



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 296 OF 2014 (O.S)

PAUL WANYIRI NDERITU.....PLAINTIFF

VERSUS

ESTHER NJIRU-OMULELET/A MURIU,

MUNGAI & CO. ADVOCATES.....DEFENDANT

JOEL VICTOIRE FRANCOIS PETERS...INTERESTED PARTY

RULING

At all material times, the plaintiff had instructed the defendant to act for him in the sale to the interested party of a portion of all that parcel of land known as L.R No. 5842/17 situated at Karen within Nairobi City County (hereinafter referred to as “the suit property”). Prior to instructing the defendant, the plaintiff had engaged two firms of advocates to handle the transaction before whom the plaintiff and the interested party had entered into agreement and supplementary agreement for sale dated 31st January 2007 and 24th November 2009 respectively. The defendant took over the conduct of the matter sometimes in January 2013 or thereabouts from the firm of Wanjama & Company Advocates. By the time the plaintiff instructed the defendant to act for him in the transaction, the defendant was already acting for the interested party in the matter. Following the appointment of the defendant to act for the plaintiff as aforesaid, the firm of Wanjama & Company Advocates forwarded to the defendant on the instructions of the plaintiff a number of documents concerning the transaction which included the original title for the suit property.

Sometimes in May 2014, a disagreement arose between the plaintiff and the defendant before the sale transaction between the plaintiff and the interested party was concluded. As a result of the said disagreement, the plaintiff instructed the firm of Iseme, Kamau and Maema Advocates to handle the transaction on his behalf. Following this move by the plaintiff, the defendant declined to handover to the plaintiff’s new advocates the documents that she had received from Wanjama & Company Advocates when she was instructed by the plaintiff to take over the transaction from the said firm of advocates. On 13th August 2014 and 14th August 2014, the plaintiff wrote to the interested party and the defendant respectively through his advocates on record informing them that the agreement for sale that the plaintiff had entered into with the interested party had been terminated and demanded from the defendant all the documents that had been handed over to her by the firm of Wanjama & Company Advocates. The defendant did not comply with the plaintiff’s demand following which this suit was filed.

The plaintiff brought this suit by way of Originating Summons under certificate of urgency on 22nd

September 2014 seeking among others an order to compel the defendant to deliver to the plaintiff all the original documents relating to the suit property which the defendant had received on the plaintiff's behalf and a declaration that the plaintiff is entitled to damages from the defendant for having been deprived of the suit property. The defendant filed a replying affidavit to the Originating Summons on 3rd December 2014. In her response, the defendant contended that she is holding the original title of the suit property to secure the interest of the interested party who had made substantial payment on account of the purchase price of the suit property. On 3rd December 2014, the interested party filed an application for leave to be joined in this suit as interested party. The interested party's application was allowed on 21st April 2015. Prior to being joined in this suit as interested party, the interested party had filed another suit against the plaintiff before this court namely, **ELC No. 66 of 2015, Joel Victorie Francois Peters vs. Paul Wanyiri Nderitu** (hereinafter referred to as "**the second suit**"). In his claim against the plaintiff in the second suit, the interested party averred that the plaintiff had breached the agreements for sale of the suit property which he had entered into with the plaintiff aforesaid. The interested party sought several reliefs against the plaintiff which included, a permanent injunction to restrain the plaintiff from selling or interfering with the portion of the suit property which he had sold to him, an order of specific performance of the said agreements for sale, in the alternative, damages for loss of bargain and further in the alternative, a refund of Ksh.4,448,013.60 which he had paid towards the purchase of the said portion of the suit property together with interest. In the second suit, the interested party is represented by the defendant's law firm while in the present suit, the interested party is represented by the law firm of Kibanya & Kamau Associates.

What is now before me is the defendant's Notice of Motion application dated 22nd September 2015 which was brought under Order 11 (3), Order 37 Rule 16 and Order 51 of the Civil Procedure Rules and section 3A of the Civil Procedure Act in which application the defendant has sought orders that :-

1. This suit be consolidated with **ELC No 66 of 2015 Joel Victorie Francois Peters –vs- Paul Wanyiri Nderitu ("the second suit")** for purposes of hearing and final disposal.
2. That this suit be designated as the pilot file for purposes of taking evidence and writing judgment.
3. That the original title for the property known as LR No. 5842/17 [Original No. 5842/2/16] ("the suit property") be deposited in Court pending the hearing and determination of the dispute between the parties.
4. Upon compliance with order 3 above, the suit and claim against Esther Njiru-Omulele T/A Muriu, Muigai & Co. Advocates be discontinued forthwith with no order as to costs.
5. That this court gives further order or directions as it may deem fit under the circumstances of this suit.
6. That costs be in the cause.

The application is premised on the grounds set out on the face thereof and on the supporting affidavit of the defendant, Esther Njiru- Omulele. In her affidavit Ms. Omulele stated as follows. She is an advocate of the High Court of Kenya and the defendant herein. The plaintiff herein is a defendant in the second suit wherein the interested party herein is the plaintiff. The subject matter of the second suit is a contract for sale of the suit property. In the second suit the interested party has sought an order for specific performance of the agreements for sale of the suit property dated 31st January 2007 and 24th November 2009 and an order restraining the plaintiff herein from interfering in any way with his interest in the suit property. This suit and the second suit arise from the same subject matter namely, the suit property. Her firm Muriu, Mungai & Co. Advocates is not a party to the agreements for sale of the suit property. The suit herein has been brought against her merely because she is holding the title documents for the suit property. This suit and the second suit raise similar questions of law and fact and the same documents shall be produced in evidence at the trial of the same. In the unlikely event that the two suits are left to

continue separately, the court would run the risk reaching conflicting decisions which may be impossible to enforce. The consolidation of the two suits will enable the court make a final determination of the issues arising between the parties and save the court's time while avoiding duplication of proceedings. The documents in contention in this suit should be deposited in court pending the determination of the main dispute between the parties which concerns the agreements for sale aforesaid. Once the said documents have been deposited in court, she should be discharged from the proceedings. The consolidation of the two suits would not prejudice any of the parties.

This application was opposed by the plaintiff through affidavit and further affidavit sworn on 29th September 2015 and 16th March 2016 respectively. The plaintiff denied that this suit is related to the second suit or that the subject matter in the two suits is the same. The plaintiff averred that the issues in the two suits are fundamentally different and cannot conveniently be tried together. He stated that the issues for determination in the second suit relate to the performance of parties' obligations under the agreements for sale dated 31st January 2007 and 24th November 2009. He stated that he delivered to the defendant the original title and other original documents relating to the suit property with instructions to the defendant to hold the same for and on his behalf and on his order but the defendant has unlawfully refused to surrender the same to him. He stated that in this suit he is seeking the return of the said documents and damages for loss suffered as a result of being deprived of the suit property. He stated that the consolidation sought is meant to confuse issues and delay his claim for the return of the documents being held by the defendant. He stated that there are no common questions of law and fact in the two suit since this suit is between an advocate and client for breach of fiduciary relationship owed to the client by an advocate while the second suit is between a vendor and a purchaser seeking to enforce performance of their obligations under agreements for sale of land.

The interested party supported the defendant's application through a replying affidavit sworn on 1st December 2015. He stated that the subject matter of this suit and the parties involved are the same and that the issues of law and fact arising for determination in the two suits are substantially similar. He added that the court will consider the same or substantially similar evidence and applicable law in determining the two cases and that the inherent danger of the decision or outcome in one suit affecting the other suits is real. He stated that the plaintiff and he had mutually agreed that the documents in contention be deposited with the defendant's law firm which at the material time represented both the plaintiff and he in the subject transaction. He stated that the said documents were deposited with the defendant's law firm for the purposes of securing mutual interest of both parties in the suit property pending the completion of the sale of a portion of the suit property by the plaintiff to him. He contended that in view of the mutual agreement between the plaintiff and he to have the title deed for the suit property deposited with the defendant's law firm as security for the completion of the sale transaction, the release of the said documents to the plaintiff would be prejudicial to him and the completion of the sale transaction between the plaintiff and him. He stated that due to the competing claims in this suit and the second suit, it is in the interest of justice and fairness for the two suits to be consolidated for hearing purposes and for the documents in contention to be deposited in court pending the hearing and determination of this suit.

The defendant's application was canvassed by way of written submissions. The defendant submitted that for a suit to be consolidated the court should be guided by the following factors:-

1. Whether the same question of law and fact arise in both cases.
2. Whether the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions.
3. Whether any party would be disadvantaged or prejudiced or whether consolidation will confer undue advantage to the other party.

The defendant submitted that he has met the foregoing criteria by demonstrating that the suits herein involve the same parties and concern the same subject matter. The defendant submitted that the reliefs and remedies that the parties in both suits have sought relate to the same subject matter and the same transaction and the evidence and documents to be relied on in both suits would be the same. The defendant

relied on the case of **Kenya Anti- Corruption Commission vs. Wilson Gacanja & 2 Others [2014] eKLR** where the court stated that, “ **In my view the various actions in the separate suits touch and concern the same subject matter and although there are different plaintiffs and defendants, the plaintiff in ELC No. 347 of 2013 can be said to be common as they claim the parcels of land that even the other plaintiffs in the other suits claim and the issue to be determined would be who of the various claimants is entitled to the suit land or portion of the suit land. I am satisfied that the issue for determination in the various suits is common and in my opinion it would be expedient and time saving to try all the 5 cases together to obviate the necessity of having to hear the same evidence time and again in every suit and further to prevent the prospects of having conflicting decisions on the same subject matter being rendered by different courts which could lead to judicial confusion.**”

On the prayer that the documents in contention be deposited in court, the defendant submitted that the said documents should be deposited in court until final determination of this suit so as to avoid the suit property being interfered with or being sold to a third party. On this issue, the court was referred to the case of **G. Criticos & Company Limited & Another vs. John Njenga Kimuthia & 2 others [2011] eKLR** where the court stated that, “**Indeed this court has jurisdiction to order deposit in court of valuable items to avoid parties intermeddling with those valuable items to the detriment of other litigants. In our present case the transaction for the intended subdivision of the land cannot possibly continue further if the title is deposited in court. There are complaints that the plaintiffs want to subdivide and dispose of it to third parties thus defeating the purpose of this suit .The interest of justice would require that the orders that will ultimately be made by this court are not rendered nugatory or of no effect because of parties entering or finalizing transactions to the detriment of other parties. In my view depositing the title in court could be one way of avoiding adverse transactions taking place. I find justifiable reason to order that the title be deposited in court to avoid further legal transactions in this matter that could affect the contesting parties.**”

The plaintiff filed his submissions on 16th March 2013 in opposition to the application. The plaintiff submitted that that the two suits which the defendant want consolidated do not involve common questions of law and fact. He relied on the case of **Eunice Nyairungu –vs. -LibeyNjokiMunene&2 others [2015]eKLR** where the court stated that; “**Applying the principle upon which consolidation may be ordered to the facts and circumstances of the two suits sought to be consolidated, I am not persuaded that consolidation would be feasible. The issues and the applicable law in respect of the issues in the two suits are different. The facts are not common and neither do any common questions of law arise in the two suits.**” The plaintiff submitted further that his claim against the defendant is limited in scope and context and as such cannot be consolidated with the claim which the interested party has against him. On the nature of his claim, the plaintiff referred the court to the case of **Slyvester Hasusa Makhoka vs. James Okao (t/a Okao & Company Advocates) & 4 others [2014] eKLR** where the court stated that, “**More importantly, these proceedings as instituted by the plaintiff are very limited in nature and scope. They are in the essence of summary proceedings between the plaintiff and the 1st defendant (advocate and client) under Order 52, rule 4 of the Rules seeking in the main an order for a cash account. The rival claims for the Kshs.8,400,000/00 between the plaintiff, the 4th defendant and the 5th defendant cannot be adjudicated in these limited proceedings. Those rival claims can only be adjudicated in a proper, fully fledged suit most likely commenced by plaint or by an originating summons under Order 37 of the Rules.**” The plaintiff submitted that the defendant’s application for consolidation is aimed at confusing the court by muddling the issues so as to prejudice the plaintiff’s case against her. The plaintiff submitted that this suit arose out of an advocate /client relationship and should remain confidential. He contended that if the defendant’s application is allowed, he would be prejudiced because he will not be able to call the defendant as a witness as she will raise the issue of advocate client confidentiality. On this submission, the court was referred to the case of **Kamamindi Selfridges Supermarket Ltd vs. Kiambu Murutani Company Ltd[2013] Eklr** where the court stated that “ **It is not disputed that Greg Karungo Advocate acted for both parties in the sale transaction that has given rise to the proceedings herein. The defendant is also categorical that it has not given any consent to the said advocate to disclose any information acquired by him during the said retainer. Section 134(1) of the Evidence Act and the decision in King Woolen Mills & Another vs. M/s Kaplan & Stratton (1993) KLR 273 therefore applies in this case and there is the risk that by being called as a witness for the plaintiff, Greg Karungo Advocate**

may disclose and/or utilize confidential information acquired from the defendant and thus prejudice the said defendant”

On the issue of depositing the original documents in contention in court, the plaintiff submitted that this prayer is meant to confuse issues and an attempt by the defendant to have the suit against her discontinued without the same being heard and determined on its own merits. The plaintiff submitted that the defendant’s prayer to have the said documents deposited in court is an indirect acknowledgement that she is holding the same illegally.

The interested party filed his submissions on 8th February 2016 in support of the defendant’s application. He submitted that consolidation of suits herein would save on costs, time as well as make the conduct of the actions more convenient by treating them as one action. He stated that the plaintiff and the interested party have common interests in the suit property the subject of the two suits. On whether the documents the subject of this suit should be deposited with the court, the interested party submitted that it would serve the interest of justice to do so as this will ensure that the suit property is preserved pending the hearing of the two suits.

I have considered the defendant’s application together with the affidavits and written submissions which were filed in support thereof by the defendant and the interested party. I have also considered the affidavits and submissions which were filed by the plaintiff in opposition to the application. Order 11 Rule 3 (1) (h) of the Civil Procedure Rules enjoins this court to consider consolidation of suits with a view to furthering expeditious disposal of cases. The principles which this court applies in the exercise of its discretion in applications for consolidation of suits were amply set out in the decision of Maraga J. (as he then was) in the case of **Nyati Security Guards & Services Ltd vs. Municipal Council of Mombasa [2004] eKLR** as follows:

“The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-

- 1. Some common question of law or fact arises in both or all of them; or**
- 2. The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or**
- 3. For some other reason it is desirable to make an order for consolidating them.”**

Further the court in **R.M.G vs. N. G. & another, Nairobi HCCC No. 29 of 2009** stated that, **“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously”.**

What this court needs to determine is whether the defendant has satisfied the foregoing principles. I have at the beginning of this ruling set out in summary the history of the dispute between the parties herein. This suit was brought by the plaintiff by way of Originating Summons under Order 52 Rules 4 of the Civil Procedure Rules to compel the defendant to release certain documents that came into the possession of the defendant by virtue of her position as the advocate for the plaintiff in the agreement for sale by the plaintiff to the interested party of a portion of the suit property. As was stated in the case of **Slyvester Hasusa Makhoka vs. James Okao (T/A Okao & Company Advocates) and 4 others (supra)**, proceedings under Order 52 Rule 4 of the Civil Procedure Rules are special in nature and are only restricted to situations where there is advocate/client relationship. The scope of the reliefs that the court can grant under that rule is also limited. The main issues which this court would be required to determine in this suit are, whether there was an advocate/client relationship between the plaintiff and the defendant, whether the plaintiff delivered to the defendant the documents in question in the course of that relationship, the terms under which the documents were delivered to the defendant, whether the defendant

has refused to return to the plaintiff the said documents and whether the defendant should be compelled to deliver to the plaintiff the said documents.

On the other hand, the second suit between the interested party and the plaintiff concerns the agreements for sale which the plaintiff entered into with the interested party. The main issues for determination in the second suit are, whether the plaintiff breached the agreements for sale which he had entered into with the interested party and if so, what reliefs the interested party is entitled to. The parties in this suit are the plaintiff and the defendant while the parties in the second suit are the plaintiff and the interested party. The defendant herein is not a party to the second suit and no claim of whatsoever nature has been made against her in that suit. From what I have set out above, I am not persuaded that there are common questions of law or fact in this suit and the second suit. As I have shown above, the issues that arise for determination in the two suits are divergent. The nature and scope of the two suits are also at variance. The causes of action in the two suits do not also arise from the same transaction. The plaintiff's claim against the defendant arises from his client/advocate relationship with the defendant while the interested party's claim against the plaintiff in the second suit arises from an alleged breach of agreements for sale of portions of the suit property. Due to the foregoing, I am not satisfied that the defendant has made out a case for consolidation of this suit with the second suit between the plaintiff and the interested party.

On the issue as to whether the documents in contention in this suit should be deposited in court, again, it is my finding that no basis has been laid for such order. The dispute herein is whether the defendant is entitled to keep holding onto the said documents. The defendant has filed a replying affidavit to the plaintiff's Originating Summons herein in which affidavit, she has justified her decision to continue holding onto the said documents. If the defendant is keeping the said documents lawfully, there is no reason why the same should be deposited in court. In my view there are no two ways about the dispute over these documents. The documents should be kept by the defendant if she is convinced that she is lawfully holding the same or should be released to the plaintiff if there is no justification for the defendant's continued detention of the same. The defendant had also asked the court to discharge her from these proceedings. I am in agreement with the plaintiff's submissions that there is no basis for discharging the defendant from these proceedings before the hearing of this suit that has been brought against her by the plaintiff. A claim has been made against the defendant which the defendant has denied. An order discharging the defendant from these proceedings would be tantamount to determining the dispute between her and the plaintiff in her favour without a hearing. That move would be contrary to the provisions of Order 52 rule 4 of the Civil Procedure Rules. The same would also offend the plaintiff's constitutional right to a fair hearing.

The upshot of the foregoing is that I find no merit in the defendant's application dated 22nd September 2015. The same is dismissed with costs to the plaintiff.

Delivered and Dated at Nairobi this 2nd Day of August. 2016

S. OKONG'O

JUDGE

In the presence of

N/A for the Plaintiff

Mr. Wilson for the Defendant

Mr. Kibanya for the Interested Party

John Court Assistant