



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 800 OF 2014

CONSOLIDATED WITH ELC NO 989 OF 2014

JOSEPH KAMANDE

JOHN MWANGI NDUTA

(SUING AS THE OFFICIALS OF THE

HUMAMA KOMAROCK SELF HELP GROUP.....1ST PLAINTIFF

THE TRUSTEES ARCHDIOCESE OF NAIROBI.....2ND PLAINTIFF

VERSUS

KURIA GATHONI t/a EMBROSE ACADEMY LTD.....1ST DEFENDANT

NAIROBI CITY COUNTY.....2ND DEFENDANT

RULING

1. The 1st defendant’s Notice of Motion dated 4/3/2015 emanates from an order of this court made on 22/08/2014 consolidating ELC Case No. 800 of 2014 and ELC Case No 989 of 2014. The 1st defendant seeks to have the said order reviewed to allow separate trials. The application is supported by the 1st defendant’s affidavit sworn on 4/3/2015. The application is opposed by the plaintiffs through a replying affidavit sworn by John Mwangi Nduta on 19/5/15.

2. The applicant deponed that the plaintiffs/respondents filed ELC 800 of 2014 and vide an application dated 19/06/14 sought exparte injunctive orders which were granted. He contended that he filed pleadings in response to the said suit together with an application dated 25/06/14 which he exhibited as “EKG4”. He further deponed that the court ordered that the application dated 25/06/14 and the preliminary objection be heard first and the same was scheduled for mention on 1/07/14. He contended further that on the scheduled date, the matter was not listed, and upon perusal of court records, it was established that ELC 800 of 2014 had been consolidated with ELC 989 of 2014. He deponed that he was not afforded an opportunity to be heard nor was his advocate served with the application for consolidation, hence the court should review the order.

3. The 1st plaintiff opposed the application, contending that there was no formal application made to the court for consolidation of the two matters and the same were consolidated due to the fact that Title Numbers Nairobi/Block 121/246, Nairobi/Block 121/247 and Nairobi/Block 121/245 relate to the same property on the ground. He contended that the consolidation was not to favour any party and that the court on its own motion can order consolidation of suits if such suits are dealing with the same subject matter. He contended that each party has the right at any one time to prosecute their application whether the suits are consolidated or not and such right cannot be defeated by consolidation of the suits. He urged the court to dismiss the application.

4. The 1st defendant/Applicant filed written submissions dated 2/02/2018 and argued that the court order made on 22/08/2015 is not in line with Article 50 of the Constitution which preserves the right to fair hearing and principles of natural justice. He submitted that the court order affected him directly as he was entitled to be heard before the said order was made. He submitted that in ELC 800 of 2014 he was sued trading as a company yet a company has a legal personality and can be sued in its own name. He further submitted that he filed an application that his name be removed and the application was to be heard on priority basis but the suits were consolidated before he could be heard on the application. He further submitted that the consolidation order was erroneous and has prejudiced the prosecution of his application and preliminary objection dated 25/06/14. He urged the court to review and set aside the consolidation order.

5. The 1st plaintiff filed submissions dated 15/02/2018 reiterating their earlier averments and submitted that review of the consolidation order is a departure from the key issue in the suits and is a delaying tactic. He submitted that the two suits should proceed as consolidated to avoid

conflicting orders being issued on the same suit property. He submitted that the fact that the applicant has an application pending is not a ground for review of the consolidation order, contending that the applicant can still prosecute his application. He submitted that consolidation of suits cannot prejudice the applicant's prosecution of the application and the preliminary objection both dated 25/06/14 as they raise issues that can be determined in the instant suit. He further submitted that the applicant is at liberty to apply to join whoever he so wishes. He urged the court to dismiss the application. The 2nd defendant/respondent associated himself with the submissions of the 1st plaintiff.

6. The court has considered the tenor and import of the application, the rival affidavits and submissions, the relevant legal framework, and the prevailing jurisprudence on the subject of consolidation of suits. The key question to be answered in the application is whether the two suits are amenable to consolidation as contemplated by the law.

7. Order 1 rule 3 (1) (h) of the Civil Procedure Rules empowers this court to consider consolidation of suits for the furtherance of expeditious disposal of cases. The jurisprudential criteria which guides the exercise of this power was amply set out in **Nyati Security Guards & Services Limited v Municipal Council of Mombasa (2004)eKLR**. The questions to be considered whenever consolidation is contemplated are: (i) whether the same question(s) of law or fact arise in the two or more suits; (ii) whether the rights or reliefs sought in the suits arise out of the same transaction or series of transactions; and (iii) whether any party will be disadvantaged or prejudiced by the consolidation.

8. The impugned consolidation order was not made by the court *suo motto*. The issue of duplicity of suits was raised before the court on 11/8/2014 by counsel for the 1st defendant (applicant). Counsel for the 1st defendant submitted that there was a similar suit, ELC 800 of 2014. Prompted by the submission, the court called for ELC 800 of 2014 with a view to perusing it to establish if the two suits were amenable to consolidation.

9. Upon perusal, the court, on 22/10/2014, gave the following directions:

The court has recalled for ELC. 800 of 2014 and perused the file thereof. In that suit, the subject matter are two parcels of land identified as Nairobi/Block 121/246 and NAIROBI/BLOCK 121/247 both of which are on the admission of the plaintiffs in that suit subdivisions of Nairobi/Block 121/245 which is the subject matter of this suit being ELC No 989 of 2014. This means that the subject matter in the two suits is the same. The parties in ELC No 989 of 2014 are also parties in ELC No 800 of 2014. It therefore follows that both suits should be consolidated. I therefore consolidate the two suits and direct that both files be mentioned before Lady Justice Nyamweya on 28/10/14 for further directions.

10. It is clear from the above verbatim directions that the judge duly considered the relevant principles. She observed that the subject matter in ELC 800 of 2014 are Parcel Numbers Nairobi/Block 121/246 and 247 which are subdivisions out of Nairobi/Block 121/245 which is the subject matter in ELC 989 of 2014. The subject matter in the two suits is therefore the same. She also observed that the parties in ELC 989 of 2014 were also parties in ELC 800 of 2014.

11. Consequently, I have not found any new material which would warrant a review of the consolidation order. The contention by the 1st defendant that the court made the consolidation order *suo motto* is incorrect. To the contrary, it is the 1st defendant (applicant) who raised the issue of duplicity of suits.

12. The upshot of the foregoing is that the Notice of Motion dated 4/3/2015 is dismissed for lack of merit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Oguye holding brief for Mr Njenga for the 1st defendant

Ms Halima Abdi - Court Clerk