



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 268 OF 2011

DATER ENTERPRISES CO.LTD.....PLAINTIFF/RESPONDENT

VERSUS

AGNES MUMBANU KINAKO.....DEFENDANT/APPLICANT

RULING

1. In the Notice of Motion dated 22nd June, 2018, the Defendant has sought for the following orders:

a. That this suit be consolidated with Machakos High Court ELC. Case No. 99 of 2015-Agnes Mumbanu Kinako vs. The Attorney General & 5 others for purposes of hearing and determination of both suits.

b. That further orders as the ends of justice may require be made.

c. That the costs of this Application be provided for.

2. The Application is premised on the grounds that this suit and Machakos ELC. No. 99 of 2015 have their principal subject matter as parcel of land known as Nzambani/Maluma/838; that it will be in the interest of justice that the two cases are consolidated for expeditious hearing and that the two suits should be consolidated to avoid duplicity of the causes of action.

3. According to the Affidavit of the Defendant, the previous attempts to have the two cases consolidated were thwarted by objections by the Plaintiff's Directors who had challenged the validity of ELC. Case No. 99 of 2015, which objection was dismissed by the court.

4. In response, the Plaintiff's Director deponed that after pre-trial directions were taken, and the Defendant was allowed to file an Amended Defence, the Defendant filed a new suit being ELC. No.99 of 2015; that when he gave evidence in this matter, the Defendant did not mention about the existence of ELC. No. 99 of 2015 and that instead of proceeding with her case, the Defendant has taken diversionary tactics only meant to derail the hearing and determination of this old matter.

5. The Plaintiff's Director finally deponed that the Defendant cannot purport to apply to consolidate a case whereby the Plaintiff's witnesses have already testified and closed its case and that the Application is frivolous, vexatious and an abuse of the court process.

6. In her Supplementary Affidavit, the Defendant deponed that the Plaintiff is not the registered proprietor of parcel of land known as Nzambani/Maluma/838; that it is because of that that she filed another suit and that the three Directors of the Plaintiff have already been convicted of forgeries in Kitui Criminal Case Number 620 of 2011.

7. The Defendant finally deponed that she had applied for the consolidation of the two suits before the matter took off but the court declined to hear the Application because of the then pending Application for striking out of ELC No. 99 of 2015.

8. The Defendant's/Applicant's advocate deponed that the subject matter of litigation in both cases is parcel of land known as Nzambani/Maluma /838; that although the matter has been heard partly, the court has the powers to order for the two cases to start *de novo* and that the Plaintiff has not shown any prejudice that will be suffered in the event the two cases are consolidated.

9. On her part, the Plaintiff's/Respondent's advocate submitted that by her own declaration, the Defendant averred that ELC. No. 99 of 2015 was distinct from ELC. No. 268 of 2011; that since 2015, the Applicant has treated both matters as distinct and allowed ELC. No. 268 of 2011 to proceed and that the Application was filed on the day the matter was coming up for Defence hearing.

10. This suit was commenced by way of a Plaint dated 3rd October, 2011. In the Plaint, the Plaintiff/Respondent averred that it was the registered proprietor of parcel of land known as Nzambani/Maluma/838; that the former owner of the suit land allowed the Defendant to cultivate a portion of the suit land and that when the Defendant was served with a notice to stop cultivating a portion of the suit, she caused

the Plaintiff's Director to be arrested.

11. The Plaintiff is praying for an order of permanent injunction restraining the Defendant from trespassing on the suit land and for general damages.

12. The Defendant entered appearance in the matter on 21st October, 2011. On 24th October, 2011, the Defendant/Applicant filed a Notice of Preliminary Objection together with a Defence. In the Notice of Preliminary Objection, the Defendant averred that the Plaintiff and the registered owner of parcel of land known as Nzambani/Maluma/838 are two distinct legal personalities, and that the Plaintiff does not have *locus standi* to sue in respect of the suit land.

13. In her Defence, the Defendant maintained that she has at all times been in possession of the suit property; that she is the lawful and legitimate owner of the suit property and that the Plaintiff was incorporated in 2007 and is not the purported owner of the suit property because the registered owner is one Dater Enterprises Limited.

14. The record shows that on 26th November, 2014, both the Plaintiffs and the Defendant's advocates informed the court that they had complied with the provisions of the Civil Procedure Rules; and that the matter was ready for hearing. The said advocates then fixed the matter for hearing. When the matter came up for hearing on 19th January, 2015, the Defendant's advocate sought for leave to file an Amended Defence. The court allowed the Defendant's oral Application to file an Amended Defence and Counter-claim within fourteen (14) days.

15. When the matter came up for mention on 16th March, 2017, both the Plaintiff's and the Defendant's advocate informed the court that they had complied with the provisions of the Civil Procedure Rules and were ready to fix the matter for hearing. The matter was fixed for hearing on 13th June, 2017, on which day the Plaintiff's Director, PW1, testified. The matter was adjourned until 19th April, 2018 when PW2 testified. The Plaintiff's case was closed on the said date and the matter was fixed for Defence hearing on 26th June, 2018.

16. The present Application dated 22nd June, 2018 was filed when the matter was pending Defence hearing. The Defendant's advocate participated in the pre-trial conference and when the Plaintiff's witnesses testified. At no particular time did the Defendant's advocate inform the court that they had filed another suit being Machakos ELC Case No. 99 of 2015 in respect to the same suit property.

17. Considering that the Defendant was given leave to file a Defence and Counter-claim, the Defendant has not explained to this court why she did not incorporate the allegations in Machakos ELC. No. 99 of 2015 in the Amended Defence and Counter-claim. Indeed, no good reason has been offered by the Defendant to explain why she had to wait until the Plaintiff closed its case to file an Application for consolidation of the two suits.

18. It is trite that the consolidation of suits is done for the purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportional disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort by making the conduct of several actions more convenient by treating them as one action (*See Koreen United Church & 3 others vs. Seng Ha Sung (2014) eKLR*).

19. Considering that this matter was filed in 2011, and in view of the fact that the Defendant did not raise the issue of consolidating the two suits when this matter came up for pre-trial directions, and only raised the issue when the matter was pending Defence hearing, I find that the Application for consolidation was only filed as an afterthought, and is not meant to achieve the overriding objective stipulated in the Civil Procedure Act.

20. I say so because to allow the Application for consolidation would mean that the hearing of this old suit has to begin *de novo*. In view of the fact that the Plaintiff has closed its case, and considering that the Defendant all along knew that the causes of action in the two matters are the same, re-opening the hearing of the two matters will be prejudicial to the Plaintiff and amounts to an abuse of the court process.

21. For those reasons, I find and hold that the Defendant's Application dated 22nd June, 2018 is unmeritorious. The same is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 24TH DAY OF MAY, 2019.

O.A. ANGOTE

JUDGE