



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**E.L.C. CIVIL CASE NO. 466 OF 2009**

**PAUL KIBUGI MUIITE.....PLAINTIFF**

**VERSUS**

**UNIKEN MARKETING SERVICES LIMITED....DEFENDANT**

**RULING**

Through the application dated 5/10/2016, the Plaintiff seeks to have **ELC Suit No. 57 of 2010** and **ELC Suit No. 525 of 2013** consolidated with this suit. The application is made on the grounds that the three suits which are pending before the Environment and Land Court, arise from the same transaction; have more or less the same parties; and that the issues raised in the suits make consolidation imperative. The Applicant urges that judicial time will be saved if the three suits are consolidated.

The application is supported by the Plaintiff's affidavit. He depones that he is the owner of L.R. No. 12882/35 Karen. He filed a further affidavit attaching copies of the plaints in the three suits. He claims that **HCCC No. 466 of 2009** is an off shoot of **ELC No. 57 of 2010** and that they both relate to the same transaction while **ELC No. 525 of 2013** relates to the same financial arrangement. The Applicant claims that the property which is the subject matter of ELC No. 525 of 2013 was the main security for the loan while the suit property in ELC No. 57 of 2010 formed the additional security. The Plaintiff contends in the suits that the two properties in Karen and Thika were irregularly sold by the National Bank of Kenya, and further, that the issue of charging unconscionable interest cuts across the three suits hence all the issues should be addressed holistically to obviate the likelihood of conflicting decisions being given by the court over the same or similar matters. He argues that consolidation will prevent the multiplicity of suits since the Plaintiff is the common denominator in all the suits.

The Applicant averred that the Defendants will not suffer prejudice if the suits are consolidated as this will save time and costs. He urged that consolidation will assist the court to see the entire spectrum of the dispute and ensure the expeditious disposal of the three suits. The Applicant argued that the Respondents have not shown what prejudice they will suffer if the consolidation is ordered.

The Applicant filed a supplementary affidavit on 14/11/2017 and annexed a copy of the Re-amended Plaintiff in Civil Suit No. 57 of 2010 in which the reliefs sought include a declaration that the transfer by chargee registered as entry number 8 is null and void and that the Plaintiff's right of redemption still exists. The suit seeks to restrain further dealings in the suit property pending hearing and determination of the suit. Prayer number 8 seeks consolidation of that suit with HCCC 633 of 2004 and 466 of 2009. The Applicant also annexed the plaintiff in ELC No. 525 of 2013 in which the Plaintiff seeks a declaration that the sale and transfer by chargee of L.R. No. 8750/1 Thika is null and void.

The Defendant does not oppose the consolidation of ELC No. 466 of 2009 and ELC No. 57 of 2010. However, it is opposed to the consolidation of these two matters with ELC No. 525 of 2013. The Defendant relied on the replying affidavit of Jackson Mwangi. The Defendant submits that consolidating the two suits with ELC No. 525 of 2013 will prejudice its case since it is not a party to that suit. The Defendants urged that consolidation will confuse issues and prolong the resolution of matters where the suits are between different parties.

The Defendant further argued that consolidation of the three suits will occasion prejudice to the parties since the parties in 466 of 2009 had complied with the requirements for pre-trial and the matter has come up severally for hearing and was adjourned at the Plaintiffs instance.

Catherine N. Ngunjiri, a director of Wa-Gathagu Limited, which is the 2<sup>nd</sup> Defendant in ELC No. 525 of 2013, swore the replying affidavit filed in court on 28/2/2017 opposing the consolidation of the suits. She depones that consolidation of ELC No. 57 of 2010 and ELC 525 of 2013 is not viable because the suits deal with different properties, seek different orders and the court is expected to make a determination on different issues. She depones that consolidating ELC No. 466 of 2009 with ELC No. 525 of 2013 amounts to trial by ambush since it has not been furnished with pleadings of the other suit. She contends that the Plaintiff is trying to re-introduce before this court matters which were previously decided by a court of competent jurisdiction and annexed a copy of the ruling made in **Milimani HC Commercial and Tax Division Case No. 633 of 2004 Thugi River Estate Limited and P.K. Muite v National Bank of Kenya and 2 Others**. In that case, the court declined to join Uniken Marketing Services Limited and Wa-Gathagu Limited as parties to the suit. The court found that as purchasers of the suit properties they were not necessary parties to the suit.

She points out that ELC No 57 of 2010 deals with the transfer of L.R. No. 12882/35 situated in Karen while ELC No. 525 of 2013 seeks a

declaration that the sale by the chargee of L.R. No. 8747 to Wa-Gathagu Limited is void. She depones that it is not in the interest of justice to have ELC No. 57 of 2010 consolidated with ELC No. 525 of 2013 since the former suit deals with many issues which do not arise for determination in the latter suit and which do not involve Wa-Gathagu Limited.

National Bank of Kenya which is the Defendant in ELC No. 525 of 2013 and ELC No. 57 of 2010 opposed the application for consolidation on the grounds that the suits raised different causes of action and that it is not a party to the instant suit.

Mr. Kamau who appeared for the 3<sup>rd</sup> and 5<sup>th</sup> Defendants in ELC No. 57 of 2010 and the 3<sup>rd</sup> Defendant in the ELC No. 525 of 2013 did not oppose the consolidation of the three suits.

South and Central (Thika) Investments Limited a party in ELC 525 of 2013 opposed the consolidation urging that the substratum of the cases is different and that there is no commonality of matters to warrant the consolidation sought. It also argues that the suits are at different stages of hearing and or pre-trial hence consolidating the suits will result in confusion and unduly delay the determination of the suits. This party also argued that the Applicant had failed to furnish proof of the allegations it made in its application.

The Defendant also relied on the ruling in HCCC NO. 633 of 2004 annexed to the affidavit of Catherine Ngunjiri in support of the argument that the application raises an issue which is *res judicata*. The Defendant argued that the court having found that the parties sought to be joined were not necessary parties to that suit, it would countermand the decision given in HCCC No. 633 of 2004 on 22/10/2008 if this court were to order consolidation. He argued that no progress had been made in ELC No. 525 of 2013 not even compliance with pre-trial requirements under the Civil Procedure Rules. The Defendant urged the court to disallow the application for consolidation of the three suits while conceding to the consolidation of ELC No. 466 of 2007 with ELC No. 57 of 2010. It urged that ELC Non 525 of 2013 should be heard separately.

The Applicant contended that the ruling by Kimaru J. was not on consolidation, but was on an application for injunction and joinder of parties. Counsel urged that joinder is different from consolidation. He argued that strictly speaking, the National Bank of Kenya which sold the charged properties and triggered these proceedings rationally ought not to be opposed to the consolidation of the suits.

Parties filed submissions which the court has considered. They attended court on 7/5/2018 and highlighted the submissions. They agreed that the proceedings would be taken in ELC No. 466 of 2009.

The court has considered the application, the replying affidavit, grounds of opposition and the submissions of the parties. The issues for determination are: -

- i. Do the three suits raise separate and distinct issues?
- ii. Do the facts giving rise to the 3 suits arise out of the same or similar transactions?
- iii. Are there common questions of law arising from the three suits?

The Parties in ELC Suit No. 57 of 2010 are Paul K. Muite v National Bank of Kenya, Uniken Marketing Services Limited, Elizabeth Nyambura Gicheha, and Peter Maina Ndirangu trading as Express Services Agency. The suit challenges the sale and transfer of L.R. No. 12882/35 situated in Karen, Nairobi.

The parties in ELC Case No. 466 of 2009 are Paul Muite v Uniken Marketing Services Limited. In this suit the Plaintiff seeks a permanent injunction to restrain the Defendant from dealing with or interfering with the Plaintiff's quiet possession and enjoyment of L.R. No. 12882/35 Karen.

In ELC No. 525 of 2013, the parties are Thugi River State Limited and Paul K. Muite v National Bank of Kenya, Wa-Gathagu Limited and the Registrar of Titles. The suit seeks a declaration that the sale and transfer by chargee of L.R. No. 8750/1 (I.R. No. 61875) Thika, is null and void.

The parties relied on several decisions in support of their arguments. The authorities show that for suits to be consolidated, common questions of law or fact would have to arise in both or all of the suits and the right to relief sought in the complaints would have to be in respect of, or arose out of the same transaction. The courts have declined to order consolidation where the suits are separate and distinct and cannot be tried in one suit.

The court agrees with the Defendant that ELC No. 466 of 2009 should be consolidated with ELC No. 57 of 2010 as they both challenge the sale and transfer by chargee of L.R. No. 12882/35. The parties in the two suits are similar. On the other hand, ELC No. 525 of 2013 relates to the sale of L.R. No. 8750/1 situated in Thika. National Bank of Kenya is a party in both 525 of 2013 and 57 of 2010 having advanced loan sums to the Applicant who offered the two parcels of land as security for the loans.

Having looked at the plaint annexed by the Applicant to the supplementary affidavit sworn on 14/11/2016, the court notes that there is no reference in ELC 525 of 2013 which challenges the sale of L.R. No. 8750/1 situated in Thika, to the loan secured by the charge over L.R. No. 12882/35, Karen. The Applicant has not demonstrated the existence of any nexus between the charges over L.R. No. 12882/35, Karen and L.R. No. 8750/1 situated in Thika. The court is persuaded that these two transactions were separate and distinct.

In ELC 525 of 2013, the Plaintiffs aver at paragraph 7 that their advocates were notified on or about 19/6/2008 that the 2<sup>nd</sup> Defendants had purchased the suit property through the statutory power of sale. If the Plaintiff believed the suit raised issues similar to those arising in ELC No. 466 of 2009, then he ought to have amended the plaint in ELC No. 466 of 2009 and added the claim in respect of L.R. No. 8750/1

situated in Thika and not filed a new suit.

The Court orders that ELC No. 466 of 2009 will be consolidated with ELC No. 57 of 2010. ELC No. 525 of 2013 raises distinct and separate issues and will be heard separately. The costs of the application will be in the cause.

**Dated and delivered at Nairobi this 27<sup>th</sup> day of June 2018.**

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Warsame holding brief for Mr. Cohen Amanyu for the Plaintiff

Mr. Havi for the Defendant

Mr. Wamae for the 2<sup>nd</sup> Defendant in ELC No. 525 of 2013

Mr. Wamae holding brief for Mr. Makori for the 4<sup>th</sup> Defendant in ELC No. 57 of 2010

Mr. V. Owuor- Court Assistant

No appearance for the parties in the other suits.