



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 225 OF 2016

SOSIANI BUILDERS LTD.....PLAINTIFF

VERSUS

CHARTER HOUSE INVESTMENT LTD.....1ST DEFENDANT

COUNTY GOVERNMENT OF UASIN GISHU.....2ND DEFENDANT

RULING

[MOTION DATED 2ND SEPTEMBER, 2019]

1. The 1st Defendant moved the Court through the Motion dated 2nd September, 2019 for the following two main prayers;

(a) Setting aside of Ombwayo J's, order of 29th January, 2019 and reinstate the 1st Defendant's counterclaim dated and filed on the 31st August, 2016, and

(b) An order consolidating this suit with **ELC Civil Suit No. 927 of 2012 – Charter House Investment Ltd Vs John Keen Songok & Another**, and **ELC Civil Suit No. 304 of 2014 – Charter House Investment Ltd Vs Simon Sang & Another**.

The application is based on the twenty (20) grounds on its face, and is supported by the affidavits of **Ogada Meso Advocate** sworn on the 2nd September, 2019 and 21st February, 2020.

2. The application is opposed by the Plaintiff through the replying affidavit sworn by **Mahendra G. Patel** described as "**Director of the Defendant Company**" on the 15th November, 2019.

3. That directions on filing and exchanging submissions were issued on 30th October, 2019. That subsequently, the learned Counsel for the 1st Defendant and Plaintiff filed their written submissions dated the 21st January, 2020 and 10th March, 2020 respectively.

4. (A) The 1st Defendant's case is that after the Plaintiff's suit was withdrawn as per notice of withdrawal dated the 7th September, 2016 on the 9th September, 2016, the 1st Defendant's counterclaim dated and filed on the 31st August, 2016 was mentioned on the 20th June, 2018 and fixed for hearing on the 22nd January, 2019. That on that hearing date, the 1st Defendant's Counsel was unwell and sent a representative from Nairobi to Eldoret to get Counsel to hold brief, and seek for an adjournment. That the Counsel was informed by the representative that the matter had by consent been fixed for the 24th July, 2019 as the trial Court was not sitting. That later, the Counsel discovered that information was incorrect, and that indeed, the Court was sitting on the 22nd January, 2019 and after placing the matter aside to 11.00 a.m. to await for the 1st Defendant and Counsel, the counterclaim had been dismissed with costs for non-attendance. That the 1st Defendant then filed this application and prays for the dismissal order to be set aside. That as the subject matter in this suit, and the two others sought to be consolidated with are related, their prayer for consolidation should be granted. The learned Counsel referred the Court to various superior Court's decisions in their submissions in support of their case. The cases includes;

- **Mbogo & Another Vs Shah EALR 1908 as cited in Maina Vs Mugiria [1983] eKLR,**
- **Belinda Murai & Others Vs Amoi Wainaina [1978] as cited with approval in Stephen Muriuki Chiuri Vs Stephen Muriuki Chiuri & 2 Others [2017] eKLR,**
- **Utalii Transport Company Ltd & 3 Others Vs NIC Bank & Another [2014] eKLR,**

- *Kenya Armed Forces Old Comrades Association Registered Trustees Vs Registered Trustees of Agape Fellowship Centre [2014] eKLR*, and
- *Law Society of Kenya Vs The Centre For Human Rights & Democracy Supreme Court of Kenya Petition No. 14 of 2013*.

(B) The Plaintiff's case is that the 1st Defendant's Counsel claim of being indisposed on the date the counterclaim was dismissed has not been proved. That the instant application was filed almost two months after Counsel discovered the counterclaim had been dismissed showing there was undue delay. That there being no suit pending, the prayer for consolidating this matter with the two others cannot arise. That in any case, consolidation would prejudice the Plaintiff, and give the Plaintiff undue advantage. The learned Counsel for the Plaintiff cited the following superior Court's decisions in support of their case;

- *Thomas K. Sambu Vs Paul K. Chepkwony alias Paul Chepkwony Koskei [2013] eKLR*, and
- *Fran Investments Ltd Vs G4S Security Ltd Vs [2015] eKLR*.

5. The following are the issues for the Court's determinations;

(a) Whether the 1st Defendant has made a reasonable case for the setting aside of the dismissal for non-attendance order of 29th January, 2019, and reinstating of the counterclaim.

(b) Whether the 1st Defendant has made a reasonable case for consolidating the counterclaim in this suit with the two other suits detailed herein above.

(c) Who pays the costs of the application?

6. The Court has after considering the grounds on the Motion, the parties' affidavit evidence, the learned Counsel's written submissions, and the record come to the following conclusions;

(a) That by the time the Plaintiff filed their Notice of Withdrawal of suit dated the 7th September, 2016, that was adopted on the 8th September, 2016, and an order extracted and issued on the 9th September, 2016, the 1st Defendant's Defence and Counterclaim dated the 31st August, 2016 was already filed and remained intact for further court processes. That the Counterclaim was eventually fixed for hearing on the 29th January, 2019 when it was dismissed with costs for non-attendance of both the 1st Defendant and its Counsel.

(b) That though the Counsel for the 1st Defendant has tendered some explanation relating their failure to come to Court, there is no attempt to explain the absence of the 1st Defendant's witness(es). That indeed, the Counsel has not disclosed whether they had notified the 1st Defendant of the hearing date after being served with the hearing notice.

(c) That the Plaintiff has rightly pointed out that the 1st Defendant's Counsel has not availed before the Court evidence that he was unwell, the response by Counsel that such evidence is sensitive, and cannot be displayed at the instant of a party is to say the least misguided. That a Counsel, being an officer of the Court, should not have difficulties obtaining an appropriate summary from the Medical Practitioner or medical facility attended, and file it with the appropriate affidavit to confirm that the Counsel sought medical attention on the date specified and or the status of his/her health during that period. That the one who alleges the existence of a fact has a legal duty to tender proof.

(d) That the foregoing aside, and giving the 1st Defendant's Counsel the benefit of doubts that their representative misled him to believe the matter had been rescheduled to the 24th July, 2019 by consent, the Court is of the considered view that justice of the case demands the 1st Defendant be given an opportunity to have their counterclaim heard and determined on merit. That the delay of filing the application of about five weeks from the 24th July, 2019 is not unreasonable or inordinate as this suit concerns land.

(e) That the 1st Defendant's claim of the relationship of land parcel *Eldoret Municipality/Block 12/424* allegedly registered with the 1st Defendant, and from which *Eldoret Municipality/Block 12/144* is said to arise from, and the parcels subject matter of the two suits sought to be consolidated with this matter has not been challenged. That it is only fair and just that as the questions of law or facts for determination in all the three matters are connected, consolidation should be allowed. That the consolidation will allow to facilitate the efficient, and expeditious disposal of the related matters between the various litigants, and save on time and costs for both the Counsel and the parties concerned.

(f) That as the Plaintiff cannot be blamed for what befell the 1st Defendant's Counsel, leading to their failure to attend Court on the 29th January 2019, and in the absence of evidence that 1st Defendant had been notified of the hearing date, the Counsel on record for the 1st Defendant will meet the Plaintiff's costs in this application notwithstanding the provision of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

7. That flowing from the foregoing, the 1st Defendant's Motion dated the 2nd September, 2019 is meritorious, and is allowed in terms of prayers (1) and (2) with the Plaintiff's costs being paid by Counsel on record for 1st Defendant.

Orders accordingly.

Delivered and signed at Eldoret this 27th day of May, 2020

S. M. KIBUNJA

JUDGE

Ruling read in the absence of all Parties/Counsel and is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.

Court Assistant: Christine