



**Ogogoh v State Corporations Advisory Committee & 2 others; Public Service Commission & another (Interested Parties) (Constitutional Petition 26 of 2023) [2024] KEHC 3442 (KLR) (Constitutional and Human Rights) (12 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3442 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION 26 OF 2023**

**LN MUGAMBI, J  
APRIL 12, 2024**

**BETWEEN**

**JULIUS OGOGOHO ..... PETITIONER**

**AND**

**STATE CORPORATIONS ADVISORY COMMITTEE ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**PRIME CABINET SECRETARY ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**PUBLIC SERVICE COMMISSION ..... INTERESTED PARTY**

**SALARIES AND REMUNERATION COMMISSION ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion application dated 25<sup>th</sup> October 2023, the petitioner seeks Orders that:
  - i. This Court do order consolidation of this matter with Nairobi High Court Constitutional Petition No. E303 of 2023; John Githongo and another -versus-State Law Office and 4 others for joint disposal.
  - ii. In the alternative, this Court, do order the stay of the instant petition pending the hearing and determination of Nairobi High Court Constitutional Petition No. E303 of 2023; John Githongo and another -versus- State Law Office and 4 others.
  - iii. Costs be provided for.



### **Petitioner's Case**

2. The application seeks a consolidation of the instant suit with Nairobi High Court Constitutional Petition No. E303 of 2023 on grounds that it raises similar questions of fact and law for determination.
3. The petitioner deposes that unknown to him, he filed this Petition in Mombasa after which he learnt about the existence of Constitutional Petition No. E303 of 2023 which had been filed in Nairobi earlier. The file was thus transferred to Nairobi by the Presiding Judge for further directions.
4. It is the petitioner's case therefore that the two petitions ought to be consolidated to save on judicial time and also to avoid duplicity. In the alternative, the petitioner proposes that if the court has a divergent view, the matter can be stayed pending the hearing of Constitutional Petition No. E303 of 2023.

### **Respondents' Case**

5. The respondents in reply filed their grounds of opposition dated 7<sup>th</sup> November 2023 on the basis that:
  - i. The notice of motion application which seeks to consolidate the instant petition with Nairobi High Court Petition No. E303 of 2023; John Githongo & Another vs State Corporations Advisory Committee & Another is an abuse of the court process.
  - ii. The petitioner has not demonstrated in anyway whatsoever any value the instant petition will add should the court allow his application for consolidation and will only lead to clogging of the court system.
  - iii. It is evident from the pleadings of the two petitions; the two cases not only challenge the same letters from the respondents, but also seek identical orders. They arise from the same set of facts and circumstances.

### **Petitioner's Submissions**

6. The petitioner through the firm of Shabaan Associates LLP filed written submissions dated 8<sup>th</sup> November 2023. Counsel cited the case of Arnold Kipkirui Langat v Atticon Limited & 7 others (2021)eKLR which elaborated the principles governing consolidation as follows:
  - " 30. .. 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.
  31. From the foregoing, it is clear that the Court has a wide discretion in ordering consolidation. 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 a 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*, Cap 21 Laws of Kenya.”

7. Counsel stressed that owing to the parallel nature of the two suits the petitioner was agreeable to have the petition transferred from Mombasa to Nairobi in a bid to save on judicial time while also desirous to be heard in the matter. It was further stressed that although the respondents had opposed the application, they had not demonstrated any prejudice they would suffer if the petitions are consolidated.

### **Respondents' Submissions**

8. Principal State Counsel, Rodgers Sekwe for the respondent filed written submissions and a list of authorities dated 7<sup>th</sup> November 2023 where Counsel argued that the present application does not meet the threshold for consolidation.
9. Whereas the petitioner argues that the consolidation is justified by virtue of the same set of facts and issues, Counsel asserted that the two petitions not only raise similar issues, but also have similar prayers and the respondents are equally identical. Mr. Sekwe insisted that the petition is essentially a duplication of Constitution Petition No. E303 of 2023. Additionally, he contended that the petitioner has not demonstrated any value the consolidation of the two petitions would bring hence is an abuse of the Court process.
10. Counsel relied on Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 Others [2022] eKLR where the Court held thus:

“The point to underscore is that a litigant has no right to pursue *pari pasua* more than once processes which will have the same effect at the same time or at different times with a view of obtaining victory in one of the process or in both... Multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right *per se*.”
11. Comparable reliance was placed in Republic v Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya (2020) eKLR and Darren Mutinda v Kisii University, Kisii University Council, Fredrick Wanyama, C.S. Ministry of Education & Attorney General (2022) eKLR.

### **Analysis and Determination**

12. There is only one issue for determination namely:

Whether the instant petition should be consolidated with Nairobi High Court Constitutional Petition No. E303 of 2023.
13. The term ‘Consolidate’ is defined in Blacks Law Dictionary, 10<sup>th</sup> edition as follows: “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, in separate judgments.”
14. The power of the Court to consolidate Petitions is provided for under Rule 17 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. It states:



## Consolidation

“The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just.”

15. In *Nyati Security Guards & Services Ltd vs Municipal Council of Mombasa* (Civil Suit No. 992 of 1994) cited with approval in *Lakhamshi Khimji Shah & another v Ajay Shantilal Shah & 2 others* (2010) eKLR made the following remarks concerning consolidation:

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. 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.”

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

1. some common question of law or fact arises in both or all of them; or
2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. for some other reason it is desirable to make an order for consolidating them.

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.

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. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer than take long and the purpose of saving time will be defeated.”

16. The principle on consolidation of suits was reaffirmed in *Stumberg and another v Potgieter*, (1970) EA 323 which was cited with approval by the Court of Appeal in *Joseph Mzungu Nyoka v Vros Produce Limited & 525 others* (2015) eKLR. In this matter, the Court held:

“... Where there are common question of law or fact 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...”

17. The essence of consolidation was discussed in *David Ojwang Okebe & 11 others v South Nyanza Sugar Company Limited & 2 Others* (2009) eKLR that:

“...The main object of consolidation is to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus, where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so.”



18. The Supreme Court in *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR discussed the threshold for consolidation of suits by stating thus:

“(39) 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.”

19. Applying the above principles to the present application, the first factor to consider is the fact that it is not disputed that the two matters are founded on the same facts. However, the Parties are not entirely similar, Petitioners are different but the Respondents are the same in the two Petitions. The fact that they are founded on the same facts makes their consolidation feasible as it would be injudicious to allow multiple matters proceedings based on same facts.

20. The contention by the 1<sup>st</sup> Respondent that the two matters should not be consolidated because they are just a duplication hence an abuse of the process of the Court is untenable. This is because the Petitioners in the two petitions are different. It is the right of each of these Petitioners to have their day in Court and be given a chance to articulate their grievance in the best way they understand it. Even though litigation may be founded on identical facts; ordinarily, facts might be having several different threads and what one Petitioner might consider important and emphasize in a matter might appear less important or inconsequential to the another which might evoke feelings that their right to be heard was compromised because their main concern in the case was not brought out.

21. In view of the above and also considering that the Respondent has not demonstrated any likelihood of prejudice if consolidation of the two Petitions is allowed, I find the 1<sup>st</sup> Respondent’s opposition to the consolidation to have no basis. I thus allow the application. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12<sup>TH</sup> DAY OF APRIL, 2024.**

.....

**L N MUGAMBI**

**JUDGE**

