REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELC NO. 120 OF 2010

NGURUMAN LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

JAN BONDE NIELSON.....DEFENDANT/APPLICANT

RULING

1. On **6th February, 2014** the defendant, **Jan Bonde Nielson** moved this Court by way of Notice of Motion dated **5th February, 2014**. The said application was filed under Certificate of Urgency under **Section 1A, 1B, 6** of the Civil Procedure Act, **Order 8 Rule 3, Order 11 Rule 3 (1) (h) and Order 51 Rule 1** of the Civil Procedure Rules. By this application the applicant seeks the following two prayers:

a) … (spent)

b) The defendant's defence be amended as per the draft amended Defence and Counterclaim;

c) That thereafter this suit be consolidated with High Court Civil Suit No. HCC No. 103 of 2009 Nguruman Limited vs Ol Donyo Laro Estate Limited so that both suits may be heard and determined together.

d) That Costs of this application be provided for.

2. The application is supported by the grounds on the face of it and the affidavits of **James Gitau Singh** sworn on **5th February, 2014**. The deponent is an advocate of the High Court of Kenya having conduct of **HCC 103 of 2009**, **Nguruman Limited VS Ol Donyo Laro Estate Limited** on behalf of the Defendant. He is also an assisting counsel to **Mr. George Oraro** in the present suit. He deposed that the Plaintiff filed HCC No. 103 of 2009, Nguruman Limited vs Ol Donyo Laro Estate Limited in which they sought inter alia, mesne profits, general damages and permanent injunction restraining the defendant from entering **L.R. Narok/Nguruman/Kamorara/1**; That save for an application seeking to separate the defendant's counterclaim from the main suit, the plaintiff has not made any efforts to prosecute Nakuru HCC 103 of 2009. That on **18th May, 2010** the plaintiff filed the present suit **(HCC 120 of 2010 Nguruman Limited Vs Jan Bonde Nielson)** seeking mesne profits, general damages, aggravated damages and mandatory injunction against the defendant to vacate Narok/Nguruman/Kamorara/1; and permanent injunction to restrain the defendant from entering Narok/Nguruman/Kamorara/1; That the defendant on the same day filed **HCC No. 332 of 2010 Jan Bonde Nielson vs Herman Philipus Steyn, Hedda Steyn** and **Nguruman Limited** claiming inter alia that there existed a partnership between the Plaintiff and Herman Philips Steyn on a 50/50 basis and an injunction to restrain the 1st and 2nd

defendants from interfering with the plaintiff's participation and management of operations of any of the partnership assets including Nguruman Limited; That in the course of preparing for trial in the present suit, it was counsel's view that the Defence ought to be amended and also include a counter claim; That the purpose of the amendment is to allow the matter be litigated on merit.

3. Further, the pleadings and proposed witness statements in both HCC 103 OF 2009 and HCC No.120 of 2010 be consolidated and heard together; That the causes of action involve the same subject matter, similar questions of law and fact and similar witnesses. Moreover the lead counsels in both matters are the same and therefore consolidation will be in the interest of the parties, save time, legal costs and lead to a speedy disposal of both cases; That the plaintiff will not suffer any prejudice that cannot be compensated by costs in the event of amendment of the Defence and subsequent consolidation.

4. The plaintiff filed a replying affidavit sworn by **Moses Loontasati Ololowuaya** on **14th February, 2014**. Mr. Ololowuaya is a director and chairman of the Plaintiff company. He avers that the application for amendment having been brought three years after the filing of the statement of Defence and two weeks before hearing of the case is a deliberate effort to further delay this matter.

5. Mr. Ololowuaya further deposed that the amendment sought is a device to abuse the process of the court as the proposed counterclaim is not a dispute relating to either Environment and or the use and occupation of, and or title to land in respect of which this court has jurisdiction to adjudicate. Further the amendments replicates the facts, claims, cause of action and reliefs sought in HCCC No. 332 of 2010 against the same parties who are now proposed to be joined in this suit; That through an application filed by the defendant in HCCC No. 332 of 2010, **Odunga J**. declined to grant some of the prayers that are proposed in the counterclaim and therefore the counterclaim is a device to abuse the court process.

6. Further the defendant's solicitors in England stated equivocally that the defendant does not and has never had any legal or beneficial interest in any asset in Kenya and in particular the shares or assets in the plaintiff company. The deponent as advised by his advocates believes that the defendant therefore has no *locus standi* to bring, maintain and prosecute the proposed counterclaim.

7.Mr. Ololowuaya also avers that the defendant will not suffer any prejudice in the event the proposed amendment is not allowed because he can file an independent suit. That indeed HCCC 332 of 2010 filed by the defendant in respect of the same transaction, facts, cause of action and parties.

8. On consolidation, he deposed that the issue was *res judicata* since the defendant had made a similar application to consolidate **ELC 351 and 352 of 2013** and **332 of 2010** and the said application was dismissed by **Mabeya J**. in a ruling delivered on **10th December, 2012**. He further opposed consolidation because there was a counter claim filed in ELC 352 of 2013 and that there were pending proceedings in the court of appeal **(Civil Appeal No. 9 of 2011**).

9. On **14th February, 2014** the matter was mentioned before me for directions. The plaintiff was represented by the learned Senior Counsel **Mr. Nowrogee,** while the defendant was represented by the learned counsel **Mr. Kimathi.** The court directed that the application be disposed off by way of written submission and on the **19th February, 2014** the plaintiff filed his submissions while the defendant did likewise on **20th February, 2014.**

10. The defendant in his submissions gave a background of the matter where he submitted that HCC No 103 of 2009 and the present suit were intrinsically linked and the genesis of the present suit is but an extension of the former suit. Furthermore the defence in both suits are strikingly similar; the veil of incorporation being used to escape liability and dispute as to management of the suit property.

11. According to Counsel, **Order 8 Rule 3** of the **Civil Procedure Rules** allows a party to amend the pleadings at any stage in the proceedings. **Rule 5** gives the court wide latitude to allow amendments for the purpose of determining the real question in controversy. Counsel submitted that it is trite law that pleadings are superstructures for parties to set out their case and therefore it is imperative that the court is seized of all the facts and evidence. He relied on the decision of **Joseph Omwamba Owiti v Magadi**

Soda Co. Ltd & another (2008) eKLR where **Nambuye J**. referred to the decision in **Galaxy Paints Company Limited v Fallan Guards Limited CA 219 OF 1998** on the purpose of allowing amendments to pleadings. Further, Counsel contends that amendments of pleadings are normally allowed, unless they cause injustice to the other side. Mere delay according to Counsel is not a ground for refusing an amendment. It was his submission that the plaintiff had not shown how the proposed amendments, if allowed will prejudice their case.

12. Counsel submitted that irrespective of whether the court allows the application to amend, it should consolidate the suits because the issues in dispute are common in the two cases. He relied on a passage in **Halbury's Laws of England, 4th Edition Vol 37** which enunciates the purpose of consolidation is to save costs, time and effort and to make conduct of several actions more convenient by treating them as one action. He also relied on **Article 159** of the **Constitution** and **Section 1A and 1B** of the **Civil Procedure Act.**

13.He further urged the court to be guided by the decision of **Kneller J.** in **Stumberg and another v Petgieter (1970) E.A. 323** in deciding the application for consolidation where the Honourable Judge stated that the same or similar questions can be either legal or factual and need not be both. In further reliance to the decision of **Muturi Investments Limited v National Bank of Kenya Limited (2006)** eKLR, the learned counsel submitted that the two cases raise a common question of law and fact and therefore it was desirable that the cases be disposed of at the same time.

14. The plaintiff filed his submissions in opposing the application. He relied on the principles set down by **Kuloba J**. in **Kassam v Bank of Baroda (Kenya) Ltd (2002) 1 KLR 294** to submit on the principles relating to amendment of pleadings. Firstly, that the amendments should be allowed if the court is satisfied that the party applying is not acting *mala fide;* it will not cause some injury to the other side which cannot be compensated by costs; is not a device to abuse the court process; is necessary for the purpose of determining the real questions in controversy; the amendment will not alter the character of the suit. Secondly, that in case of late amendments, the applicants must show that the delay is not deliberate and court exercises such discretion for or against the applicant. Thirdly, in exercising discretion, the court ought to consider whether the amendment embodies a legally valid claim; the reasons why the proposed amendment was not included in the original pleading and justification for the delay if any.

15. In applying these principles, counsel contended that in bringing the proposed amendment three years after the defendant filed his Statement for Defence and two weeks before the hearing date was intended to delay the case; That there was no adequate explanation for the delay or why the subject of the amendment was not included in the defendant's Statement of Defence.

16. Counsel submitted that the proposed amendment is an abuse of the court process because the proposed subject matter does not relate to either the Environment and/or the use and occupation of, and or title to land in respect of which this court has jurisdiction. According to Counsel the Environment and Land Court is a specialized court by virtue of **Article 162 (3)** of the **Constitution.** It therefore cannot purport to hear other matters but for disputes relating to the Environment and the use and occupation of, and title to, land.

17. Further, he submitted that the proposed counterclaim is an invalid claim, scandalous, frivolous and vexatious because it replicates the facts, claim, cause of action and reliefs sought in HCCC 332 of 2010. The witness statements and list of documents in the counterclaim are also a replica of the documents filed in the aforesaid case. In relying on the decision of **Mpaka Road Development Ltd v Kana (2004) 1 EA 161** and **Time magazine International Ltd & 2 Others v Rotich & Another (2000) KLR 544,** Counsel submitted that the counterclaim will only cause the plaintiff unnecessary anxiety, trouble and expense and will further delay fair trial.

18. Counsel was also opposed to some of the prayers in the proposed counter claim. He submitted that they had been dealt with by a court of competent jurisdiction hence *res judicata* to that extent. In particular he contends that the issue of the defendant participating in management of the suit property was

settled and that he is not entitled to an injunction order against the plaintiff.

19.He also submitted that this Honorable court is prohibited by the provisions of **Section 6** of the **Civil Procedure Act** from proceeding with the trial because the proposed counter claim will have the effect of a cross suit with a matter directly and substantially in issue in HCC 332 OF 2010.

20. Counsel also submitted that the defendant through his solicitors in England had denied any legal or beneficial interest in Kenya. As such he has no interest to sustain his standing in a court of law. Further he contends that the defendant will not suffer any prejudice in the event that the proposed amendment is not allowed as there are other avenues for him to litigate the same issue.

21. On consolidation, Counsel submits that the matter is res judicata. The defendant ought to have applied for consolidation of these two suits on **26th July, 2011** when he made an application for consolidation of the said two suits with HCC No. 332 of 2010. In that application **Mabeya J**. dismissed the application with costs and the defendant did not file an appeal. Therefore, he urged the court not to reopen the issue of consolidation in the present suit. Counsel relied on **Mburu Kinyua v Gachini Tuti (1976-80) 1KLR ER 313.**

22. At the hearing of the application the learned Senior Counsel, **Mr. Ahmednasiir** was present for the Plaintiff, whilst the learned counsel **Mr. Singh** was present for the defendant. Both Counsels highlighted their written submissions which I have summarized herein above

23. **Mr. Singh** urged the court to consider whether the defence should be amended. In support of his case, he stated that HCCC 332 of 2010 was filed on **20th May, 2010** while the present suit was filed on **18th May, 2010**. That at the time, the two parties did not know of the existence of the other suit; That the defendant's attempt to consolidate the two suit was dismissed by **Mabeya J**. on the ground that one suit was filed in the Commercial division while the other was filed in the Environment and land court. According to Counsel, it became imperative to amend the defence and the proposed amendments do not deviate or alter the character of the case. Counsel contends that even though the issues are the same in the two suits, they are distinct to the extent of the prayers sought.

24.On consolidation, the learned counsel submitted that there were three cases which touch on the same subject matter, **Narok/Nguruman/Kamorara/1**, how the suit property was acquired, the financing and shareholding of the managing company. He thus contends that if the suits are not consolidated, the court may end up hearing two different cases and stand a risk of having two different rulings touching on the same subject matter. Further he supported the proposal by **Emukule J.** and **Wendoh J**. in their rulings that the two suits ought to be consolidated because the issues and witnesses are the same.

25. **Mr. Ahmednassir** opposed the application and relied on the affidavit of **Moses Loontasati Ololowuaya** and his written submissions. He reiterated the principals to be observed in amendments of pleadings. Counsel contends that the real purpose of the defendant is to delay the hearing of the case. Further he submitted that the proposed amendment will take this suit outside the scope of jurisdiction of the court.

26. He further submitted that no prejudice shall be occasioned against the defendant since the issues are similar to HCCC 332 of 2010 and therefore can be litigated in that case. Further counsel urged the court that the issues the defendant seek to litigate are res judicata. According to Counsel, the intention of the defendant is to have a second chance to litigate on the same matter.

27. On Consolidation, Counsel submitted that the application was dealt with by **Mabeya J**. and the same was dismissed. According to him, the matter is *res judicata* and this was an attempt to appeal to the decision of the court through the back door. He urged the court to dismiss the application with costs.

28. In a short rejoinder, **Mr. Singh** stated that there was new evidence that had come to the attention of the defendant thus necessitating amendments to the defence. He also stated that a final judgment in the England case had not be provided by the Plaintiff.

29.From the pleadings filed in the application herein and the submissions by counsels for the respective parties, the issues for determination are:-

1. Whether this court has jurisdiction to hear and determine the issues raised in the intended counter-claim.

The jurisdiction of this court under **Section 13(2)** of the **Environment and Land Court Act** is to hear and determine disputes-

> **(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
>
> **(b) relating to compulsory acquisition of land;**
>
> **(c) relating to land administration and management;**
>
> **(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
>
> **(e) any other dispute relating to environment and land.**

30. It is contended that the proposed counter-claim does not relate to a dispute relating to either the Environment and/or the use and occupation of, and/or title to land in respect of which this court has jurisdiction under the aforesaid provision of the law and **Article 162(2)(b)** of the **Constitution of Kenya, 2010**.

31.Although the defendant has not expressly stated in his amended statement of defence that he is claiming any interest in the suit property, by implication and particularly through the averments contained in paragraph 4K of the amended statement of the defence, which by dint of paragraph 16 of the defence and counter-claim, is part of the counter-claim, the defendant (the plaintiff in the counter-claim) contends that in order to defraud and deny him access to the plaintiff and **the suit property,** Herman (proposed 1st defendant in the amended defence and counter-claim) commenced obstructing both the defendant and his agents access to the operations of the plaintiff and **on the suit property** from sometime around 2008.

32. From the averments in the amended statement of defence, it is clear that the dispute contemplated in the proposed counter-claim is not purely commercial as to put it outside the jurisdiction of this court. That fact is attested by the ruling of **Odunga J**. in Nairobi HCCC NO.332 OF 2010 where the proposed plaintiff, in similar circumstances, moved the court by way of an application dated 30/8/2010 seeking, *inter alia*, that pending the *inter partes* hearing of the suit, the court do issue an interlocutory injunction restraining the defendants their agents employees and/or nominees from interfering with the plaintiff's homestead commonly known as Ol Donyo Laro.

In his ruling, the judge held:-

> **"Based on the foregoing I find that the plaintiff has satisfied the conditions necessary for the grant of an interlocutory injunction in terms of prayer 8 of the motion."**

In effect, the judge issued an interlocutory injunction restraining the defendants (the plaintiff in Nakuru HCCC NO.120 OF 2010 included), from interfering with the plaintiff's homestead commonly known as Ol Donyo Laro.

33.From the ruling of **Mabeya J**., in respect of an application by the plaintiff in Nakuru HCCC No.120 of 2010 for review or variation of the ruling of **G.V Odunga J.,** it is clear that part of the claim by the defendant in Nairobi HCCC No.332 of 2010 is in respect of his right to occupy a portion of the suit property. In his ruling **Mabeya J**., held:-

"Accordingly, for the foregoing reasons, I will allow prayer Nos.3 and 4 of the motion dated 3 September, 2012 with a rider that:-

Provided that these orders are subject to the order made on 30th March, 2012 in that, the 3rd defendant shall not have access to or shall not purport to exercise its right of enjoyment of quiet possession and occupation in the suit property on the plaintiff's homestead known as Ol Donyo Laro or the 11 out posts or camps or any other area currently operated or occupied by the plaintiff."

Noting that the suit property in the Nairobi suit is the subject matter in Nakuru HCCC No.120 of 2010; to wit Nguruman Kamorora/1, and despite the observation of **Mabeya J**., that:-

"It is quite clear that in the Nakuru suits, the central issue would be ownership and right to occupy the suit property whilst in this suit, it is manifestly clear that the issue is commercial transaction between the plaintiff and the defendant, viz, the alleged partnership."

34.I hold the view that the mere fact that the claim by the plaintiff raises questions not expressly in the purview of this court, does not necessary oust this court's jurisdiction to hear and determine the dispute herein.

35. I therefore, find and hold that by virtue of the defendant's implied claim that he has a right of access to the suit property and the evidence on record to the effect that the defendant is occupying part of the suit property, this court has jurisdiction to hear and determine the dispute raised in the counter-claim. However, this finding should not be construed to mean that the Honourable judge in the Nairobi suit misdirected himself by refusing to consolidate the Nairobi case and the Nakuru cases. In any event, the Honourable judge was categorical that the reason for refusing the orders sought is that the dispute is more of a Commercial nature than being land oriented.

36. Having read and considered the pleadings filed in that case, I totally agree with the Honourable judge that the issues raised in that case would be better dealt with by the said court and not the Environment and Land Court.

2. Whether some of the issues raised in the proposed counter-claim are *res judicata*?

In the submissions filed on behalf of the plaintiff, it is contended that the plaintiff is not entitled to prayers Nos. (e) and (f) in the proposed counter-claim. In those prayers, the defendant seeks:-

(e) to restrain the 1st and the 2nd defendants in the proposed counter-claim from using its Corporate veil to exclude the plaintiff (in the proposed counter-claim) from participating in the management or the operations of the joint venture assets;

(f) to restrain the 1st defendant in the proposed counter-claim from interfering with the plaintiff (in the proposed counter-claim) in common management of the joint venture assets.

37. The decision of the court that is the basis of the contention that the two prayers above are r*es judicata* is in respect of the defendant's application dated 30.8.2010. In that application, the defendant (then plaintiff/applicant) inter alia, sought a mandatory injunction to compel the defendants (the plaintiff herein included) to allow him to participate in the management or operation of any of the partnership assets including the suit property herein; and/or an interlocutory injunction restraining the defendants from interfering with his common management of the partnership assets including the suit property.

With regard to those prayers, **G.V Odunga J**., held:-

"Accordingly, I am unable to grant the plaintiff the order he seeks in prayer 9 of the motion. In effect I decline to compel the defendants their agents employees and/or nominees to allow the plaintiff/applicant to participate in the management of the operation of any of the partnership

assets including all the parcel of land comprised in the Title No.Narok/Nguruman Kamorora/1 (the property) whether by himself or through his agents, employees and nominees."

38. Concerning the foregoing ruling of the Court, it is important to note that it was in respect of an application. As such, it did not entirely settle the plaintiff's claim in that regard. All what it did was to stop the plaintiff from bringing another application claiming similar reliefs. The question as to whether the plaintiff is entitled to the same claim after the suit is heard on its merits is still pending. That being the case, I am unable to agree with the plaintiff's submission that because those prayers were denied in an application for interlocutory reliefs, the prayers in respect thereof in a subsequent pleading (like the proposed counter-claim) are *res judicata*.

3. Whether the proposed counter-claim is *res sub judice*?

39. As concerns this issue, it is submitted, on behalf of the plaintiff that, even if the amendments were to be allowed, this court would be prohibited by the provisions of **Section 6** of the Civil Procedure Act from proceeding with the trial of the proposed counter-claim as the counter-claim has the same effect as a cross-suit. Further that the matters in issue in this suit are also directly and substantially in issue in Nairobi Milimani HCCC NO.332 of 2010 previously filed by the defendant against the parties proposed to be joined in the current suit through the counter-claim. In this regard reference is made to **Section 6** of the Civil Procedure Act and the case of **Bundotich** v. **Managing Director Kenya Airways Authority and Another** (2007)2 E.A 90.

In **Bundotich** v. **Managing Director Kenya Airways Authority and Another** *(supra)*, it was observed:-

"The issue at the core of both this suit and the other suit was the ownership of the land reference number 209/14824. Obviously, if the plaintiff succeeded in the other suit the plaint herein would have no leg to stand on. If that issue were to be dealt with before the two courts, at the same time, there is every possibility that the courts could reach inconsistent verdicts. If that were to happen the courts would have been put into disrepute. Meanwhile, if the two cases were left to run side by side in two different courts that would be a waste of precious judicial time. In order to ensure that judicial time is utilized in an optimum manner and also to safeguard the integrity of the judiciary, by removing the possibility that two court's of concurrent jurisdiction might arrive at inconsistent decisions on the same subject matter, this suit should be struck out."

40. The sentiments expressed in the case above, in my view, were the rational for enactment of **Section 6** of the Civil Procedure Act. That section prohibits courts from proceeding with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previous 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.

41. In applying the foregoing provisions of the law to the circumstances of the case, I note as a fact, that the claim sought to be introduced through the defendant's amended defence and counter-claim is in *pari materia* to that in Nairobi HCCC NO.332 of 2010. I also note that the issues, reliefs and parties in Nakuru HCCC NO.103 of 2009 are basically similar. For instance, in Nakuru HCCC NO.103 of 2009 the plaintiff seeks to restrain the defendant, a limited liability company, by its directors, officers, servants, agents, employees, invitees and or otherwise howsoever, and the said directors, officers, servants, agents or invitees whether for themselves or for the defendant company, from entering or being upon the suit property, Nguruman/Kamorora/1, and in particular upon the portion or area known as Ol Donyo Laro of and situate in the suit property and or occupying or taking possession of it and or remaining on it or any part of it or of the suit property; and/or a permanent injunction restraining the defendant, by its directors, officers, servants, agents, employees, invitees and or otherwise howsoever, and the said directors, officers, servants, agents or invitees whether for themselves or for the defendant company from advertising or claiming otherwise howsoever proprietorship or ownership or shareholding of or in the suit property, Nguruman/Kamorora/1, or any part thereof and in particular of the portion or area known as Ol Donyo Laro of and situate in the suit property.

42. In the current suit the prayers sought against the defendant, are a replica of those sought in Nakuru HCCC NO. 103 OF 2009 *supra*. The only difference in the two suits is that, the defendant is sued as the defendant, as opposed to Nakuru HCCC NO.103 OF 2009, where he fits in the description directors, officers, servants, agents, employees, invitees of the defendant in that suit.

43. The property in respect of which the orders sought against the defendant in all the suits herein is the same to wit, Nguruman/Kamorora/1. Therefore, there is no doubt that allowing the proposed amendment, will definitely render Nakuru HCCC No. 120 of 2010 *res sub judice* Nairobi HCCC NO. 120 OF 2010.

From the analysis above, it also appears that Nakuru HCCC NO.120 OF 2010 is *res sub judice* Nakuru HCCC NO.103 OF 2009.

4. Whether the defendant has the right to bring and prosecute the counter claim?

44.In view of my finding that allowing the counter-claim would render the suit herein *res sub judice* Nairobi, 132 of 2010 and being of the view that it is inappropriate in the circumstances of this case to allow the intended defence and counter-claim, I find it unnecessary to consider and determine this issue.

5. Whether the consolidation sought is *res judicata?*

45. As pointed out earlier, the defendant had brought an application in Nairobi HCCC NO.332 of 2010 seeking to consolidate the Nairobi Suit with the Nakuru suits herein. That application was rejected by **Mabeya J**., vide a ruling delivered on **10th December, 2012**. In that ruling the Honourable judge held:-

"It is quite clear that in the Nakuru suits, the central issue would be ownership and right to occupy the suit property whilst in this suit, it is manifestly clear that the issue is commercial transaction between the plaintiff and the defendant, viz, the alleged partnership. To my mind, these are not similar questions of law to warrant a consolidation."

46.Owing to the above decision, it is submitted on behalf of the plaintiff, that the defendant ought to have applied for consolidation of the Nakuru suits through its application for consolidation which was rejected. That having failed to do so, the defendant should not be allowed to open the issue of consolidation of ELC No.351 of 2013 with ELC NO.352 OF 2013 (It's not clear which suits Counsel for the plaintiff is referring to as the only ELC cases which are the subject of this application are 103 of 2009 and 120 of 2010). Reliance was made on **Section 7** of the Civil Procedure and the decision of Appeal in **Mburu Kinyua** v. **Gachini Tuti** (1976-80) 1KLR 790 where the Court of Appeal held:-

"That the second application was *res judicata* since the facts on which it was based were known to the appellant at the time when he made the first application.....That, although the judge held not referred in his ruling on the first application to the appellant's application to file a further affidavit, the appropriate mode of testing the judge's decision on that application was to appeal against his ruling rather than make another application to set the judgment aside."

47.By dint of the provisions of **Section 7** of the **Civil Procedure Act**, courts are prohibited from trying any suit or issue where 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 heard and determined.

It appears that the bar contemplated in **Section 7** is in respect of matters in respect of which the former court heard jurisdiction to hear and determine. The question which arises in this case is whether the court in Nairobi had jurisdiction to hear and determine the question raised in this matter, being the consolidation of the two cases pending before the Environment and Land Court, Nakuru. My view on this question is that the Nairobi Court could not lawfully consider the question as to whether the Nakuru suits should be consolidated for purposes of hearing and determination for want of jurisdiction. Only a judge sitting as a judge for the Environment and Land Court would, in my view, have had jurisdiction to

consider the question of consolidation of the two cases herein. That being the case, I find and hold that the application herein seeking to consolidate **Nakuru HCCC NO. 120 OF 2010** with **Nakuru HCCC NO.109 OF 2009** is not *res judicata*.

6.**Whether the defendant has made up a case for consolidation of the two suits herein?**

In **EAN Kenya Limited** v. **John Sawers & 4 others** (2007) eKLR **Waweru J**., had this to say on consolidation of suits:-

".....the test to be applied is not whether the parties are the same but whether the same or similar questions of law or fact are involved in the suits."

48.In applying the above test to the circumstances of this case, I reiterate that the only difference between the two suits herein is the description of the defendant, otherwise, the subject matter and the reliefs sought are basically the same. I also wish to point out that, on strict application of the law, Nakuru HCCC NO.120 OF 2010 is *res sub judice* Nakuru HCCC NO. 103 OF 2009.

49. Since counsels appear to have decided to litigate in bits, to obviate the possibility of another application challenging the propriety of Nakuru HCC NO.120 of 2010, I find and hold that a case for consolidation of the suits has been made up. Consequently, I order that the two suits be consolidated for purposes of hearing and determination.

50.Noting the concerns raised in the plaintiff's submissions that the application herein is a scheme by the defendant to delay the hearing and determination of the suits, I direct the parties, with the help of the Registrar of this Court, to fix the matter for hearing within 60 days from the date hereof.

Dated, signed and delivered in open court this 10th day of October 2014

L N WAITHAKA

JUDGE

PRESENT

Mr Odanda holding brief for Mr Singh

Gitau for the defendant

N/A for the plaintiff

Emmanuel Maelo : Court Assistant.

L N WAITHAKA

JUDGE