



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND CASE NO. 43 OF 2019

SYOKIMAU BRIGHT HOMES LTD.....PLAINTIFF

-VERSUS-

EAST AFRICAN PORTLAND CEMENT.....DEFENDANT

RULING

1. By a notice of motion dated 20th January 2021, the Plaintiff/ Applicant sought for the following orders;

a) Spent

b) Spent

c) That this honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondent, its servants, agents or anyone acting under its instructions from selling, alienating, disposing of in any manner or interfering with the parcel of land known as L.R. No. 8784/4 (subdivided in to L.R. Nos. 8784/144, 8784/145 and 8784/146) without giving the first priority of purchasing the same to the Plaintiff pending the hearing and determination of the main suit herein.

d) That this honourable court be pleased to grant the Plaintiff leave to amend the plaint herein.

e) That the attached draft amended plaint be deemed as duly filed upon payment of the additional filing fee if any.

f) That costs be provided for.

2. The application is supported by the grounds on its face together with the supporting affidavit of Wilson Mbithi Munguti, a Director and Chairman of the Applicant, sworn on 20th January, 2021. He deposed that in 2010, following the Defendant's interest to sell land, the Applicant offered to purchase the said land measuring 1000 acres to be hived off the Respondent's land parcel number 8784/4 (subdivided in to L.R Nos. 8784/144, 8784/145 and 8784/146) on behalf of the local community. That the Respondent gave priority of purchase of the said property to the local community which led the Applicant to mobilize over 5000 poor, needy and landless members of the local community with the aim of purchasing the suit land. The Applicant further stated that vide a letter of 3rd March 2011, they made an expression of interest to purchase 1000 acres from the Respondent. That the Commissioner of lands consented to the intended sale and that the Respondent authorized the Applicant's entry in to the suit land. That Kenya Commercial Bank (KCB) was authorized to undertake the sale of the suit property on behalf of the Respondent, but the said bank informed the Applicant that their offer had been declined.

3. The Applicant has averred that they are apprehensive that the authority to sell the suit property granted to KCB will prejudice their position in view of the fact that they had been granted a priority of purchase and the local community stands to lose the chance of owning the land which is situated in their locality. The Applicant pleads that unless the Respondent and their agents are restrained from selling, alienating, disposing of in any manner or interfering with the suit property without giving the first priority of purchase to the Applicant, then the Applicant's efforts to purchase 1000 acres on behalf of their members who are poor, needy and landless individuals will be rendered futile.

4. The Applicant further stated that since the suit was filed, new developments have occurred necessitating an amendment of the plaint. The Applicant concluded that allowing the application will not prejudice the Respondent in any way.

5. The application was opposed. The Respondent through Roseline Ominde, their acting Legal Services Manager swore an affidavit on 19th April 2021, where she deposed that the suit property is registered in the name of the Respondent. That on 28th October 2016, the court directed that all matters relating to the ownership of L.R. No. 10424, and I.R 17951, L.R No. 10425 and I.R 17839, LR No. 8784/4 and I.R No. 75467 and L.R No. 7815/1 be consolidated and determined as one matter under Machakos ELC No.155 of 2016 (formerly Nairobi ELC No. 1108 of 2015) **The East African Portland Cement Company Limited v Sammy Kathuli & 49 Others** as the lead file. That the matters include:

- a) Petition No. 40 of 2016: Naftary Kariuki & Others v EAPC & Another.
- b) J.R No. 90/2016 Patrick Maingi Nguku & Others v EAPCC.
- c) ELC No. 1190/2015: Syokimau Bright Homes & Others v Eapcc.
- d) Misc. Application No. 428 of 2015: Francis Kirima M'ikunyua & Others v Eapcc.
- e) ELC No. 1108 of 2015: Eapcc v Sammy Kathilu & 49 Others.
- f) J.R No. 04 /2016: Patrick Maingi Nguku & Others v Eapcc.

6.It was further deposed on behalf of the Respondent that this court issued an order on 1st February 2021 directing the Applicant to peruse the lead file ELC NO. 155 /2016, as it is clear on the record that this matter cannot be separately prosecuted as the suit property is among those being dealt with in ELC 155/2016. The Respondent also contended that the draft amended plaint is inconsistent with original pleadings and will entirely alter the nature of the Defendant's defence, hence the same is an abuse of the court process. They further averred that amending the plaint at this stage when the Defendant already called its witnesses and closed its case shall occasion great prejudice to them. That a party should not use an amendment to turn their suit into a gamble at the opponent's expense. The Respondent concluded by stating that the application lacks merit, is frivolous, vexatious and an abuse of the court process.

7.The application was canvassed by way of written submissions. Both parties filed their submissions.

THE APPLICANT'S SUBMISSIONS

8.The Applicant filed their submissions dated 13th September 2021 on 14th September 2021. They submitted that Order 40 Rule 1 of the Civil Procedure Rules allows a party to be granted an injunction where the property in dispute is in danger of being wasted, damaged or alienated. Counsel relied on the case of **Giella v Cassman Brown (1973) EA 358** to restate the principles that ought to be considered before grant of an injunction which are; existence of a prima facie case with a probability of success, whether the threatened injury is irreparable and cannot be compensated by an award of damages and the balance of convenience.

9.Counsel also referred the court to the case of **Nguruman Ltd v Jan Bonde Nielsen & 2 Others [2014] e KLR**, where the court held that all the three conditions set out in **Giella v Cassman Brown** (supra) are distinct and logical hurdles which must be surmounted sequentially. Relying on Order 40 Rule 1 of the Civil Procedure Rules, the Applicant submitted that in the instant suit, the suit property is in danger of being alienated as the Respondents did not deny granting Kenya Commercial Bank the authority to sell the suit property. Reliance was placed on the case of **Nguruman Ltd** (supra) where a *prima facie* case was defined as a case where the court takes the view that on the face of it, the Applicant's case is more likely than not to ultimately succeed. Counsel also cited the case of **Mrao Ltd v First American Bank of Kenya & 2 Others (2003) KLR 125**, where the court described a prima facie case as a case which, on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for a rebuttal from the later.

10.It was contended by the Applicants that they had established a *prima facie* case and that they will suffer prejudice if the authority of sale given to Kenya Commercial Bank is exercised before the case is heard and determined. The Applicant argued that their suit was premised on the doctrine of promissory estoppel. Relying on section 120 of the Evidence Act, as well as the cases of **Pickard v Sears 112 E.R 179**, **Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR** and **Carol Construction Engineers Limited & Another v National Bank of Kenya [2020] eKLR**, the Applicant asserted that the doctrine of promissory estoppel precludes a party from acting inconsistently with a promise made by that party if that promise induced another party to reasonably rely and act on it to that other party's detriment.

11.On the question as to whether the Applicant will suffer irreparable harm if the injunction is not granted, it was submitted for the Applicant that, if Kenya Commercial Bank exercises the authority to sell the suit property without considering the Applicant's rights that have accrued through promissory estoppel, the Applicant will have lost the opportunity to purchase the subject property for its members. Reliance was placed on the case of **Ali Elmi Abdi v Nairobi County Government [2018] eKLR** cited with approval in the case of **Waithaka v Industrial and Commercial Bank Development Corporation [2001] eKLR** to argue that even if the Applicant can be compensated by damages, courts will not always refuse to grant an injunction just because the Respondent has the ability to pay damages.

12.As concerns the question of the balance of convenience, the Applicant relied on the case of **Bryan Chebii Kipkoech v Barnaba Tuitoek Bargarion & Another [2019] eKLR**, to contend that the Applicant stands to suffer greater inconvenience if the suit land is sold to another purchaser other than them, than the Defendant stands to suffer if the Plaintiff's suit is dismissed. The Applicant asserted that the Respondent failed to act consistent to their promise to sell the suit property to them.

13.The Applicant also averred that they should be granted leave to amend their Plaint. Counsel submitted that the amendments sought were mere corrections that go towards the resolution of the matter in dispute and that the said amendments will not in any way occasion injustice to the Respondents. Counsel referred the court to the cases of **Daniel Ng'etich & Another v K-Rep Bank Ltd [2013] eKLR** and **Tildesley v Harper (1878) 10 Ch. D. at p.296**, to argue that amendments sought before hearings should be allowed freely, as long as granting them will not result to an injustice to the other party, and there cannot be an injustice if the other party can be compensated by costs.

14.On the issue as to who should bear costs, the Applicant relied on section 27 of the Civil Procedure Act and argued that costs follow the event and are awarded at the discretion of the court. They sought for costs of the Application.

THE RESPONDENTS' SUBMISSIONS.

15. In opposition to the application, the Respondent filed their submissions dated 22nd September 2021 on 27th September 2021. They submitted that it is not in dispute that the Respondent is the registered proprietor of the suit land. Counsel submitted that the Applicant's claim is hinged on the doctrine of promissory estoppel. The Respondent relied on the case of **Kyangaro v Kenya Commercial Bank Ltd & Another (2004) 1 KLR 126** cited with approval in the case of **Patrick Waweru Mwangi & Another v Housing Finance Co. of Kenya Ltd (2013) eKLR at page 145**, to argue that while equitable doctrines apply in Kenya, doctrines of equity also apply and he who comes to equity must come with clean hands. They asserted that the Applicant was dishonest and had not come to court with clean hands.

16. The Respondent submitted that the assertion by the Applicant that they anticipated purchasing the suit property based on the Respondent's promise allegedly made in July 2011, was misleading. They argued that it is not correct that when they authorized the Applicant's members to enter the suit property to evict intruders, that amounted to a promise to sell the suit property to the Applicant. The Respondent emphasized that the fact that the Respondent acquired the services of the Applicant is not in dispute, but that the services were not offered with the promise that the Respondent will eventually sell the parcel of land to the Applicant, as the services which were for the sum of Kshs. 145, 541, 900/= were to be paid for, as demonstrated by the letter dated 5th July 2013 from Ameyo Ogutu, Etole & Company Advocates. The Respondent submitted that the Applicant's allegations therefore concerning the said services demonstrated the Applicant's dishonesty which does not endear them to equitable remedies.

17. The Respondent further submitted that the Applicant's actions are based on selfish intentions as the Applicant insists on being given first priority to purchase the suit property on behalf of the local community notwithstanding the fact that the local community had shown interest in acquiring the same property through various other self-help groups. The Respondent stated that sale of the suit property is intended to be fair, transparent and competitive and no single group has priority to the detriment of other groups and no group was promised first priority, as the sale was intended to be a willing buyer- willing seller transaction. It was further submitted for the Respondent that the Applicant had not presented any sale agreement between themselves and the Respondent hence they cannot claim to have an enforceable right, contrary to section 3 (3) of the Law of Contract Act. The Respondent placed reliance on the case of **Ayoub v Standard Bank of South Africa (1963) E.A 619**, where it was held that courts will not imply a trust save in order to give effect to the intention of the parties. The Respondent emphasized that there was no intention by the Respondent to sideline other members of the local community in order to prioritize the Applicant. The Respondent submitted that the Applicant has no legal right whatsoever over the suit property and the suit as filed is a waste of the court's judicial time and an abuse of the court process.

18. On whether the Applicant had satisfied the requirements for grant of a temporary injunction, the Respondent placed reliance on the case of **Giella v Cassman Brown** (supra) to argue that the three conditions set out in that case, as discussed earlier in this ruling, must be satisfied before an injunction is granted. On whether the Applicant had established a *prima facie* case, the Respondent stated that the Applicant has no legal right to the suit property and therefore the Applicant has not demonstrated a *prima facie* case. To buttress their position, the Respondent relied on the cases of **Mrao v First American Bank** (Supra) and **Nguruman Ltd** (supra).

19. As regards the question as to whether failure to grant a temporary injunction to the Applicant would expose them to irreparable injury, Counsel submitted that the Applicant had not shown that they would suffer irreparable harm which cannot be compensated by damages. It was argued that the concept of irreparable harm seeks to protect the *prima facie* case established by the Applicant from being rendered nugatory, however in the absence of a *prima facie* case, then there can be no irreparable injury. The Respondent referred the court to the case of **Nguruman Ltd** (supra). The Respondent further submitted that the Applicant shall not suffer prejudice if the orders sought are not granted, but on the contrary the Respondent will suffer an injustice and be prejudiced if the orders are granted, as its right to enjoyment and disposal of its property, a right protected in law will be curtailed. Reliance was placed on the case of **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited (2001) KLR**, where the court held that there is no commodity for sale whose loss cannot be compensated adequately in damages.

20. It was further contended for the Respondent that the balance of convenience tilted in favour of the Respondent, as it has a right to its property which right includes the right of disposing off the same within the ambit of the law. Counsel referred the court to the case of **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, where the court was of the view that the Plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction, will be greater than that which is likely to arise from granting it.

21. On the issue as to whether the Applicant should be granted leave to amend their Plaintiff, the Respondent submitted that the draft amended plaintiff is inconsistent with the original pleadings and will entirely alter the nature of the Respondent's defence, hence granting that prayer would facilitate an abuse of the court process. Further, the Respondent stated that they had already called their witnesses and closed their case and therefore amending the plaintiff at this stage will greatly prejudice them, as the Applicant had turned this suit in to a gamble at the expense of the Respondent. The Respondent concluded by urging the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

22. I have carefully considered the application, the affidavit in support, the Replying affidavit as well as the parties' submissions together with the authorities relied upon. In my view, this matter presents two issues for determination;

a) Whether the Applicant has satisfied the conditions for grant of an injunction.

b) Whether leave ought to be granted to the Applicant to amend their plaintiff in terms of the draft amended plaintiff attached to the application.

23. Order 40 Rule 1 of the Civil Procedure Rules provides in respect of temporary injunctions as follows;

“Where in any suit it is proved by affidavit or otherwise-

a) That any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

b) That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the Defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

24. Principles for grant of temporary injunctions are well settled. In the case of **Giella v Cassman Brown (1973) E.A 358**, the court laid down principles for grant of temporary injunction as follows;

a) **The Applicant must establish a prima facie case with a probability of success.**

b) **If the injunction is not granted, the Applicant will suffer irreparable injury that may not be compensated by an award of damages.**

c) **Where a court is in doubt, it should decide the application on a balance of convenience.**

25. A *prima facie* case was described in **Mrao Ltd v First American Bank of Kenya and 2 Others (2003) KLR** as follows;

“A *prima facie* case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

26. On whether the Applicant has established a *prima facie* case, the Applicant has submitted that their case is anchored on the doctrine of promissory estoppel. They contend that if the authority of sale given to Kenya Commercial Bank in respect of the suit property is exercised before this matter is heard, they will suffer prejudice. They argue that the Respondent gave them a promise to grant them first priority to sell the suit property to them in July 2011 when the Respondent sought the services of the Plaintiff to evict trespassers on the suit land. The Respondent in rebuttal have argued that they never promised to sell the suit land to the Applicant, and that services offered to the Respondent by the Applicant’s members to evict intruders on the suit property were services devoid of any promise and which services entitled the Plaintiff to payment of Kshs. 145,541,900/=.

27. It is not in dispute that the Respondent is the registered proprietor of the suit property. The rights of a registered proprietor are protected in law. Section 24 (a) of the Land Registration Act provides as follows;

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. “

28. In **Park View Shopping Arcade Ltd v Charles M. Kangethe & 2 Others [2004] eKLR**, it was held that the Constitution safeguards the sanctity of private property.

29. The prayer for temporary injunction is based on promissory estoppel doctrine. The doctrine of promissory estoppel is a doctrine of equity which has been applied in the Kenyan jurisdiction. It essentially means that if a party by their words, representation or conduct makes a promise that induces another party to rely on and act upon the said words, representation or conduct to the latter’s detriment, equity will not let the promisor act inconsistent with their promise.

30. The Blacks Law Dictionary, 11th Edition defines promissory estoppel as following:-

“The principle that a promise made without consideration may nonetheless be enforced to prevent injustice if the promisor should have reasonably expected the promisee to rely on the promise and if the promisee did actually rely on the promise to his or her detriment.”

31. In the case of **Carol Construction Engineers Ltd & Another v National Bank of Kenya [2020] eKLR**, the court outlined five elements that must be satisfied for a party to anchor their claim on promissory estoppel:

a) **Representation:** There must be a representation by the representor in words or by acts or conduct.

b) **Reasonableness:** The person relying must satisfy the court that it was reasonable for them to rely on the representation.

c) **Reliance:** the victim must demonstrate that he was induced by the representation and on such reliance acted on it.

d) **Detriment:** the victim must show that in acting in reliance of the representation, he suffered some detriment or changed his position, and

e) Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

32. Therefore, this court must establish whether the Applicant has established a *prima facie* case based on promissory estoppel. The Applicant states that in July 2011, the Respondent authorized them to offer services of evicting intruders on the suit property with a promise that the said property will be sold to the Applicant. The Respondent has denied this allegation and stated that those services were worth KShs. 145,541,900/=, which the Applicants have demanded to be paid. I have perused documents annexed to the Applicant's affidavit in support of their application. The Applicant stated that the Respondent intimated their intention to give priority of purchase to the local community. They annexed several letters to that effect. The Applicant argued that the Respondent intimated its intention to sell the land to the Applicant in July 2011 when they allowed the Applicants members to evict intruders on the suit land. The document for that allegation is annexure 8, which is a letter by the Applicant dated 17th August 2011, where the Applicant stated that they had evicted 50% of the intruders and sought for further assistance of transport to enable them complete the eviction exercise.

33. The question therefore is whether annexures 3,6,7 and 8 can be said to amount to a promise to sell 1000 acres of the suit property to the Applicant, which the Respondent must honour? Annexure 3 is a letter by the the Respondent, addressed to the Assistant Minister, Ministry of Youth affairs and Sports; it stated that priority will be given to local community members, groups as well as the Respondent's staff Sacco members at prevailing market rates. In annexure 6, the Respondent wrote a letter to the Applicant and stated that priority was to be given to the local community through the Applicant, but the decision to sell was awaiting government approval. They also stated that they could not make firm commitments. In the letter dated 26th August 2011 written by the Respondent and addressed to the District Commissioner Athi River, the Respondent stated that they had no objection to dealing with the Applicant or any other group as long as it was genuine, bona fide and representatives of the local community and other interested local groups.

34. The question that arise therefore is whether, from the material placed before court, it can be concluded that there was a promise from the Respondent to the Applicant to sell 1000 acres to the Applicant and which promise the Applicant reasonably relied and acted upon to their detriment. As was held in the case of **Carol Construction Engineers Ltd** (supra), for a party to rely on the doctrine of promissory estoppel, they must satisfy the court that there was representation, or conduct from the other party which they reasonably relied upon and acted on at their detriment. The intentions of the parties must be clear. Considering the evidence placed before court in the instant matter, I am not satisfied at this preliminary stage that there is material placed before this court to show that the Respondent promised to sell 1000 acres to the Applicant, and that the Applicant relied on and acted upon such promise to their detriment. The offer to purchase 1000 acres by the Applicant was made vide their letter dated 17th November 2020, through their advocates Gesicho & Associates. Thus, the allegation that there was a promise to sell land measuring 1000 acres to the Applicant by the Respondent is not supported.

35. On the question as to whether the Applicant acted in reliance of the promise, the Applicant has stated that pursuant to the priority to purchase made to the local community, the Applicant mobilized more than 5000 poor, needy and landless members of the local community with the aim of pooling resources in anticipation of purchasing the land for its members. The Applicant has not demonstrated the action they took in reliance to the Respondent's representation that resulted to their detriment. In the premises therefore the Applicant has not at this stage established a *prima facie* case based on promissory estoppel.

36. On the issue as to whether the Applicant will suffer irreparable loss, the Applicant ought to satisfy the court that if the suit property is not sold to them they will suffer irreparable loss. In **Pius Kipchirchir Kogo v Frank Kimeli Tenai [2018] eKLR**, the court held as follows;

“Irreparable injury means that the injury must be the one that cannot be adequately compensated for in damages and that the existence of a *prima facie* case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted. And there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

37. From the material placed before court, I am not satisfied that in the event the suit property is sold to persons other than the Applicant, the Applicant shall suffer irreparable injury.

38. On the question of balance of convenience, this court will address itself to the question as to which party will suffer greater harm from granting or refusing the injunction pending a decision on the merits. In the case of **Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 Others (2016) eKLR**, the court while addressing the question of balance of convenience stated as follows;

“Where any doubt exists as to the Applicants' right, or if the right is not disputed, but its violation is denied, the court in determining whether an interlocutory injunction should be granted, takes in to consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the Applicant, on the other hand might sustain if the injunction was refused and he should ultimately turn out to be right.....Thus the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If the Applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction.”

39. In the instant case, the Respondent is the registered proprietor of the suit land, which essentially grants them all the rights and privileges over the same. In my view they may suffer greater harm by the grant of injunction than the harm that may be suffered by the Plaintiff if the injunction is not granted and they are successful upon trial. Therefore, the balance of convenience tilts in favour of declining the injunction.

40. On the prayer for leave to amend the Plaintiff, the Applicant has submitted that the Respondent will not suffer any prejudice by allowing the said prayer. The Respondent has argued that this suit is a consolidation with several other suits and the Respondent has already testified and closed its case.

41. The law in respect of grant of leave for amendment of pleadings is well settled. The general rule is that amendment of pleadings sought

before the hearing of a suit should be freely granted, if granting the same will not result in an injustice to the other side, and there is no injustice if the other party can be compensated by costs. See **Eastern Bakery v Castelino (1958) EA 451**. On the other hand, an amendment will not be allowed if it causes injustice to the other party. In the case of **St Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR**, the court cited with approval the case of **Tildesley v Harper (1878), 10 Ch. D at p 296** where it was held as follows;

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”

42. Similarly, in the case of **Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991**, the Court of Appeal set out principles which may guide the court in deciding whether or not to grant leave to amend pleadings as follows;

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case;**
- b) Amendments should be timeously applied for;**
- c) Power to amend can be exercised by the court at any stage of the proceedings;**
- d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other party;**
- e) The Plaintiff will not be allowed to reframe his case if by an amendment of the plaint the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow amendment notwithstanding the expiry of the current period of limitation.**

43. In the instant case, the Applicant has argued that the Respondent will not suffer any prejudice by granting leave to amend. The Respondent on their part assert that this suit is consolidation with several other suits and the Respondent has already testified and closed its case, therefore they will be prejudiced by the amendment. They maintain that the draft amended Plaint is inconsistent with original pleadings and will entirely alter the nature of the Defendant's defence, and that amending the plaint at this stage shall occasion great prejudice to them. They argue that a party should not use an amendment to turn their suit into a gamble at the opponent's expense.

44. In addition, the Respondent has contended that this suit was consolidated with other suits, namely; Petition No. 40 of 2016: Naftary Kariuki & Others v EAPC & Another, J.R No. 90/2016 Patrick Maingi Nguku & Others v EAPCC, ELC No. 1190/2015: Syokimau Bright Homes & Others v Eapcc, Misc. Application No. 428 of 2015: Francis Kirima M'ikunyua & Others v Eapcc, ELC No. 1108 of 2015: Eapcc v Sammy Kathulu & 49 Others, J.R No. 04 /2016: Patrick Maingi Nguku & Others v Eapcc and ELC No.155 of 2016 (formerly Nairobi ELC No. 1108 of 2015) **The East African Portland Cement Company Limited v Sammy Kathuli & 49 Others**, which is the lead file. The Applicant did not respond to this argument. I therefore took the liberty to peruse Machakos ELC No. 155 of 2016 and indeed confirmed that this suit was consolidated with the said suits and the same is pending determination. The Applicant has not explained why this application was filed separately in this file and not in the lead file.

45. I agree with the Respondent that this application should have been made in the lead file number ELC No. 155 of 2016 and not by separating this file from the other files. Once consolidation of suits is done, all the consolidated suits become one suit and a party cannot move the court in a manner that separates their claim from the rest of the claims within the consolidated suits, as the other parties are entitled to participate in all such applications.

46. In the premises, I find and hold that the Notice of Motion dated 20th January, 2021 lacks merit and I dismiss the same with costs to the Defendant.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 11TH DAY OF NOVEMBER 2021.

A. NYUKURI

JUDGE