



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 1993 OF 2002

TRIPLE EIGHT INVESTMENTS (KENYA) LTD....PLAINTIFF/RESPONDENT

-VERSUS-

CITY FINANCE BANK LIMITED.....1ST DEFENDANT/RESPONDENT

NYANJA HOLDINGS LIMITED.....2ND DEFENDANT/APPLICANT

NDUNG’U, NJOROGE & KWACH ADVOCATES....3RD PARTY/RESPONDENT

CONSOLIDATED WITH MILIMANI HCCC NO. 1506 OF 2000

BETWEEN

NYANJA HOLDINGS LIMITED.....PLAINTIFF

-VERSUS-

CITY FINANCE BANK LIMITED.....1ST DEFENDANT

TRIPLE EIGHT INVESTMENTS (KENYA) LTD.....2ND DEFENDANT

RULING

1. This ruling relates to a Notice of Motion Application dated 28th October, 2015, filed by the 2nd Defendant (herein the Applicant), under the provisions of Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. It is premised on the grounds on the face of it and an Affidavit dated 28th date 2015, sworn by Judy W. Gichumbi, an Advocate of the High Court of Kenya, practicing as such, in the firm of M/s Njoroge & Musyoka Advocates, which has the conduct of this case on behalf of the Applicant.

2. The Applicant is seeking for orders that, it be granted leave to amend its Defence and consolidate its claim by way of counterclaim, in the matters of; HCCC No. 1965 of 1991 and HCCC No. 1506 of 2000, as per the draft annexed amended defence and the costs be in the cause. It is deposed that, the Plaintiff instituted this suit, by way of Plaint dated 24th August 2000, and the Defendants filed their defences dated 30th October 2000 and 19th October 2000, respectively.

3. The Applicant avers that since the filing of the Plaint, there has been a lot of legal changes, in that, Order 11 of the Civil Procedure Rules 2010, provides for new provisions in regard to Pre-trial directions and Conference and that the newly enacted Land laws have created new rights and responsibilities, thus changing the procedure of realization of securities.

4. Further that, there have been new developments in the matter which includes: receivership, consolidation of the two suits and the additional parties, which are not reflected in the pleadings and the same, will create confusion and uncertainty. Therefore the proposed amendment will enable the Court to determine the real issues between the parties herein and facilitate expeditious prosecution of the suit.

5. Finally, it is averred that the mistakes sought to be corrected are genuine mistakes and not misleading and that the other parties do not

stand to suffer any prejudice. It is therefore in the interest of justice that the orders sought be granted.

6. However the Applicant was opposed by the Plaintiff vide grounds of objection and notice of preliminary objection dated 20th November 2015, stating that the Application is incompetent, bad in law, misconceived and therefore an abuse of the Court process. Further that the application is supported by an incompetent affidavit, the same having been sworn by an Advocate and on contested and/or disputed issues of facts.

7. The Plaintiff also argued that the Application is brought later in the day and contrary to the overriding objectives of the Civil Procedure Act. That it is mala fides, and meant to delay the expeditious conclusion of this matter. That if the Court grants the orders sought, the Plaintiff will be highly prejudiced, in that, its right to access justice protected and decreed under Article 48 of the Constitution of Kenya, 2010, shall be violated by the delaying tactics adopted by the Applicant herein.

8. Further the Applicant has not provided any material or laid any basis upon which the Court can exercise discretion in its favour in relation to the proposed amendments. That the change in the names of and/or additional parties has already been addressed in the amendment of pleadings by the 1st Defendant herein, pursuant to leave granted on 25th March 2015 and that the enactment of the Land Act 2012, and Land Registration Act, 2012, do not confer any rights to the Applicant herein as they have no retroactive effect whatsoever. Further that Order 11 of the Civil Procedure Rules, 2010, merely provides for procedural pre-trial steps and do not demand amendments to pleading.

9. The 1st Defendant also opposed the Application vide a Replying Affidavit dated 1st November 2015, sworn by James Murage, an Advocate of the High Court of Kenya, and the Head of the Legal services, with the 1st Defendant. He deposed that, ground three (3) of the Application is incorrect in that only two (2) suits namely; HCCC No. 993 of 2002 and HCCC No. 1506 of 2000; were consolidated by the Honorable Mr. Justice Warsame on 21st June 2007, as opposed to the averments that, the suit; HCCC 1965 of 1991, was also consolidated with the other two (2) suits.

10. That the consolidation of the two (2) suits herein together with HCCC No. 1965 of 1991, would amount to an absurdity because the properties LR No. 209/4796/3, LR No. 7583/1 subject of the suit and HCCC No. 1965 of 1991, have nothing to do with LR No. 37/256/3, purchased by the Plaintiff and that consolidation of will undermine the proceedings before another Judge of the same co-ordinate jurisdiction as suit, HCCC No. 1965 of 1991, consolidated with HCCC No. 251 of 2008, is substantially heard.

11. Further, in HCCC No. 1965 of 1991, the purchaser of the charged properties, 209/4796/3 and LR No. 7583/1, Redmars Holdings Limited, is different from the Plaintiff herein, Triple Eight Investments (K) Ltd, who was the purchaser of the charged property herein, LR No. 37/256/3 Nairobi.

12. The 1st Defendant argued that there is no confusion in the state of the pleadings as already filed by the parties and therefore the application is not justified at all and will seriously disrupt the proceedings herein. That even then, the application, has been made a decade after the Applicant's suit was filed and no material has been exhibited to support it. Therefore it is thus untenable and otherwise an abuse of the court process;

13. On the issue of the proposed amendments, the 1st Defendant argued that, it is clear from the pleadings herein, the suits filed namely, HCCC No. 1506 of 2000 and HCCC No. 993 of 2002 by the Plaintiff have been pending for over 10 years now. That the defence filed by the Applicant to the Plaintiff's suit, sought for the dismissal thereof and in its suit, sought cancellation of the sale and transfer made in favour of the Plaintiff by the 1st Defendant.

14. Further as can be noted from the Plaintiff filed by the Applicant in HCCC No. 1506 of 2000, it is clear that, it is challenging the process of sale of the property and seeking damages for the same. The defence the Applicant filed in this suit raises similar points of defence as in the Plaintiff. Thus, the draft amended Plaintiff purports to introduce completely new causes of action, new pleadings and claims and in effect, the Applicant is overhauling its case altogether and creating a completely new pleading.

15. The 1st Defendant argued that if the proposed amendment is allowed to proceed, it shall be seriously prejudiced by having to face claims whose effect would be to re-open matters altogether masquerading as an amendment. That event then, the Applicant has not explained in any way or in any convincing manner, as to why it seeks a complete overhaul of its defence yet, throughout the existence of the suits, the Applicant has always had legal representation. Finally it was argued that, the matters pleaded in the proposed defence and counter-claim offend the Limitation of Actions Act, Cap 22.

16. In response to the opposition raised by the Respondents, the Applicant filed a supplementary affidavit dated 23rd February 2016, sworn by George Boniface Njau Mbugua Nyanja, a director of the Applicant. He deposed that, the Affidavit in support of the Application herein was drawn with full authority of the Applicant. He literally reiterated the content thereof save to add that, the two matters herein have already been consolidated but the pleadings and documents have not been consolidated. Further, the Respondents have had an opportunity to amend their documents with no opposition from the Applicant and it is unjust for them to claim that the matter has been delayed or will be delayed on account of consideration or amendment by the Applicant.

17. It was reiterated that the consolidated suits relate to the same subject matter and that no new issues have been added in the amendment other than, what will bring certainty and in compliance of the new legal proceedings. That the proposed amendment will reflect the correct names of the parties in keeping with the amendments done by the other parties and will enable the court to determine the real issues between the parties herein, in that, the nature of the matter herein, is that, without the issues and the pleadings being consolidated, it will be confusing and result in injustice to the Applicant and there is no justification to read malice on the part of the Applicant. Therefore, it is in the interest of justice to grant the orders sought.

18. The Application was deposed of by filing of submissions by the parties and subsequent highlighting of the same. The Applicant

submitted that, the Court has unfettered discretion to allow amendment of pleadings but the discretion should be exercised judicially. Reliance was placed on Order 8 rule 3 of the Civil Procedure Rules, 2010, which allow parties to amend their pleadings at any stage. That, every litigant is entitled to be given a reasonable opportunity, 2010, to present his or its case, as enshrined in Article 50 of the Constitution of Kenya.

19. The Applicant relied on the legal principles in the case of; Harrison C. Kamau vs Blue Shield Insurance Co. Ltd (2006) eKLR, where it was stated:-

“ the amendments of pleadings.....(is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided:

(i) There (has) been no undue delay;

(ii) No new inconsistent cause of action (is) introduced;

(iii) No vested interest or accrued legal right (is) affected, and

(iv) The amendment (can) be allowed without injustice to the other side”

20. The Applicant further relied on the case of; Andrew Ouko vs Kenya Commercial Bank Limited & 3 Others (2014) eKLR, where the Court held that:

“the sole purpose of amending pleadings is to give the Court an opportunity to adequately consider the issues in dispute. This means that the court must very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny such party leave to amend its pleadings as a last resort and with good or sufficient cause.”

Further that it was held that:-

“the overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.”

21. The Applicant submitted that it will be difficult to comply with Order 11 of the Civil Procedure Rules, as the parties will have to file two sets of documents in support of each consolidated file. The Applicant denied being guilty of laches in seeking to amend its pleadings and shifted the blame to Plaintiff and the 1st Defendant for filing multiple applications ever since the matters were filed.

22. In further support of the orders sought, the Applicant cited the case of; Tilde vs Harper (1878) 10 Ch.D 393 where Bramwell L.J. stated that;

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

23. It was submitted that the Applicant has changed Advocates and the new Advocates finds the amendment necessary. The case of; Andrew Ouko vs Kenya Commercial Bank Limited (supra), was cited where the Court observed that:-

“it is not lost to the court that parties continuously look at their cases introspectively before the same are finally heard by the Court to ensure that they fully present their cases for determination by the Court. upon instructions by a party and perusal of documents in a matter, a firm of Advocates may form a particular opinion about how to prosecute its client’s case while another firm that takes over the matter from that previous firm, might look at the matter differently necessitating a change of tact. This court takes the firm view that until such time that judgment is delivered, the door for amendment of pleadings remains open. Order 8 Rule 1 of the Civil Procedure Rules, 2010 permits amendments to pleadings at any stage of the proceedings.”

24. That the Respondent’s argument that the amendment raises new causes of action, is not fatal to the application herein and that in any case, the Respondents have not demonstrated the new cause or prejudice demonstrated. The case of; Bosire Ogerovs Royal Media Services (2015) eKLR, quoted the case of; Eastern Bakery vs Castelino (1958) E.A. 461, where Sir Kenneth O’Conner, President of the then Court of Appeal for Eastern Africa, (as he was then) stated that;

“it will be sufficient.....to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”

That he further observed that:

“the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

25. Finally the case of; Tripple Eight Construction Company (Kenya) Limited, was relied on where the Court observed that:--

“On the issue that the intended amendments will introduce a new cause of action, it is clear both from a reading of Order 8 Rule 3(5) of the Civil Procedure Rules and on authorities that the mere fact that the amendment is likely to introduce or substitute a new cause of action is no ground to deny a party leave to amend as long as the new cause of action was in existence at the time the original plaint was filed and it arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

26. Similarly, the case of; Hiram Bere Kinuthia & 2 Others vs Edick Omondi & 3 Others (2014) eKLR, was cited where the Court held that;

“the Defendants have not demonstrated that the proposed amendments do not arise from the same facts or substantially similar facts that gave rise to the suit. Their objection solely on grounds that the proposed amendments seek to introduce a new cause of action ought to fail as the matters giving rise to the amendment in my view can be said to have arisen out of the same facts and circumstances out of which the cause of action arose.”

27. However the Plaintiff/Respondent submitted that, it is trite law that an Application to amend a suit contains issues of contested facts and in this matter the Applicant seeks to consolidate its claim against the Plaintiff and the 1st Defendant, and in fact the Applicant has included a counter-claim, in the draft annexed defense, which is obviously a matter of fact. The deposition by an Advocate on matters of facts not within the deponent’s knowledge offends the principles established in the case of; Trust Bank (In Liquidation) –vs- Kiprono Kittony & Others, Civil Suit No. 223 of 2002.

28. Further, though the Affidavit is attached as part of the Application, it is indeed not referred to in the body of the Application, though the Applicant has attempted at paragraph 2 of the supplementary Affidavit to rectify this anomaly, by alleging that it had given its seal of approval to the swearing of the said Affidavit. That in the given circumstance the Affidavit should be declared as incompetent and struck out.

29. The Plaintiff/Respondent further submitted that in order for suits to be consolidated, they should have common questions of law or fact arising out of the same or a series of transactions or for any desirable reason. Reference was made reference to several legal authorities that deal with consolidation of suits which include inter alia; the case of; Stumberg and another –vs- potgeiter [1970]EA 323, where the Court held as follows:-

“Where there are common questions of law or facts 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” (emphasis added).

30. 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.”

31. The Plaintiff/Respondent concede that under Order 11 Rule 3 (1)(h), the Honourable Court has the jurisdiction to consolidate two or more suits. However, it was reiterated that; the subject matter of the suit herein and HCCC No. 1506 of 2000, relates to Land Reference No. 37/256/3, Nairobi. That a perusal of the Plaint dated 12th August 2002, and filed on the 13th August 2002, shows that the Plaintiff’s claim against the 1st and 2nd Defendants is that the 1st Defendant exercised its statutory power of sale, sold to the suit property by way of private treaty land Reference No. 37/256/3, Nairobi and a Transfer in favour of the Plaintiff was registered on 26th June 2000.

32. The said Agreement contained the parties’ respective rights, duties and obligations but the 1st Defendant failed to discharge all its obligations and failed to grant the Plaintiff vacant possession of the subject property and account for rents collected during the time when the said possession had not been given to the Plaintiff, hence Prayers (a)-(d) of the Plaint seeking for specific performance of the terms of the agreement and a restraining order against the 2nd Defendant herein in prayer (e) of the Plaint.

33. That, in respect of HCCC No. 1506 of 2000, which has been consolidated with this suit, the 2nd Defendant challenges the exercise by the 1st Defendant of its statutory power of sale and the transfer of the same property, Land Reference No. 37/256/3, Nairobi to the Plaintiff, on the grounds that the 1st Defendant acted fraudulently and in breach of its duty of care and contractual obligations. That, 2nd Defendant further alleges that the sale was done in breach of a restrictive order existing in HCCC No. 1965 of 1991 between it, the 1st Defendant and a Third Party purchaser of another property. Hence the 2nd Defendant seeks for a declaratory order to nullify and/or cancel the sale of Land Reference No. 37/256/3, Nairobi, plus general and exemplary damages.

34. It was submitted that, the suit HCCC No. 1965 of 1991, was instituted by the 2nd Defendant herein and two (2) other persons vide a Plaint, dated 24th April 1991 against the 1st Defendant herein challenging the validity of Mortgage dated 8th December 1988 and Charge dated 23rd October 1989 and the notices for sale in respect of two properties, LR No. 209/4796/3 and LR No. 7583/1 both security facilities and financial accommodation advanced to the 2nd Defendant herein. The 2nd Defendant sought for, inter alia, a declaration nullifying the Mortgage and Charge, an order of injunction prohibiting the sale of the two properties, an order for taking accounts and for discharge of the securities and delivery of the title documents to it. Therefore, it is apparent that, the subject matter of the two suits are different in that whereas the consolidated suit herein is in respect of land reference No. 37/256/3, Nairobi, HCCC No. 1965 of 2001, relates to LR No. 209/4796/3 and LR No. 7583/1.

35. That, it is further apparent that in the suit herein, the parties are concerned with the sale and/or disposal of Land Reference No. 37/256/3, Nairobi while in HCCC No. 1965 of 2001, challenges the validity of the charge and mortgage instruments over LR. No. 209/4796/3 and LR. No. 7583/1. Thus, the Plaintiff herein, is not a party to HCCC No. 1965 of 1991 and has no interest in the contractual dispute between the Defendants herein over the security instruments in LR. No. 209/4796/3, and LR No. 7583/1 or the two properties. As such there is no common legal issue to be tried in respect of the two suits and these are two different transactions that bear different obligations and responsibilities as between the Defendants to which the Plaintiff is not privy. Moreover, there is no nexus between those instruments and the suit property therein, to the sale of LR. No. 37/256/3, Nairobi.

36. The Court's attention was drawn to the deposition at paragraphs 5,6 and 7 of the 1st Defendant's Replying Affidavit, and not controverted at all by the 2nd Defendant/Applicant that, the suit HCCC No. 1965 of 1991, was consolidated with HCCC No. 251 of 2008 and are presently at an advanced stage of hearing before Hon. Mr. Justice Fred Ochieng. That the Plaintiff herein is not a party to the consolidated suit ad has no interest therein.

37. The Plaintiff reiterated that the Application is an afterthought and a scheme to further delay the hearing and determination of this matter in breach of its right to access to justice decreed and protected under Article 48 of the Constitution. Reference was made to the case of; Law Society of Kenya –vs- The Centre for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 of 2013, where the Supreme Court of Kenya stated that:-

“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”.

38. It was submitted that the 2nd Defendant, out of mischief, has conflated the prayer for amendment to written statement of defence and counter claim together with the application for consolidation. That under Section 100 of the Civil Procedure Act, Cap 21 Laws of Kenya, the Honourable Court has power to allow amendment of pleadings and Order 8 Rule 3 of the Civil Procedure Rules, provides a broad criteria which should guide the Court in the exercise of discretion. However, the discretion must of must of necessity be exercised judicially.

39. Further that the principles to be considered on an application to amend pleadings were set out in the case of; Eastern Bakery vs Castelino (1958) EA 461 where Sir Kenneth O'Connor held that:-

“it will be sufficient.....to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.....the court will refuse to amend where the amendment will change the action into one of a substantial different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment.....the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

40. The same principles were elucidated by the Court of Appeal in the case of; Central Kenya Limited vs Trust Bank Limited (2000) EALR 365. That in the instant matter, the 2nd Defendant seeks to introduce a counterclaim in the suit herein purportedly to consolidate its claim in HCCC No. 1506 of 2000 and 1965 of 1991 and as has been clearly discussed above, the Plaintiff herein is not a party to HCCC No. 1965 of 1991 and not privy to the issues surrounding the security documents leading to the suit and has no interest in the suit properties therein. Therefore, a consolidation of the claims arising from HCCC No. 1965 of 1991 is grossly prejudicial to the Plaintiff.

41. It was submitted that the reliance on Order 11 of the Civil Procedure Rules that provides for pre-trial proceedings and directions to seek forgers herein has no basis in that, it is not denied that this matter is first part-heard before the Honourable Court. Therefore, Order 11 does not apply. Secondly, the provisions of Order 11 of the Civil Procedure Rules are inapplicable to cases pending before the Division, as it is the Practice Directions issued Pursuant to Order 11, of the Civil Procedure Rules, Rule 1 that is in fact in operation. In any case, the Applicant herein has not stated what changes that Order 11 of the Civil Procedure Rules has purportedly introduced which they have found difficult to comply with in the current status of the suit herein.

42. Moreover, the changes in the status and/or names of the parties herein do not in any way prejudice the 2nd Defendant, in that, on 25th March 2015, the Court ordered that the name of the 1st Defendant be amended to reflect its current name. This was duly done and the Application indeed reflects the correct name(s) and description of the 1st Defendant herein.

43. That even more interesting is the 2nd Defendant's allegation that due to the enactment of the Land Laws in 2012, it has new statutory rights and protections. That it is the most unscrupulous and dishonest ground brought by the 2nd Defendant herein as it is clear that the sale of LR No. 37/257/3, Nairobi to the Plaintiff herein, was done in the year 2000. The Land Act, 2012, and the Land Registration Act, 2012 were enacted more than 12 years, later after the impugned transaction. Therefore these statutes do not apply retrospectively. That Section 23(3)(b), (c) and (e) of the Interpretations and General Provisions Act, Cap 2, Laws of Kenya which prohibits retrospective application of statutes, provides that:

“(3)where a written law repeals in whole or in part another written law, the,, unless a contrary intention appears, the repeal shall not:-

(b) affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

(c) affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed; or

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made”

44. In particular, Section 106(2) of the Land Registration Act, 2012 is clear on this point and provides that:

“(2) Nothing in this Act shall affect the rights, liabilities and remedies of the parties under any mortgage, charge, memorandum of equitable mortgage, memorandum of charge by deposit of title or lease that, immediately before the registration under this Act of the land affected, was registered under any of the repealed Acts. (emphasis added).

45. Whereas the provision of Section 106(3) states that:

“(3) for the avoidance of doubt-

(a)any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of the land under this Act; (emphasis added).

46. Similarly, Section 162(1) of the Land Act, 2012 provides that:

“Unless the contrary is specifically provided in this Act, any right, interest, title, power or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.

47. It was thus submitted that the Land Act and Land Registration Act of 2012 are not applicable to these proceedings and cannot form the premise for the proposed amendments to the pleadings herein. Even assuming that the same were relevant to these proceedings; the 2nd Defendant ought to have moved the Court way back in 2012 when the enactments were made and when the name of the 1st Defendant changed.

48. The Plaintiff/Respondent submitted that the 2nd Defendant/Applicant filed the Plaintiff in HCCC No. 1506 in the year 2000, a period of 16 years and wondered why has it not taken steps to amend its pleadings since then and/or why it did not try to amend its Defence after the consolidation of the suits herein in 2007 or before the Plaintiff's witness had testified and why has it been sitting on its laurels until this time when the parties are to fix this matter for further hearing. That the 2nd Defendant/Applicant can only be described as indolent litigant. It is against judicial policy for this Honourable Court, to step in and assist an indolent party who has waited for 16 years, to belatedly seek to amend not only its pleadings but to introduce a new cause of action, through the Counterclaim herein.

49. That in the case of; Rubina Ahmed & 3 Others vs First National Finance Bank Limited (2012) eKLR, the court cited with approval the holding in Central Kenya case, (supra) and held the same view that:

“The proposed further amendments are now being sought fifteen years after the institution of the case. Surely, I must say, fifteen years goes beyond the phrase “mere delay”. The Plaintiffs herein have been in deep slumbers and this court cannot and shall not aid such indolence. I am inclined to agree with the Defendant's arguments that it will be prejudicial as the issues that are now sought to be added happened several years ago and the Defendant shall be hard pressed to trace some witnesses or even find vital evidence in respect thereof. I find that such prejudice cannot be compensated by way of costs. In the case at hand, not only the application is being brought after a long delay, but there is also the issue of the possible prejudice by the Defendant on the rights that have been ensured to it by virtue of the decision already made in its favour. Further, it was not disclosed in the Affidavits filed in support of the application when the particulars sought to be pleaded came to the knowledge of the Plaintiff. this Court cannot speculate on that. I am therefore of the view that the amendments sought are not made in good faith, and that if they are allowed they will be prejudicial to the Defendant which prejudice cannot be compensated by way of costs”.

50. Finally it was submitted that the 2nd Defendant's Application to amend the defence and counterclaim is contrary to the overriding objective of the Civil Procedure Act Section 1A which stipulates that:

“the overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

51. The 1st Defendant also filed its submissions and argued that the proposed consolidation of the two 2 suits herein, HCCC No. 993 of 2002 and HCCC No. 1506 of 2000 with HCCC No. 1965 of 1991, will seriously prejudice and embarrass the proceedings as it is clear from the annexures “JM2(a), (b) & (c) of its Replying Affidavit filed herein and that the other suit, HCCC No. 1965 of 1991 concerns sale of a property LR No. 209/4796/3 and LR No. 7583/1, which are different properties from the one involved in this suit, LR No. 37/256/3 Nairobi

West. That under Order 1 Rule 3 of the Civil Procedure Rules, it is anticipated that parties can be joined as Defendants in a suit in which a matter arises from the same act or transaction. In fact, the Court is required under Order 1 Rule thereof to order separate trials if it realizes that there is a misjoinder.

52. It was further submitted that the sale of the other 2 properties LR No. 209/4796/3 and LR No. 7583/1, arose in another transaction totally unrelated to the sale of LR No. 37/256/3 Nairobi West, by the 1st Defendant to the Plaintiff that arose under the Agreement for sale dated 24th March 2002 by private treaty. In addition, the sale of LR No. 209/4796/3 and LR No. 7583/1, was undertaken by public auction in favour of Redmars Holdings Limited, as can be seen from the ruling by Lady Justice Khaminwa dated 13th November 2008. Further, there is even an order of injunction in favour of the Plaintiff in that suit from eviction by Redmars Holdings Limited and in the suit herein, no such orders exist, instead the Plaintiff's and 2nd Defendant's Advocates are receiving rent in a joint account. Therefore there will be issues of the regularity of sale by public auction in HCCC No. 1965 of 1991 while in the suits consolidated herein; there are issues of regularity of sale by private treaty to the Plaintiff and so it is not convenient, practical or tenable to consolidate the suits; even then, HCCC No. 1965 of 1991 is already consolidated with HCCC No. 251 of 2008, with HCCC No. 993 of 2002 and HCCC No. 1506 of 2000 and as stated herein some of the suits are part heards and in different Court.

53. It was submitted that the proposed amended suit will be a fresh suit altogether, in that, in the Plaintiff filed herein in HCCC No. 1506 of 2000 by the 2nd defendant herein, seeks to nullify the sale undertaken in favour of the Plaintiff and damages. But in the proposed amended defence and Counterclaim, there are all sorts of claims including; nullification of the mortgages, declarations, discharge or mortgages and delivery of title and illegality. That such new amendment after the period of limitation lapsed; between 24th March 2002, when the property was sold and 25th March 2008, forms new claims which are completely time barred. There would be no basis in re-introducing them all over again.

54. I have at the conclusion of the arguments by the respective parties alongside the submissions advanced. I must thank the parties for the detailed submissions supported by elaborate research on the legal principles applicable herein. I beg for leave to associate myself with the same and need not repeat them herein. Hence, the simple task of evaluating the facts herein and the legal issues raised.

55. The first issue raised relates to the Affidavit sworn by the Advocate representing the Applicant. On that issue, I entirely agree with the submissions by the Plaintiff/Respondent that the Advocate should not have deposed to factual matters in contention. It is a long-established rule that a [lawyer](#) should not be both counsel and a witness in a case. In the case of; *Bank of British North America v. McElroy Bank of British North America v. McElroy*, 15 N.B.R. 462 at 463 Justice Ritchie of New Brunswick described the practice of putting one's [lawyer](#) up as a [witness](#) as "indecent" and stated that it "should be discouraged". I therefore find that the explanation by the Applicant that, the Affidavit in support of the Application herein was drawn with full authority of the Applicant, does not hold water as it should not have been deposed by the Advocate. On that ground alone, the same should be struck out. However in the interest of substantive justice under Article 159 of the Constitution and based on the supplementary affidavit, I shall not strike it out.

56. I shall now consider the prayers sought for herein, being the Applicant be granted leave to amend its statement of Defence and consolidate its claim, in the matters of; HCCC No. 1965 of 1991 and HCCC No. 1506 of 2000, by way of counterclaim as per the draft annexed amended Defence.

57. I find that from all the submissions respectively, it has come out clearly as follows:-

- a) *the main purpose of amending pleadings is to give the Court an opportunity to adequately consider all the issues in dispute; and*
- b) *for suits to be consolidated, they should have common questions of law or fact and the rights or relief claimed in them should be in respect of, or arise out of the same transactions. The suits may also be consolidated for some other reason and or if the Court finds desirable to make an order for consolidating them.*
- c) *It is clear as analysed herein that the subject matter of the two suits sought to be for consolidated are different, in that the consolidated suits this suit and HCCC No. 1506 of 2000, are in respect of land reference No. 37/256/3, Nairobi, whereas HCCC No. 1965 of 1991, relates to LR No. 209/4796/3 and LR No. 7583/1;*
- d) *Similarly, the Plaintiff in the consolidated suit seeks for an order for specific performance of the terms of the agreement and a restraining order against the 2nd Defendant herein, whereas in HCCC No. 1965 of 1991, seeks for, inter alia, a declaration nullifying the Mortgage and Charge, an order of injunction prohibiting the sale of the two properties, an order for taking accounts and for discharge of the securities and delivery of the title documents to it; therefore the reliefs sought are different;*
- e) *In the same vein, the Plaintiff herein, is not a party to HCCC No. 1965 of 1991 and has no interest in the subject matter being, the security instruments in LR. No. 209/4796/3, and LR No. 7583/1;*
- f) *Further the suit HCCC No. 1965 of 1991, consolidated with HCCC No. 251 of 2008, are at an advanced stage of hearing and the consolidation will cause delay,*
- g) *Equally, the cases have been in court for too long a time as evidenced by the respective case numbers being; HCCC No. 1965 of 1991, HCCC No. 1506 of 2000 and, HCCC No. 993 of 2002 and may obviously raise the issue of limitation of action may arises; and*
- h) *Finally I find no merit in the reasons advanced for prayers sought. As correctly stated by the Respondents the issues of change in the law and the requirements of Order 11 of the Civil Procedure Rules are matters of evidence and procedure for compliance. That is matter which the Court will take judicial notice.*

58. As a result of the aforesaid, I find no merit in this Application and I dismiss it with costs to the Respondents. As a matter of fact the Applicant will not suffer any prejudice as it will still prosecute its claims in the respective suits.

59. Those then are the orders of the Court.

Dated delivered and signed in an open Court on this 9th day of October 2018

GRACE L. NZIOKA

JUDGE

In the presence of:

Mr. Mwangi for the 1st Defendant/Respondent

Ms Okoth for Mr. King'ara for the 2nd Defendant/Respondent

No appearance for the Plaintiff/3rd party