filed both in soft and hard copy.

5. The parties who have not filed witness statements and who intend to call witnesses shall do so within 30 days from the date hereof in default of which they shall not be permitted to tender any evidence at the trial. The witness statements shall be filed in soft and hard copy.

6. The parties shall ensure that all the parties to the consolidated suits have the bundles of documents and witness statements filed in the three suits. It shall be the responsibility of a party who has not been served with a particular bundle of documents or witness statements to inform the party who has not affected service to do so.

7. The parties shall appear before the Deputy Registrar for Case Management at which all the issues of filing and service of bundles of documents and witness statements shall be sorted out.

8. In the event that any party wishes to see the original of any document any other party wishes to rely on at the trial, he shall give notice to the party who wishes to produce the document/s and they shall agree on the time and place where the original document/s shall be inspected if available.

9. The parties shall agree on issues for determination within 45 days from the date hereof.

DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF JULY 2021

S. OKONG'O

JUDGE

Ruling read virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Okatch and Mr. Kanjama for Maestro

Mr. Kamau h/b for Ms. Nyaga for Arap Moi

Mr. Ashitiva for USIU

Mr. Kamau for the A.G

Mr. Fraser S.C for the ICEA

Mr. Nthiga for Balozi

Mr. Githara for Muthaiga Homes

Mr. Elkington for Andrew Sunkuli

Ms. C.Nyokabi-Court Assistant