



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 411 OF 2016

THOMAS SCHIERING.....PLAINTIFF

VERSUS

NEREAH MICHEAL SAID.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 26th February, 2019 by the Plaintiff/Applicant seeking consolidation of this suit with Mombasa ELC No 442 of 2017, Thomas Schiering –versus- Nereah Micheal Said & 2 Others. The application is based on the following grounds:-

- (a) That similar questions of law and fact are involved in the instant suit and in ELC No 442 of 2017 quoted above.
- (b) That consolidation of the above-noted suits is necessary to avoid duplication of proceedings and multiplicity of suits by two different judges of the same court.
- (c) That consolidation of the suits will save court's time and ensure the efficacious disposal of the matters herein in one go.
- (d) That it would therefore be just, convenient and expedient for all parties involved if the above-noted suits were consolidated and heard as one.
- (e) That the orders herein will not prejudice any of the parties herein.

2. The application is supported by the affidavit of Thomas Schiering, the applicant sworn on 26th February, 2019 in which he deposes that the questions of fact and law in the two matters are similar and therefore the view that the two matters ought to be heard together since they arise out of the same relationship between the applicant and the respondent herein who is the 1st defendant in ELC No. 442 of 2017. A copy of the plaint in ELC No 442 of 2017 has been annexed. It is further deposed that the properties in issue in the two matters, KWALE/GALU KINONDO/2458, KWALE/GALU KINONDO/2459 and KWALE/GALU KINONDO/2460 were subdivided from KWALE/GALU KINONDO/755.

3. In opposing the application the defendant filed grounds of objections on the following grounds:-

1. That the application is incompetent, bad in law and fundamentally defective, and an abuse of the court process and should be dismissed for reasons:

- (a) That the applicant has improperly invoked the jurisdiction of the Honourable Court.
- (b) That the application has been filed about (sic) contradict provisions of the Civil Procedure Act.
- (c) That the application is made in bad faith to distract court from ordering the hearing of the matter.
- (d) That inherent jurisdiction of court is inapplicable in the circumstances of this case as invoked by the Applicant.

2. That the Honourable Court is under duty pursuant to the subjudice rule to stay ELC No. 442 of 2017 even *suo moto* in light of admissions of the applicant in the instant application to wit that:-

(a) The instance (sic) case was filed in 2016 and ELC No. 442 of 2017 was filed later;

(b) The two cases raise similar issues in his estimation and likely to result in the same outcome.

3. That the application in the instance (sic) case is for dismissal in light of the fact that the ELC 442 of 2017 is pending ruling before the Honourable Court on application for stay pending appeal.

4. That reliefs sought in the impugned application are untenable, mischievous, contra-statute together with relevant subsidiary laws and ought to be dismissed with costs.

4. Ms. Mukoya, learned counsel for the applicant submitted inter alia that under Order 11 rule 3(1) (h) of the Civil Procedure Rules, the court can order consolidation of suits. That consolidation should be allowed since both matters are similar and in order to save on the court's time and resources.

5. Mr Abidha, learned counsel for the respondent submitted that the signature in the application and the plaint are different and that the provisions cited are irrelevant. He pointed out that there is a ruling pending in ELC No. 442 of 2017 for stay since it was filed after this case. The respondent's counsel submitted that where a party files parallel cases, the subsequent case should be struck out. He relied on the case of **Bakari Mfaume Bakari –versus- Joseph Kariuki Kibara (2018) eKLR** and argued that ELC No. 442 of 2017 should either be stayed or be struck out. He urged the court to dismiss the application.

6. I have considered the application together with the pleadings and the rival submissions. The only issue to determine is whether or not this suit should be consolidated with ELC No. 442 of 2017.

7. In Mombasa ELC No. 442 of 2017, the plaintiff is Thomas Schiering who is also the plaintiff in this case while the 1st defendant therein, Nereah Micheal Said, is the 1st defendant herein. Gerhard Heinduk, Wolfgang Georg Johann Elgatuer and Kenya Power & Lighting Company Limited who are the 2nd, 3rd and 4th defendants in ELC No. 442 of 2017 are not parties in this case. In that case the plaintiff is seeking a mandatory order directing the 4th defendant to restore and/or reconnect electricity supply in the plaintiff's residence on KWALE/GALU KINONDO/2458 and KWALE/GALU KINONDO/2459; a permanent injunction restraining the 1st, 2nd and 3rd defendants from disposing, selling, leasing and/or otherwise dealing with plot No. KWALE/GALU KINONDO/2460 as well as an order directing the Land Registrar Kwale to delete the entries entitling the 2nd and 3rd defendants to the property known as Plot No. KWALE/GALU KINONDO/2460.

8. In this case the plaintiffs who is also the plaintiff in Mombasa ELC No. 442 of 2017 is seeking orders of a permanent injunction restraining the defendant (who is the 1st defendant in ELC No. 442 of 2017) from subdividing, selling, disposing, transferring, constructing, evicting, threatening and/or interfering in any manner with plot No. KWALE/KINONDO/2458 KWALE/KINONDO/2459; a declaration that the interest of the defendant in the said properties has been extinguished and an order directing the Land Registrar Kwale to cancel all entries on the Green card(s) and/or register of the said properties indicating the defendant as the registered owner and in its place replace and/or register the plaintiff as the owner thereof. The applicant avers that two plots, KWALE/GALU KINONDO/2458 and KWALE/GALU KINONDO/2459 and KWALE KINONDO/2460 were subdivided from KWALE/GALU KINONDO/755. The respondent has not filed any affidavit to rebut the applicant's averment.

9. From the pleadings in Mombasa ELC No 422 of 2017 and this case, the following issues are not in doubt:-

(a) Both suits involve Plot Nos. KWALE/GALU KINONDO/2458, 2459 and 2460.

(b) The parties in both cases are the same except that there are other defendants in Mombasa ELC No. 422 of 2017.

(c) Both cases have not been heard.

10. Essentially therefore, the bottom line is that the subject matters in this case and that in Mombasa ELC No. 422 of 2017 are the same. The parties are also the same save that there are other defendants in Mombasa ELC No. 422 of 2017 who are not parties in this case.

11. The principles of consolidation of suits were re-stated in **Stumberg and Another –versus- Potgeiter 91970) E.A 323** 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.”

12. One of the issues that a trial court considers during the pre-trial directions and conferences under Order 11 rule 3 (1) (h) of the Civil Procedure Rules is the consolidation of suits in appropriate cases. This is with a view to furthering the expeditious disposal of the cases and to ensure proper case management.

13. In the case of Law Society of Kenya –versus- The Centre for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 of 2013, the Supreme Court of Kenya 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 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.”

14. The issue here is whether this suit is amenable to consolidation with Mombasa ELC No. 422 of 2017. The Civil Procedure Rules mandate courts to consider consolidation of suits and in so doing, to be guided by the following:-

(a) Do the same questions of law or fact arise in both cases?

(b) Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?

(c) Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?

15. Considering all the above, it is my view that this is a proper case for consolidation. Ultimately the main issue will be over ownership of plot Nos. KWALE/GALU KINONDO/2458, 2459 and 2460 and it will not be an efficient of available judicial and administrative resources for one court to determine that issue differently in this case and another court to determine it differently in the other case. I am not in agreement with Mr Abidha's submission that the remedy lies in striking out or staying the other case.

16. In the result, I find that the Notice of Motion dated is merited and the same is allowed in the following terms:-

(a) This case and Mombasa ELC Case No. 422 of 2017 are hereby ordered consolidated for purposes of being heard and determined together and the hearing shall be on the basis of the pleadings already filed in the two suits subject to any subsequent amendments.

(b) This file shall be the lead file for purposes of filing any further pleadings and recording of proceedings.

(c) Costs shall be in the cause.

(d) Orders accordingly.

DATED, SIGNED and DELIVERED at Mombasa this 7th day of July, 2020.

C.K. YANO

JUDGE

In the presence

Yumna Hassan Court Assistant