



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 13 OF 2008**

**VINCENT E. MUKOKO.....PLAINTIF**

**VERSUS**

**ABDIRAHMAN ABDINUR..... DEFENDANT**

**AND**

**HARUN OMAM OKAL OKEYO.....INTERESTED PARTY**

**RULING**

**The Application**

The Defendant herein is seeking the following orders in an application by way of a Notice of Motion dated 22<sup>nd</sup> August 2013:

1. That High Court Civil Cause No. 132 of 2013 at Nairobi between Abdirahman Abdinur and Vincent E. Mukoko be consolidated and heard with ELC No. 13 of 2008.
2. That this Court grants a stay of the proceedings in this case pending the hearing and determination of this application.

The Defendant's application is premised on grounds outlined in the application and in an affidavit he swore on 22/8/2013. He claims that the subject matter in the two suits is the same and the parties are similar. Further, that the intended consolidation will not introduce a new cause of action and will not be prejudicial to the Plaintiff's case. The Defendant attached copies of the Pleadings of High Court Civil Case Number 132 of 2013.

**The Responses**

This application was opposed by both the Plaintiff and Interested Party. The Plaintiff filed Grounds of Opposition dated 16<sup>th</sup> September 2013 wherein he stated that the Defendant's application together with the suit in High Court Civil Case Number 132 of 2013 are frivolous, vexatious, an abuse of the court process, and meant to delay the hearing and determination of the Plaintiff's suit in Civil Case Number 13 of 2008 (O.S) and should be struck out. Further, that the Defendant's application and suit offend the provisions of sections 6 of the Civil Procedure Act, and should be dismissed with costs.

The Plaintiff averred that Sitati J. in a ruling dated 1<sup>st</sup> October, 2010 delivered herein made a decision that the suit property, namely Massionette No. 2 on L.R No. 209/12308/11 belongs to the third party, Harun Omam Okal Akeyo. However, that the Plaintiff has not been able to hand over vacant possession of the

suit property as the Defendant has unlawfully refused to vacate and he is not paying rent while taking advantage of the pendency of this suit.

Further, that the Defendant's occupation of the suit property is illegal and unlawful, as he has never been a purchaser and his tenancy with the Plaintiff determined on or about 31<sup>st</sup> December 2007. The Plaintiff asked that the Defendant be compelled to deposit rent in court at the market rate together with security for costs of Kshs.6 million since 16th January 2008 to date.

The Interested Party also filed Grounds of Opposition dated 18<sup>th</sup> October 2013, wherein he averred that. Sitati J. in the ruling dated 1<sup>st</sup> October, 2010 on an application by the Defendant herein for an order of injunction against the Interested Party, dismissed that application and found that the Interested Party had never been nor was he a party to this suit. In addition that Muchelule J. in his ruling on the Plaintiff's application dated 3<sup>rd</sup> February, 2011 for vacant possession against the Defendant reiterated that the Interested Party has never been nor was he then a party to this suit.

The Interested Party stated that he is not a party in HCCC No. 132 of 2013 and that the matters raised in HCCC No. 132 of 2013 are *res judicata*. Further, that the Defendant's claim in this suit is inconsistent with the claim in HCCC No. 132 of 2013.

### **The Submissions**

This Defendant's application was canvassed by way of written submissions. The Defendant's Advocates filed submissions dated 10<sup>th</sup> October 2013, wherein it was averred that the dispute in the two suits sought to be consolidated arose out of the same subject matter which is an agreement to lease with the option to purchase masionette No. 2 on LR No. 209/12308/11, located in South C Nairobi. Further, that the parties in the two suits are the same, the rights and reliefs claimed in the two suits arise out of the same transaction, and the decision made in one suit will directly affect the other.

It was further submitted by the Defendant's counsel that the overriding objective of the Civil Procedure Act and Rules under section 1A of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes, and consolidating the two suits will save both the court's and the parties' time. Th counsel cited various authorities where suits were consolidated, including **EAN Kenya Ltd vs John Sawers & 4 Others (2007) e KLR, Murban Movers vs Tornado Carriers (2013) e KLR and Rispah Wangari Githuku vs Josephat Kimani & Another, (2013) e KLR.**

The Advocates for the Plaintiff filed submissions dated 18<sup>th</sup> November 2013 and reiterated their arguments in opposition to the Defendant's application. The counsel submitted that the Plaintiff filed the suit herein on 16<sup>th</sup> January 2008, and that most issues have been determined by various applications that have been filed and heard since then. Further, that the issues being raised by the Defendant are the same issues in the present suit, majority of which have been determined including that of ownership of the suit property. It was contended that the Defendant's suit therefore offends section 6 of the Civil Procedure Act, and should be stayed pending the hearing and determination of the suit herein.

The Advocates for the Interested Party filed submissions dated 18<sup>th</sup> October 2013 and reiterated the findings in the rulings that were delivered by Sitati J. and Muchelule J. on 1<sup>st</sup> October 2010 and 3<sup>rd</sup> February, 2011 respectively, and reproduced the relevant parts of the said rulings. The Interested Party submitted that the matters and issues raised in the Plaintiff's application filed in HCCC 132 of 2013 are the same that arose in ELC No. 13 of 2008, and that there is no claim made or remedy sought against him in the said Plaintiff.

Further, that no issue has been raised with regard to the Interested Party's ownership of the suit property. The Interested Party submitted that the Defendant in filing HCCC 132 of 2013 and raising the same issues that have been determined in the present suit was *res judicata* and in abuse of the process of court. The counsel for the Interested Party relied on the judicial decisions in **Prof. Christopher Mwangi Gakuu vs**

**Kenya National Highway Authority and 5 Others, HC Constitutional Application No 585 of 2012, and Magnate Ventures & Another vs Nairobi City Council and 2 Others, HCCC 708 of 2008** in this regard.

### **The Issues and Determination**

I have carefully considered the pleadings and submissions made by the parties. The main issue for determination is whether the suit herein is amenable to consolidation with **HCCC 132 of 2013 - Abdirahman Abdinur and Vincent E. Mukoko**. The provision of the law that empowers this Court to consider consolidation of suits is Order 11 Rule 3 (1)(h) of the Civil Procedure Rules, and the objective is to further the expeditious disposal of cases. The principles involved when a court is to consider consolidation of suits were also amply set out 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.”**

The task before this court is therefore one of comparing the suits sought to be consolidated, in order to determine whether the same involves common questions of law or fact, whether the reliefs claimed arise out of the same transaction or whether it is convenient and efficient to pursue the same in a consolidated suit.

I have in this regard perused the Originating Summons dated 16<sup>th</sup> January 2008 and filed in court on the same date and note that it was seeking a determination of the following questions:

1. Whether the caveat registered as IR 96961/3 on the suit property by the Defendant is fraudulent by reason of being based on a false document being the agreement for sale dated 10<sup>th</sup> January 2007
2. Whether the said caveat should be withdrawn by the Defendant or removed by an order of the Court
3. Whether the Plaintiff was entitled to vacant possession of the suit property after the expiry of the Defendant’s tenancy and to enable him transfer it to a third party who has purchase the property.
4. Whether the Plaintiff is entitled to compensation in general damages for fraud and loss of earnings

I have also perused the Plaintiff filed in HCCC 123 of 2013 dated 19<sup>th</sup> April 2013 and filed on 23<sup>rd</sup> April 2013. I note that the main claim by the Plaintiff therein is that the Defendant therein breached a sale agreement for the sale of the suit property and sold it to a third party, and the said Plaintiff is claiming payment of Kshs 4,250,000/= being loss of opportunity to purchase and own the said property, and loss of rental income, as well as general damages.

Both suits arise from an agreement entered into between the Plaintiff and Defendant dated 1<sup>st</sup> December 2006 for the purchase of the suit property. The parties in both suits are the Plaintiff and Defendant herein, with the Plaintiff herein being the Defendant in HCCC 231 of 2013, and the Defendant herein is the Plaintiff in the said suit. The nature of the agreement entered into by the parties is what is disputed, as well as the issues as to whether there was breach of the same, and if so which party was in breach and what remedies the parties are entitled to. The alleged Interested Party has not been joined as a party in either suits and it is my opinion that he has no right of audience before this Court for this reason.

It is however worth to note that the issue of the caveat raised in the originating summons filed in ELC 13

of 2008 was disposed of in the ruling by Sitati J. delivered on 1<sup>st</sup> October 2010, in which the Honourable Judge allowed prayer 2 of the Plaintiff's Chamber Summons dated 16<sup>th</sup> January 2008 which sought the immediate withdrawal and removal of the caveat registered as IR 96961/3 on the suit property.

I also note that directions as to the hearing of the Originating Summons dated 16<sup>th</sup> January 2008 filed in ELC 18 of 2008 have not been given, neither has it been converted to a Plaint. It was therefore not possible for the Defendant therein to file a Defence and Counterclaim thereto. He was therefore within his rights to file the suit in HCCC No. 132 of 2013 to present his claim, and as the issues he raises arise from the same set of facts as those in the suit herein, and will still need to be heard and determined upon, it is appropriate that the two suits be heard and determined together to save on judicial time and costs.

The prayer for consolidation in the Defendant's application dated 22<sup>nd</sup> August 2013 is accordingly allowed for the foregoing reasons, and it is hereby ordered as follows:

1. That the suit in **Nairobi HCCC ELC NO 13 OF 2008 (O.S)- Vincent E. Mukoko vs Abdirahman Abdinur** herein be consolidated with **Nairobi HCCC No. 132 of 2013 - Abdirahman Abdinur vs Vincent E. Mukoko** for purposes of being heard and determined together. The hearing shall be conducted on the basis of the pleadings already filed in the two suits, subject to any subsequent amendments.
2. The Plaintiff in **Nairobi HCCC ELC NO 13 OF 2008 (O.S)- Vincent E. Mukoko vs Abdirahman Abdinur** shall be the Plaintiff in the consolidated suit, while the Defendant in the said suit shall remain the Defendant in the consolidated suit.
3. The said Plaintiff and Defendant in the consolidated suit shall within 60 days of the date of this ruling file a bound, indexed, and paginated bundle of the pleadings, list and bundle of documents and witness statements that they wish to rely on during the hearing of the consolidated suit.
4. The file for the suit in **Nairobi HCCC ELC NO 13 OF 2008 (O.S)- Vincent E. Mukoko vs Abdirahman Abdinur** shall be the lead file for purposes of filing of pleadings and recording of proceedings.
5. The costs of the Defendant's Notice of Motion dated 22<sup>nd</sup> August 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_16<sup>th</sup>\_\_\_\_ day of

\_\_\_\_February\_\_\_\_, 2015.

**P. NYAMWEYA**

**JUDGE**