



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 350 OF 2018

DOROTHY SEYANOI MOSCHION.....PLAINTIFF

VERSUS

CHARLES KIMERIA MWANGI.....DEFENDANT

RULING

1. The defendant in this suit, Charles Kimeria Mwangi, through an amended notice of motion dated 3/2/2020, sought a consolidation order relating to the following 10 (ten) suits pending before the Environment and Land Court at Nairobi:

- i. ELC No 350 of 2018 - Dorothy Seyanoi Moschion vs Charles Kimeria Mwangi [this suit]**
- ii. ELC Case No 305 of 2018 - Dorothy Seyanoi Moschion vs Andrew Stuart;**
- iii. ELC Case No 338 of 2018 - Dorothy Seyanoi Moschion vs Andrew Stuart & another;**
- iv. ELC Case No 348 of 2018 - Dorothy Seyanoi Moschion vs Adrian Dearing;**
- v. ELC Case No 349 of 2018 - Dorothy Seyanoi Moschion vs Adrian Dearing;**
- vi. ELC Case No 915 of 2012 - Dorothy Seyanoi Moschion vs Philip John Ransley & another;**
- vii. ELC Case No 367 of 2018 - Dorothy Seyanoi Moschion vs Guy Elms & 3 others;**
- viii. ELC Case No 368 of 2018 - Dorothy Seyanoi Moschion vs Guy Elms & 6 others;**
- ix. ELC Case No 374 of 2018 - Dorothy Seyanoi Moschion vs Guy Elms & 6 others;**
- x. ELC Case No 352 of 2018 - Dorothy Seyanoi Moschion vs Philip John Ransley.**

2. The said application is the subject of this ruling. The application was premised on the following verbatim grounds:-

- 1. That all the suits mentioned above involve resultant plots excised from the subdivision of LR No 5892 (Original Number 5830/2);**
- 2. That all the suits mentioned above are instituted by the same plaintiff and the facts in all the cases refer to similar facts;**
- 3. That the cause of action arising from all the cases mentioned above involve similar transactions;**
 - 3A. That the defendants in the said suits rely on similar evidence and same witnesses to prove their respective defences against the plaintiff in the said suits. The plaintiff is also a common witness in all the said suits relying on similar facts and evidence.**
 - 3B. That the suits raise common issues of law and fact, grievances and relate to the same subject matter against the defendants based on similar evidence.**

4. That the remedies sought in all the above mentioned cases are similar;

5. That the consolidation and or hearing/ adjudication of these suits before the same judge will avoid inconsistencies when judging the matters, absurdity and or different decisions on the same set of facts, transactions and or issues of law arising from the same set of or similar facts;

6. That the consolidation of the aforementioned cases and or the same being heard by the same judge will ensure speedy and expeditious disposal of the suits saving the court precious judicial time;

7. That there is no prejudice to be suffered by the plaintiff herein should this application be allowed as prayed;

8. That it is in the interest of justice this application should be allowed.

3. The application was supported by an affidavit sworn on 3/2/2019 (sic) by Mr Oscar Litoro, counsel for the applicant. The application was canvassed through both written and oral submissions. The applicant's case was that the ten suits have one common plaintiff; they relate to the same cause of action and they all relate to subdivisions out of Land Reference Number 5892. It was further contended by the applicant that all the defendants in the ten suits were alleged to have acquired their parcels of land from the plaintiff fraudulently. Further, it was the applicant's case that there was a common set of facts in the ten suits. Urging the court to grant the orders on the above grounds, Mr. Litoro, counsel for the applicant, submitted that if left to proceed for hearing before different judges, there was bound to be absurdity in the event of conflicting findings by the different judges. Counsel added that none of the cases had commenced for hearing. Lastly, counsel argued that consolidation would save judicial time.

4. Various defendants in the suits filed responses and made submissions on the application. Ms Kemunto, counsel for the defendants in ELC Case Numbers 305, 338, 348, and 349 of 2018, supported the application and aligned herself with the submissions of Mr Litoro. She emphasized that all the parcels of land forming the subject matter in the ten suits were subdivisions out of LR No 5892 and the issues falling for determination in the ten suits were the same. She added that all the prayers sought by the plaintiff in the ten suits were the same and save for the parties, all the witnesses were the same. Counsel argued that it was important to avoid conflicting decisions on the same set of facts and issues. She urged the court to allow the application.

5. Ms Mwangi, counsel for the defendant in ELC No 352 of 2018, similarly supported the application for consolidation. She hastened to add that she did not file any papers because her client died in 2019.

6. Ms Ndirangu who held brief for Mr Nderitu for the 7th defendant in ELC No 368 of 2018 supported the application and associated herself with the submissions of Mr Litoro.

7. Mr Mwango for the 1st and 2nd defendants in ELC 915 of 2012 supported the application and aligned himself with the submissions of Mr Litoro. Relying on the affidavit filed by Ms Virginia Shaw, he submitted that the subject property in the ten suits was the same; the plaintiff made similar allegations of collusion in all the suits; the reliefs sought were similar; the pattern of facts were the same; and witnesses were the same. Counsel added that in the circumstances, consolidation and joint hearing would realize the overriding objective of expeditious disposal of the suits. Counsel urged the court to consolidate the suits.

8. The 2nd, 3rd and 4th defendants in ELC No. 368 of 2018, through Mr Litoro, supported the application and urged the court to grant the consolidation order.

9. Mr Kahari for the plaintiff in ELC No 915 of 2012 opposed grant of the orders as prayed. Relying on the plaintiff's grounds of opposition, replying affidavit and written submissions, counsel submitted that the plaintiff was only amenable to a consolidation order relating to ELC No 915 of 2012 and ELC No 352 of 2018 because: (i) the plaintiff is the same and one Philip Ransley is a defendant in both suits; (ii) the subject matter is LR 5892; (iii) the defendants are a couple; and (iv) parties were likely to call common witnesses. Counsel added that the plaintiff was opposed to a consolidation order relating to other suits because although the subdivisions emanated from the same parcel of land, they had different parcel numbers. He added that the plaintiff was opposed to consolidation because the transactions were done at different times by different advocates and their suits were going to have different witnesses.

10. Mr. Miyare for the plaintiff in all the other nine (9) suits opposed the application. Relying on the plaintiff's replying affidavit dated 20/3/2020 and various authorities, counsel submitted that some of the suits sought for consolidation had pending contempt of court proceedings. Secondly, counsel argued that none of the defendants had sworn a replying affidavit, contending that the application had been mischievously brought by an advocate. He added that the advocates who had participated in the impugned activities were the ones who had sworn affidavits in support of the application. Counsel contended that the defendants may not be aware of the application.

11. Counsel added that the suits were at different stages of proceedings and in some of them the defendants were deceased and the suits required substitution. Counsel argued that owing to pending applications in different suits, a consolidation order was untenable. He added that although hearing had not commenced in any of the suits, consolidation was not tenable. Mr. Miyare argued that the defendants did not deserve a consolidation order because they had not complied with pre-trial directions.

12. Counsel further argued that common legal representation was not a ground for consolidation. He added that the witnesses in the suits were not the same. He contended that although the suit properties were subdivisions from a common mother title, they were separate properties. He added that the plaintiff had not prayed for cancellation of the titles or reinstatement of the original title. Counsel submitted that the reliefs sought were not similar.

13. Mr. Miyare added that the fraud alleged in the suits was enormous that the suits could not be handled by a single judge. He submitted that the plaintiff was opposed to consolidation of ELC No 915 of 2012 and 352 of 2018. Counsel argued that a common mother title was not a

ground for consolidation. Counsel urged the court to dismiss the application.

14. In his short rejoinder, Mr. Litoro for the applicant invited the court to look at the pleadings. Counsel added that it was the plaintiff who had failed to comply with pre-trial requirements in all the suits except one. Counsel argued that the pending contempt application would be disposed upon consolidation.

15. I have considered the application, the responses thereto, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The key question falling for determination in this application is whether the applicant has satisfied the criteria upon which an order of consolidation is granted. Before I dispose that question, I will pronounce myself on the court's position on the suit relating to the deceased defendant.

16. Ms Mwangi, counsel for the defendant in Nairobi ELC No 352 of 2018, submitted that her client died sometime in 2019. She did not specify the precise date. She added that the estate of the deceased defendant had not conducted succession. The court has taken note of that fact. First, it is not clear if the suit against the deceased defendant is still alive. Secondly, in the absence of substitution, no proceedings can be conducted in relation to a defendant who is deceased. The import of the foregoing is that no consolidation order can issue in relation to ELC No 352 of 2018 at this stage. I now turn to the key question in the application.

17. The jurisdiction of this court in relation to consolidation of suits is guided by the framework in Article 159 of the Constitution as read together with Sections 1A, 1B and 3A of the Civil Procedure Act and Order 11 rule 3(1) h of the Civil Procedure Rules. The common theme in the above legal framework is the just, expeditious, proportionate, and affordable resolution of disputes.

18. The Supreme Court of India in **Prem Lala Nahata & another v Chandi Prasad Sikaria; Appeal (Civil) 446 of 2007** summed up the meaning and purpose of consolidation and the guiding principle in exercise of the discretionary jurisdiction to grant an order of consolidation in the following words:-

“It cannot be disputed that the court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common question of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order the suits”.

19. The Supreme Court of Kenya pronounced itself on the same subject in **Law Society of Kenya v Center for Human Rights & Democracy & 2 Others [2014] eKLR** in the following words:-

“39. 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 parties. Consolidation was never meant to confer undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

20. I have looked at the pleadings in the suits subject matter of this application. The plaintiff is the same in all of them. In all of them, the plaintiff alleges fraudulent disposal of subdivisions out of a common mother title to different defendants through alleged connivance of common persons. Thirdly, the reliefs in the suits are, by and large, the same.

21. Secondly, what emerges from a perusal of the pleadings is that there are common questions of law and facts falling for determination in the suits. Further, there is likely to be commonality in terms of witnesses. Thirdly, there is commonality in terms of the reliefs sought against the various defendants. The only difference relates to the impugned subdivision title numbers. Lastly, the plaintiff's right to relief is alleged to have arisen out of the same series of transactions relating to subdivisions out of a common mother title.

22. In the circumstances, the court is satisfied that the criteria upon which our courts exercise jurisdiction to grant an order of consolidation has been met. Consequently, the court makes the following disposal orders relating to the notice of motion dated 3rd February 2020:-

a. No consolidation order would issue in relation to Nairobi ELC No 352 of 2018 at this point because the defendant therein is said to have died and there has been no substitution.

b. Save for ELC No 352 of 2018, all the other suits listed in prayer 1 of the amended notice of motion dated 3/2/2020 are hereby consolidated.

c. The nine (9) consolidated suits, together with Nairobi ELC 352 of 2018, shall be mentioned before the Presiding Judge of the Court for appointment of a judge to hear the consolidated causes, taking into account the pending contempt application, the past recusal(s), the court currently seized of majority of the suits, and any other relevant factor.

d. Parties shall agree on the lead file for the purpose of taking proceedings, and in default, the Presiding Judge shall be at liberty to designate one out of the nine files as a lead file.

e. The court assigned the consolidated causes shall similarly be assigned Nairobi ELC No 352 of 2018 for appropriate directions upon ascertainment of the status of the suit against the deceased defendant.

f. Parties shall bear their respective costs of the application

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 10TH DAY OF DECEMBER 2020.

B M EBOSO

JUDGE

In the Presence of: -

Mr Litoro for the defendant in ELC No 350 of 2018 and for the 2nd, 3rd and 4th defendants in 368/2018.

Mr Shah for the 2nd, 3rd, 4th and 6th defendants in ELC No 374 of 2018 and for the 2nd, 3rd and 4th defendants in ELC No 367 of 2018; and for the 3rd defendant of ELC No 915 of 2018.

Ms Mutuku holding brief for Mr. Miyare for the plaintiff.

Ms Mureithi holding brief for Mr Kahari for the plaintiff in ELC No 915 of 2012.

Ms Kemunto for the defendant in ELC Nos 305, 338, 348 of 2018 and for the 1st defendant in ELC No 349 of 2018.

Ms Ndirangu holding brief for Mr Nderitu for the 7th defendant in ELC 368 of 2018.

Ms Mwangi for the defendant in ELC No 352 of 2018.

Mr Mwangi holding brief for Mr Sisulo for the 1st and 2nd defendants in ELC No 915 of 2012.