



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO.180 OF 2018**

**(Formerly Nairobi ELC No. 25 of 2013 and Machakos ELC 186 of 2009)**

**MARY THERESA OLE PERE.....1<sup>ST</sup> PLAINTIFF**

**ANTHONY PARPAE OLE PERE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**PAMA ESTATE LTD.....1<sup>ST</sup> DEFENDANT**

**CHARLES KIMANI.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Applications before Court for determination are the Plaintiffs' Notice of Motion dated the 22<sup>nd</sup> October, 2014 and 7<sup>th</sup> September, 2015 respectively. In the application dated 22<sup>nd</sup> October, 2014 the Plaintiffs seek leave to amend their Plaint and the annexed Amended Plaint be deemed to have been duly filed. In the Application dated the 7<sup>th</sup> September, 2015, the Plaintiffs seek to consolidate Machakos ELC No. 186 of 2009 between Mary Theresa Ole pere & Another V PAMA Estates Limited & Another with Machakos HCCC No 95 of 2011 between John Mwaura Muiruri & Another Vs Mary Theresa Ole Pere & Anthony Ole Pere.

In the application dated the 22<sup>nd</sup> October, 2014 which is supported by the affidavit of NELSON MUTAI who is an Advocate in conduct of the matter on behalf of the Plaintiffs', he avers that the amendment sought is intended to bring before the Court the real matters in controversy between the parties herein. Further the said amendments will not occasion any prejudice to the Defendants. In the application dated the 7<sup>th</sup> September, 2015 which is supported by the affidavit of the 1<sup>st</sup> Plaintiff Mary Theresa Ole Pere where she explains that she is a Defendant in ELC 95 of 2011 together with the 2<sup>nd</sup> Plaintiff. She claims the two suits relate to the parcel of land in Ongata Rongai to which she is a co owner together with the 2<sup>nd</sup> Plaintiff. She avers that this being a land matter the two matters should be consolidated with ELC 186 of 2009 being the lead suit.

The Parties filed their respective submissions to canvass the two applications.

**Analysis and Determination**

Upon consideration of the Plaintiffs' Notice of Motion Applications dated the 22<sup>nd</sup> October, 2014 and 7<sup>th</sup> September, 2015 including the respective affidavits and submissions, the following are the issues for determination:

- Whether the Plaintiffs' should be granted leave to amend their Plaint.
- Whether the Machakos ELC No. 186 of 2009 between Mary Theresa Ole pere & Another V PAMA Estates Limited & Another should be consolidated with Machakos HCCC No 95 of 2011 between John Mwaura Muiruri & Another Vs Mary Theresa Ole Pere & Anthony Ole Pere.

As to whether the Plaintiffs' should be granted leave to amend their Plaint.

The Plaintiffs did not file submissions in respect to this point but the Defendants in their submissions opposed the application for amendment for reasons that the Applicants have sought leave way out of time, no explanation has been given for the unreasonable delay and the respondent will be prejudiced with the said amendment. They have relied on the decision of **John Mulwa Kangaa V Pan African**

**Insurance Co. Ltd (2015) eKLR and Central Bank Ltd V Trust Bank Ltd & 5 other (2000) eKLR** to buttress their arguments.

Section 100 of the Civil Procedure Act makes provisions on the General Power to Amend and gives the Court discretion on whether to allow an amendment or not.

Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provide that: **‘(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings. (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.’**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **‘(1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.’**

**In the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR**, the Court of Appeal in dealing with issues of amendment held a follows: **‘The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-**

**“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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 side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on Limitation Acts.”**

Insofar as the Defendants contend that the amendment sought has not been brought timeously, but on perusal of the draft amendments and noting that the Defendants never filed a replying affidavit to oppose the same but only raised it in their submissions, I opine that there is no prejudice they will suffer if the said proposed amendments are allowed. In the circumstance and in relying on the decision as well as legal provisions cited above, I find that the amendment sought by the Plaintiffs is necessary for the determination of the real question in controversy. In any event, I note the Defendants will also be granted leave to amend their Defence if need be.

As to whether the Machakos ELC No. 186 of 2009 between Mary Theresa Ole pere & Another V PAMA Estates Limited & Another should be consolidated with Machakos HCCC No 95 of 2011 between John Mwaura Muiruri & Another Vs Mary Theresa Ole Pere & Anthony Ole Pere. The Plaintiffs have sought for consolidation of these suits and submit that even though the suit properties in the two suits is not the same but the Plaintiffs in both cases is one and they are seeking the same line of recourse. Further, that the suits relate to Ngong/ Ngong/ 16204 and 36811 which the Defendants have been using as a frontage to shops and a parking yard. They further admit that the Defendants are strangers to Machakos HCCC NO. 98 of 2011. They contend that it would take financial sense to consolidate them and save judicial time. They further submit that the relief being sought after, partly arise out of the same transaction or series of transactions. They explain that despite having separate titles, the two properties are situated in the same locality and the facts of the two cases are almost identical. They have relied on the case of **Nyati Security Guards & Services Ltd V Municipal Council of Mombasa (2004) eKLR** to support their averments. The Defendants opposed the application relied on the said case of **Nyati Security Guards & Services Ltd V Municipal Council of Mombasa (2004) eKLR**. They explained that the two suits should not be consolidated as there are no common facts; no common issues arising; remedies sought are by different parties with the Plaintiff in one suit being a Defendant in another suit. They insist that the suits will only result in convolution of the hearing.

From the averments above, I note the two suits seek varied reliefs, the suit lands are different and the parties are not the same.

Order 11 Rule 3 (1) (h) of the Civil Procedure Rules provides that:’

**(1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—**

**(h) consider consolidation of suits;’**

In the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** the learned Judge explicitly stated the criteria for consolidation of the suits as follows: **‘The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-**

1. *Do the same question of law or fact arise in both cases?*
2. *Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction*
3. *Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party.*

Further that in the case of; *Nyati Security Guards & Services Ltd –vs- Municipal Council of Mombasa [2004] eKLR*, the Court set out the principles that to guide a Court the consolidation of two or more suits as follows:

***“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.”***

*Based on the facts as presented and in associating myself with the judicial authorities as well as the legal provisions cited above, I hold that the two suits sought to be consolidated have different parties and are seeking varied reliefs. Insofar as I concur with the Applicants that consolidation would be convenient for them, it is not that simple. At this juncture, I opine that consolidation would delay the matters instead of expediting them, and this might disadvantage or prejudice a party. I am of the view that the two suits should proceed separately but simultaneously.*

*It is against the foregoing that I find the application dated 7<sup>th</sup> September, 2015 unmerited and will disallow it. I however find the application dated 22<sup>nd</sup> October, 2014 merited and will grant the Plaintiffs leave of 14 days to file and serve the *Plaint* after which the Defendants are allowed to file their amended Defence in 14 days if need be.*

Costs will be in the cause.

**Dated signed and delivered via email this 20<sup>th</sup> day of May, 2020**

**CHRISTINE OCHIENG**

**JUDGE**