**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC. NO. 74 OF 2019**

**ONESMUS NGIGE MUNYAMBU.....1ST APPLICANT**

**ROSE ACHIENO OBIRIKA.....2ND APPLICANT**

**VERSUS**

**KENWOOD PROPERTY DEVELOPERS.....1ST RESPONDENT**

**FAMILY BANK LIMITED.....2ND RESPONDENT**

**RULING**

By an Originating Summons dated **24th April 2019,** the Applicants herein sought for the following Orders against the Respondents :-

***1) That the Court be pleased to consolidate the instant suit with ELC No. 15 of 2017, which relates to the same subject matter for final determination of all issues relating to the suit land.***

***2) That in the alternative to 1 above, this Honourable court be pleased to urgently issue a hearing date for this suit.***

***3) That this Honourable Court be pleased to adopt the Replying Affidavit filed on 2nd October 2018 by the 2nd Respondent as the formal Reply to the Applicants instant suit as the two applications are similar save for the orders on consolidation.***

***4) That the Honourable Court be pleased to declare that the Respondents ought to partially discharge all that parcel of land contained in Villa No. 1 and Villa No. 6 of Kenwood Villas, developed on parcel of land known as LR NO. 8361/3 and 8361/4 (Grant Number 81149 and 81150).***

***5) That the Honourable court be pleased to direct the Respondents to discharge all that parcel of land contained in Villa No. 1 and Villa No. 6 of Kenwood Villas, developed on parcel of land known as LR NO. 8361/3 and 8361/4 (Grant Number 81149 and 81150).***

***6) That upon discharge all that parcel of land contained in Villa No. 1 and Villa No. 7 of Kenwood Villas be considered free of any encumbrances.***

***7) That Onsemus Ngige Munyambu and Rose Prieto Obirika the Applicants herein be declared the legal owners of Villa No. 1 and Villa No. 6 respectively of Kenwood Villas developed on parcel of known as LR NO. 8361/3 and 8361/4 (Grant Number 81149 and 81150).***

***8) That an Injunction do issue restraining the Respondents, their employees, and or agents from selling and/or transferring in any way interfering with the Applicants exclusive enjoyment and use of all that parcel of land contained in Villa No. 1 and Villa No. 6 of Kenwood Villas.***

***9) That the court do direct the Respondents to complete the construction of the Villas as per agreements signed between the Applicants and the 1st Respondent.***

***10) That costs of this application be provided for.***

***11) Any other order that this Honourable Court may deem fit to grant.***

The 1st Applicant in his Supporting Affidavit dated **24th April 2019,** averred that together with his wife, they accepted an offer to purchase one of the properties to be developed by the 1st Respondent known as Villa Number 1 for **Kshs. 27,000,000/=,** on parcel of land known as **LR No. 8361** and **8361/4.** That they then signed the letter and the sale agreement and began the periodical payment of the purchase price.

That in the year **2017**, the 1st Respondent's representatives informed them that they had taken out a loan facility with the 2nd Respondent for the construction of the villas and the same had been secured by the subject parent title on which the villas had been developed on. Further that the 1st Respondent had allegedly defaulted on repayments terms and the 2nd Respondent was intent on exercising its statutory right of sale. He averred that the time the dispute arose between the Respondents, he had already paid **Kshs. 26,300,000/=** and was in the process of finalizing the acquisition of the villa. He further averred that he has however been unable to make any further payments as the question of entitlement is still unanswered. That he has been prejudiced by the halting of the project as he is unable to use the villa.

It was his contention that the amounts he paid for the Villa was capable of partially discharging the portion of land from the entire charged parcel of land and freeing his Villa from any encumbrance. Further that there is an ongoing suit between the 1st Respondent and the 2nd Respondent being **ELC NO. 15 OF 2017,** before this Court where he was an Interested Party but his Application was denied as the court directed that the same can only exist as an independent suit. He contended that by filing this instant suit, he has regularized his pleadings. He further averred that the Respondents had already responded to the issues herein and it is only just and expedient that their responses be adopted within this suit. He therefore urged the Court to consolidate the instant **Originating Summons** with **ELC NO. 15 OF 2017** as the same relate to the same subject matter.

He further averred that if the court finds in favour of the Respondents, he was ready and willing to deposit the balance of **Kshs.700,000/=** to the Defendant Bank subject to the court ordering completion of the Villa and accordingly grant him possession and all necessary completion documents including the title to Villa No. 1.

The suit is contested and through its Director **Caroline Muchendu**, the 1st Respondent filed their Replying Affidavit on **17th June 2019** and averred that the 1st Respondent is the registered proprietor of the suit property. It was her contention that they informed the Applicants that the 1st Respondent would take a loan facility with the 2nd Respondent for purposes of construction and that monies paid by the Applicants towards acquisition of the units would also be channeled for construction. She further averred that the 1st Respondent obtained from the 2nd Respondent a loan facility in the sum of **Kshs. 93,400,000/=** which loan facility though approved in **2011** was only disbursed in trenches in the year **2013.**

She further contended that the 2nd Respondent had given a moratorium period that was extended on 3 occasions the effect of which was that the repayment of the principal amount was to begin as from **October 2016**. However, the 2nd Respondent breached the same and began deducting loan repayments from the disbursed monies as early as 30 days after the disbursement of the monies which were to be utilized in the construction of the apartments.

That the moratorium ended in **October 2016** and in **November 2016,** the 2nd Respondent served the 1st Respondent with a Redemption Notice upon but an advertisement was placed in the newspaper of **11th January 2017,** indicating a different auction date from the one cited in the Redemption notice. She further averred that 1st Respondent was never served with the statutory demand notice as required by law and that led it to filing of **Thika ELC Case No. 15 of 2017**.

She alleged that the Applicants are yet to pay the full purchase price and therefore no prejudice is occasioned to them and should the Applicants settle the balance of the purchase price, then there would be no objection to a discharge made in favour of the Applicants. She stated that the construction of the **13** units is almost complete with the project being at **75%** completion and the irregular deduction of monies for construction have led to the dispute with 2nd Respondent and the project stalling. She further averred that the Applicants are already enjoined in **ELC Case No. 15 of 2017** and their filing of the present Originating Summons is a way to vex the 1st Respondent.

It was her contention that consolidation of this suit is untenable because the issues for determination in the two suits are totally different and the proposed action may lead to delay in the conclusion of **ELC Case No. 15 of 2017**. She further averred that the subsistence of the two suits offends mandatory statutory requirements that forbids the filing of a multiplicity of suits. She also averred that **ELC Number 15 of 2017** has progressed so far and the Plaintiff has already closed its case and the application for consolidation is brought late in the day and it will only serve to delay the conclusion of the suit **ELC Number 15 of 2017**.

On **29th May 2019** the 2nd Respondent, through its Senior Legal Officer **Lawrence Anthony Ouma**, swore a Replying. He averred that the 2nd Respondent offered to the 1st Respondent a financial facility for the sum of **Kshs.93, 400,000/=** for construction of 13 residential units on **L.R No. 8361/3 and 8361/4 (Thika**). The facility was to be repaid in full within 24 months from the date of the first draw down i.e. after a moratorium of 12 months and thereafter to be repaid in full within the remaining 12 months.

That the 1st Respondent accepted the offer and a legal charge was registered against the suit property on **8th February 2013**. He further averred that on **31st July 2014,** upon the 1st Respondent's request, the 2nd Respondent extended the grace period for the repayment of the loan by 6 months after which the 1st Respondent was to resume the normal repayment of the loan as per the existing arrangement until maturity on the **7th March 2015**.He contended that the grace period was further extended subject to the terms as laid out in paragraph 11 of the 2nd Respondent's Replying Affidavit.

He averred that when the 1st Respondent defaulted in repaying the facility, the 2nd Respondent proceeded to exercise its statutory power of sale and complied with all procedures. He further contended that as a result of the 1st Respondent failing to fulfill its obligations under the

legal charge, the 2nd Respondent acquired a valid legal interest over the subject properties which interest can only be extinguished upon the 1st Respondent fulfilling its obligations under the agreement.

He also stated that the alleged part payments by the Applicants with respect to Villa No. 1 and Villa No. 6 were made directly to the 1st Respondent contrary to the conditions in the letter of offer and that the 2nd Respondent was not privy to their agreement. It was his contention that the prayer of discharge is misconceived and that any claim by the Applicants can only lie against the 1st Respondent and not the 2nd Respondent.

He averred that the Applicants had sought to be enjoined in **ELC Case No. 15 of 2017,** and they were allowed. Further that when the Applicants filed an Originating Summons the court directed that the issues raised therein be addressed in the main hearing of **ELC No. 15 of 2017** (Thika). It was therefore his contention that the instant Originating Summons is r*es judicata* in view of the fact that another O.S seeking similar orders has been determined by this court. He further contended that by the virtue that the Applicants have been enjoined in **ELC 15 OF 2017,** and the orders issued in respect to the Originating Summons filed on **31st June 2018,** the Applicants have been granted an opportunity to fully ventilate their claims and their Advocate has had the opportunity to exhaustively participate in the proceedings and cross-examine the witnesses.

He further contended that the agreements for lease executed between the Applicants and the 1st Respondent, states that any dispute between them is subject to arbitration and must be resolved as such and that the 2nd Respondent cannot be a party to such arbitral proceedings. He further stated that the Application is incompetent, frivolous, incurably defective and an abuse of the court process.

The Originating Summons was canvassed by way of written submissions.

The Applicants through the Law Firm of **R. W Mbanya & Company Advocates** filed their submissions on **10th July 2019,** and submitted that as Interested Parties in **ELC 15 OF 2017,** they did not have any reprieve to stop their houses from being sold and filing this instant application would save this Honourable Court precious judicial time as the subject properties, facts, evidence and most importantly the parties are similar in nature.

It was further submitted that Section 3A of the Civil Procedure Act gives the court powers to issue any orders that meets the end of justice. They relied on **Order 37 Rule 4 of the Civil Procedure Rules, 2010** which provides;

> ***"any mortgagee of mortgagor whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge or any person entitled to or foreclosure or redeem any mortgage whether legal or equitable may take out as of course an origination summons returnable before the judge in chambers for such relief of the nature or kind following as may be by summons specified and the circumstances of the case may require that is to say sale, foreclosure delivery of possession by the mortgage, redemption conveyance delivery of possession by the mortgagee."***

It was further submitted that the issue raised by the Applicants in this suit have not been raised before any other court. that even though they are interested parties in **ELC No. 15 of 2017, (Thika**), the same does not make the instant suit *Res Judicata* as the initial and irregular Originating Summons filed under **ELC 15 of 2017,** was never heard to its final determination. The Court was therefore urged to grant the prayers sought in the Origination Summons .

The 1st Respondent filed its written submissions on **27th September 2019** through **Messrs. Hiram Christopher Advocates**. It submitted that the Origination Summons offends mandatory provisions of **Section 6 of the Civil Procedure Act** which prohibits the continuance of prosecution of numerous suits touching on the same subject matter. It was its submission that the inclusion of the Applicants as interested parties in **ELC NO. 15 OF 2017,** afforded them an opportunity to participate and ventilate their grievances at trial.

It was further submitted that the Applicants herein have failed to meet the threshold for consolidation of suits as the questions of law or facts in both cases are dissimilar. Further that the rights claimed in the two cases arise out of several successive transactions and the reliefs sought by the respective parties in the two suits are substantially different. They relied on the case of ***Law Society Of Kenya …Vs… The Centre For Human Rights & Democracy, Supreme Court of Kenya, Petition No. 14 of 2013*** where the Supreme Court had this to say about consolidation of suits:-

> ***"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."***

It was further submitted that this Honourable court cannot rewrite the agreement between the parties as it has been invited in the Originating Summons.

It was their submission that the Application for consolidation has been brought by the Applicants after the Plaintiff and the Defendant in **ELC 15 OF 2017,** have closed their cases. It was submitted that under the Civil Procedure Rules 2010 any application for consolidation of suits should be taken at the pre-trial conference of both suits and prior to hearing to avoid multiplicity and achieve the overriding objective of the Civil Procedure Act, that is to save costs, time and effort by making the conduct of several actions into one action. They relied on the case of **Machakos ELC No. 268 of 2011 Dater Enterprises Co. Ltd –vs- Agnes Mumbanu Kinato [2019] eKLR** where the Court declined an application for consolidation where one of the cases had progressed substantially and the application for consolidation was brought after the case was pending defence hearing.

The 1st Respondent urged the court to resist the Applicants invitation to rewrite the contract and dismiss the plea for partial discharge.

The 1st Respondent also submitted that the Applicants have failed to establish the ingredients necessary for grant of the mandatory injunctive/compelling orders. It was submitted that it was necessary for the Applicants to show that the 1st Respondent had breached their right and that despite issuance of a notice to remedy the breach to the 1st Respondent, it has persisted in the breach that cannot be remedied by damages. They relied on the case of **Robai Kadili Agufa & Another –vs- Kenya Power & Lighting Co Ltd [2015] eKLR** where the court made reference to the case of ***Kenya Breweries Ltd & Another –vs- Washington O. Okey [2002] eKLR***.

The 1St Respondent submitted that the Applicants seek to circumvent their obligations set out in the agreement of lease and that no prejudice will be suffered by the Applicants if the suit is dismissed as the Applicants still have unexplored remedied under the agreement to lease against the 1st Respondent.

The 2nd Respondent filed its written submissions on **30th September 2019** through **Messrs. Mukele Moni & Company Advocates**. It was their submission that the instant application offends the provisions of **Sections 6 and 7** of the Civil Procedure Act.

It relied on the case of ***Republic –vs- Registrar of Societies – Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR*** where the court held that;

> ***"…therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed…"***

It was its submissions that the Applicants claim and that in **ELC NO. 15 OF 2017 (Thika)** are separate and distinct and therefore do not comprise of the same or similar questions of law or fact and the consolidation of the suits will not assist in the expeditious disposal or just determination of the two matters but will create an unnecessary burden and hardship upon the 2nd Respondent who has no interest in the dispute between the Applicants and the 1st Respondent.

It was therefore its submission that the Applicants have failed to meet the threshold for their prayer for partial discharge which is in effect a prayer for specific performance as the claim for specific performance cannot issue since it has been caught up by the doctrine of limitation of actions. The Court was therefore urged to dismiss the Originating summons with costs

The court has now carefully considered the pleadings on record and the written submissions. The court too has considered the relevant provisions of the law and makes the following findings. The issue for determination is ***whether the Applicants are entitled to the orders sought.***

It is the Respondents submission that the Applicants instant suit is barred by **section 7 of the Civil Procedure Act** as it is *Res judicata*. However the Applicants have submitted that the Originating Summons they filed was dismissed by Court and that the issues they had raised were never heard and determined. **Section 7 of the Civil Procedure Act** provides that;

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court***."

Therefore, the former suit ought to have been heard and decided in its finality. In this instant the Originating Summons that was filed by the Applicants in **ELC 15 of 2017** was never heard and determined to its finality and the instant Originating Summons cannot be Res judicata as there is no evidence that there is a suit that is substantially the same as the instant suit that was heard and determined. The Court holds and finds that the instant Originating Summons is not res judicata. See the case of ***Mwk …Vs… Amw [2016] eKLR*** where the Court held that;

> ***"Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter of because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata."***

Further in the case of **Nguruman Limited …Vs… Jan Bonde Nielsen & another [2017] eKLR** the Court held that;

> ***"Applying the above principles to the suit herein, even without getting into the question of whether the subject matter is the same; or that the parties are the same; or whether there is concurrence of jurisdiction I find that there is no evidence of any determination, let alone a final determination of a former decision in a case similar to this case. There can be no plea of resjudicata where there is no previous or former suit where a final determination has been made.***

Further the Respondents have also contended that the suit offends **Section 6 of the Civil Procedure Act** which provides that;

> ***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed***.

Though the Respondents have submitted that the facts in the instant Originating Summons and those in **ELC 15 of 2017,** are dissimilar and that the issues are totally different, the 1st Respondent has also submitted that the subsistence of the two suits offends the provision of the statutory requirements as set out in **Section 6** and the 2nd Respondent has also submitted that the matter is *Res judicata* and that it offends **Section 6 of the Civil Procedure Act**.

It is important to note the requirements as set out in **Section 6 and 7 of the Civil Procedure Act**. That a matter only becomes res judicata if the issues in the two suits are substantially the same and further that a matter offends **section 6** if the issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties. It would therefore seem that the Respondents have acknowledged that the issues and facts in this instant suit are substantially the same as those in **ELC 15 of 2017**. The principles for consolidation of suits are set out in the case of **Nyati Security Guards & Services Ltd …Vs Municipal Council of Mombasa (2000) eKLR** where the court held as follows:

> ***"The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where:***
>
> ***a) Some common question of law or fact arises in both or all of them;***
>
> ***b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;***
>
> ***c) For some other reason, it is desirable to make an order for consolidating them;***

From the available evidence, it is the Court's considered view that the parties in tis instant suit are the same as those in **ELC 15 of 2017,** further that the suit property involved is also the same and therefore some common questions of law and facts arise. It is also the Court's view that it is desirable to make an order for consolidating the suit as all the parties are claiming interest over the same suit property and the question that the Court would then be answering is with regards to entitlement of the suit properties.

It would be impossible for Court to grant the orders sought in this instant suit with regards to discharge of the properties without first determining who is entitled to the suit property. Therefore the Court finds that the prayers sought are intertwined as the 2nd Respondents claims to have crystalize its statutory power of sale and therefore holds legal interest over the suit property. It is this Court's Considered view that the two matter being substantially the same ought to be consolidated. Further as alleged by the Respondents, this matter offends section 6 of the Civil Procedure Act and the footnote requires that the matter is either stayed until the other one is heard and determined but in practice the two are normally consolidated in order to save the Court's time. See the case of **Nguruman Limited …Vs… Jan Bonde Nielsen & another [2017] eKLR** where the Court held that

> ***"40. Where the test of res subjudice is established or met, the explanatory notes to the Section 6 of the Civil Procedure Act stipulates that the latter suit would be stayed until the earlier suit is heard or determined.***
>
> ***41. In practice, the two similar suits could be consolidated for hearing and determination."***

It is further not in doubt that **Thika ELC No. 15 of 2017,** has greatly progressed with evidence of witnesses being taken. It is therefore proper that in order to avoid a repeat of the same issues and delay of the matter further, that the Court adopts the responses by the Respondents as formal replies to the instant suit.

Having Consolidated the two suits, the Court finds and holds that the prayer sought by the Applicants on whether the Court ought to declare them legal owners , discharge their Villas and further grant a permanent injunction can only be determined at the main trial and therefore are not merited at this stage.

Having carefully considered the facts of this case, the affidavits filed by all parties, the rival submissions herein and the relevant provisions of law, and authorities cited, this Court finds that the instant suit being substantially the same as **ELC No. 15 OF 2017 (Thika),** ought to be consolidated and the Respondents responses be adopted as their formal replies. As to the issues on whether or not the properties ought to be discharged and a permanent injunction granted, the same would only be canvassed with and determined at the main trial after calling of evidence.

The Upshot of the foregoing is that the **Originating Summons** dated **24th April 2019,** is found partially merited and is allowed in terms of prayers **No. 1 and 3 only** with costs being in the cause.

It is so ordered.

**Dated, signed** and **Delivered** at **Thika** this **14th** day of **May 2020**

**L. GACHERU**

**JUDGE**

**Court Assistant.....**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of;**

**M/s. R. W. Mbanya Advocates for the 1st and 2nd Applicants**

**M/s Hiram Gachugi Advocates for the 1st Respondent**

**No appearance for the 2nd Respondent**

**L. GACHERU**

**JUDGE**