



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**ELCC No. 268 OF 2017**

**SOUTH KNIGHT LIMITED .....PLAINTIFF**

**VERSUS**

**I & M BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**LEGACY AUCTIONEERING SERVICES LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 19<sup>th</sup> November 2020, the 1<sup>st</sup> and 2<sup>nd</sup> defendants seek the following orders:

1. *[Spent]*

2. *[Spent]*

3. *This case be consolidated with the following cases:*

a. *Nakuru ELC Case Number 42A of 2017: South Knight Limited -vs- I&M Bank Limited & Another.*

b. *Nakuru ELC Case Number 98 of 2017: Susan Njeri Kamau –vs- I & M Bank Limited & 3 Others*

c. *Nairobi High Court Succession Cause Number 202 of 2016: Re Estate of Francis Kamau Erastus Mungai [deceased]*

4. *This Honorable court do order this case to be the test suit.*

5. *Costs be in the cause.*

2. The application is supported by the affidavit sworn by Edward Wanjala, the 1<sup>st</sup> defendant's Branch Manager - Nakuru. He deposed that all the above suits that they are seeking to consolidate involve the same subject matter, land parcel No. Nakuru Municipality Block 3/427.

3. The plaintiff responded to the application through a replying affidavit sworn by Daniel Macua Ndonga, one of its directors. He deposed that the cause of action in the present suit and ELC Case No. 42A of 2017, facts and circumstances, the parties and their legal representation is similar, hence their consolidation would facilitate the expeditious determination of the suits. As regards ELC 98 of 2017, he took the position that the transactions giving rise to it and the facts therein are numerous and that consolidating it with the other cases will result in confusion. Finally, he opposed consolidation of Succession cause No. 202 of 2016 on the ground that the application therein was found to be incompetent by the court and that the matter has been overtaken by events.

4. The application was canvassed through written submissions. The 1<sup>st</sup> and 2<sup>nd</sup> defendants/applicants argued that they have satisfied the conditions necessary for consolidation of suits and referred the court to the case of **Selecta Kenya Gmbh & Co Kg Vs Chase Bank Kenya Limited & 2 Others [2018] eKLR** in which the Supreme Court Case of **Law Society of Kenya vs. Center for Human Rights & Democracy & 12 Others [2014] eKLR** was cited. They added that all the suits raise common questions of facts and law and that the parties are the same. They also relied on the case of **Benson G Mutahi Vs Raphael Gichovi Munene Kabuto & 4 Others [2014] eKLR** and submitted that consolidation of suits will save judicial time and resources and that the present suit should be the test suit as the subject property has already been sold.

5. The plaintiff/respondent argued in response that the cause of action in this suit and ELC Case No. 42A of 2017 are similar and ought to be consolidated while the transactions giving rise to ELC 98 of 2017 are numerous hence consolidation will result in confusion. It also opposed consolidation of Succession Cause No. 202 of 2016.

6. The plaintiff/respondent in ELC Case No. 98 of 2017 in her submissions argued that she supports consolidation save to add that ELC Case No. 98 of 2017 ought to be the lead file since, according to her, the prayers therein if granted will ultimately affect the subsequent suits.

7. I have considered the application, the affidavits and the submissions by the parties. The principles applicable when considering an application for consolidation of suits are well settled. The High Court in **Mombasa in HCC No. 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa** stated as follows on what the court should consider in consolidation of suits:

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

*(a) Some common question of law or fact arises in both or all of them: or*

*(b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or*

*(c) For some other reason it is desirable to make an order for consolidating them.*

8. In **Law Society of Kenya vs Center for Human Rights and Democracy and 12 others [2014] eKLR** the Supreme Court observed:

*[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.*

9. In the present matter, the plaintiff in its further amended plaint is seeking a declaration that the sale of land parcel Number Nakuru Municipality Block 3/427 held on 15<sup>th</sup> February 2018 in exercise of statutory power of sale is null and void as well as general and special damages for unlawful sale. The defendants filed a counter claim for KShs 9,037,123.55 plus interest on the overdrawn and arrears account.

10. A perusal of the plaint in ELC Case Number 42A of 2017 reveals that the parties are the same as those in this suit: South Knight Ltd as plaintiff and the bank and its auctioneer as the defendants. The suit property is the same and the reliefs sought revolve around the exercise of a chargee's power of sale.

11. As was noted earlier, the plaintiff in ELC Case No. 98 of 2017 (Susan Njeri Kamau) supports consolidation save that she would rather have ELC Case No. 98 of 2017 as the lead file. In the suit, Susan Njeri Kamau claims to have purchased land parcel Number Nakuru Municipality Block 3/427. The defendants in the suit are essentially same as those in previous suits: I&M Bank, the bank's auctioneers, South Knight Ltd and one new party who is said to have been involved in the sale transaction. Susan Njeri Kamau is seeking an injunction restraining the from selling the suit property, a declaration that the 2<sup>nd</sup> defendant acquired the suit property fraudulently, cancellation of the title document held by the 2<sup>nd</sup> defendant and a declaration that the charge in favour of I&M Bank is null and void ab initio.

12. In view of the foregoing, I am satisfied that common questions of law and fact arise in ELCC 268 of 2017, ELCC 42A of 2017 and ELCC 98 of 2017 and that the reliefs claimed in the cases are in respect of, or arise out of the same transaction or series of transactions. I do not agree with the plaintiff in ELCC 268 of 2017 that consolidation ought not be ordered owing to a perceived fear of possible confusion arising from the transactions giving rise to ELCC 98 of 2017. The whole idea of a trial is that the court will sift through the transactions and facts, however numerous and confusing. Since the core issues and facts are common, I will grant consolidation of the three cases.

13. Regarding the question of which matter should be the lead file, I note that the question of validity of both title and the charge document is challenged in ELC Case No. 98 of 2017. A determination on that issue will no doubt have ramifications on the other aspects of the suits. For good order, I deem it appropriate that ELC Case No. 98 of 2017 be the lead file.

14. The situation is however totally different as regards Succession Cause No. 202 of 2016. A perusal of the documents annexed by the applicants shows that the said matter was filed in the Family Division of the High Court at Milimani Law Courts under the **Law of Succession Act**. The applicant therein claimed that land parcel No. Nakuru Municipality Block 3/427 was part of the estate of Francis Kamau Erastus Mungai (deceased).

15. In terms of **Article 162** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**, this court has jurisdiction in matters to do with the environment and the use and occupation of, and title to land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69** and **70** of the **Constitution**. The court's jurisdiction does not extend to intestate or testamentary succession to estates of deceased persons.

16. I note that at paragraph 7 of the ruling dated 5<sup>th</sup> March 2018, my brother Muchelule J observed that Succession Cause No. 202 of 2016 was incompetent. If that be the case, it was a nullity *ab initio* and was not transferable to another court. See **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] eKLR**. It is thus not possible, or even desirable, to consolidate the succession cause with the other suits herein.

17. In the result, I make the following orders:

**a) Nakuru ELC Case Number 268 of 2017 is hereby consolidated with the following cases:**

**i. Nakuru ELC Case Number 42A of 2017: South Knight Limited -vs- I&M Bank Limited & Another.**

**ii. Nakuru ELC Case Number 98 of 2017: Susan Njeri Kamau –vs- I & M Bank Limited & 3 Others**

**b) Nakuru ELC Case Number 98 of 2017 shall be the lead file.**

**c) Costs of Notice of Motion dated 19<sup>th</sup> November 2020 shall be in the cause.**

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021.**

**D. O. OHUNGO**

**JUDGE**

Delivered through Microsoft Teams video link in the presence of:

No appearance for the plaintiff in ELC Case Number 268 of 2017

No appearance for the defendants in ELC Case Number 268 of 2017

No appearance for the plaintiff in ELC Case Number 98 of 2017

No appearance for the defendants in ELC Case Number 98 of 2017

No appearance for the plaintiff in ELC Case Number 42A of 2017

No appearance for the defendants in ELC Case Number 42A of 2017

No appearance for the applicant in Milimani Succ. Cause No. 202 of 2016

No appearance for respondents in Milimani Succ. Cause No. 202 of 2016

Court Assistant: E. Juma