



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI**

**ELC CAUSE NO. 231 OF 2013**

**JOHN MWANGI WAMAI.....PLAINTIFF/RESPONDENT**

**VERSUS**

**TERESA GATHIRI MWEMA.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**WILLIAM NGATIA KARIUKI..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**Introduction**

1. The 1<sup>st</sup> defendant/applicant, **Teresa Gathiri Mwema** (hereinafter called the applicant) filed the notice of motion dated **27<sup>th</sup> May, 2014** praying that the suit herein be consolidated with Nyeri ELC No. 27 of 2014 for purposes of hearing.
2. The application is premised on the grounds that the parties as well as the subject matter in the suits are the same; that it is in the interest of justice to have the suits heard together and that no prejudice will be occasioned on the parties if the cases are consolidated.
3. The application is supported by the affidavit of the applicant in which the grounds thereon are reiterated.
4. In reply and opposition to the application, the plaintiff **John Mwaniki Wamai** (hereinafter referred to as the plaintiff/respondent) filed the replying affidavit sworn on **17<sup>th</sup> June, 2013**. In that affidavit the plaintiff/respondent has deposed that the application is *res sub judice* Nyeri ELC No.24 of 2014; that the applicant ought to have lodged a counter-claim under Nyeri ELC No.27 of 2014 as opposed to filing a new suit and that the suit on which the application is based is fatally defective and an abuse of the court process.
5. The plaintiff/respondent also filed the notice of preliminary objection dated **4<sup>th</sup> June, 2014** where he contends that the application is *res sub judice* Nyeri ELC No.27 of 2014; that this court lacks jurisdiction to hear and determine the application and that the application and the suit is bad in law, without merit and an abuse of the process of the court.
6. The application is also opposed through the replying affidavit of the 2<sup>nd</sup> defendant (William Ngatia Kariuki) sworn on **12<sup>th</sup> June, 2014**. In that affidavit, The 2<sup>nd</sup> defendant has pointed out that the parties in

both suits are the same and contended that the applicant should raise the issues raised in the former one, Nyeri ELC No.27 of 2014, instead of filing another suit.

7. The application was disposed of by way of written submissions.

### **Submissions for the applicant:**

8. In the submissions filed on behalf of the applicant, it is conceded that the issues raised in the suits as well as the parties in the suits are the same but explained that the applicant could not raise a counter-claim as suggested by the respondents because his claim is premised on the activities of his co-defendant as opposed to those of the plaintiff in the former suit.

9. On whether the suit should be struck out for being *res sub judice* Nyeri ELC No.27 of 2014, it is submitted that **Section 6** of the Civil Procedure Act which the plaintiff/respondent relies on to challenge the application, does not bar consolidation of suits. Further that the respondents have not demonstrated the prejudice, if any, they would suffer if the suits are consolidated.

10. Reference is made to **Order 11 Rules 1 and 3** of the Civil Procedure Rules and submitted that the law allows consolidation of similar suits. These rules provides as follows:-

**11(1) “This Order shall apply to all suits except small claims or such other suits as the court may order by order exempt from this rule**

**3) with a view to furthering expeditious disposal of cases and case management, the court shall within thirty days after the close of pleadings convene a case conference in which it shall-**

**h) consider consolidation of suits.**

### **Submissions for the plaintiff/respondent**

11. In the submissions filed on behalf of the plaintiff/respondent it is reiterated that the application herein offends the provisions of **Section 6** of the Civil Procedure Act. In that regard, reference is made to the decisions in the cases of **Thiba Min Hydro Co. Ltd vs. Joseph KaruNdwigwa (2013) e KLR and Republic v. The Chairman District Alcoholic Drinks Regulation Committee & 5 others Malindi HC Misc. Application No.4 of 2013 (JR).**

In **Thiba Min Hydro Co. Ltd** (*supra*) **Oloa J.**, stated as follows:-

**“...It is clear to me that the plaintiff herein and the defendants are really the same litigants and the claim herein can be perfectly litigated in the suit now before the sub-ordinate court. It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleadings in both cases, I am satisfied that the claim herein can be litigated in Kerugoya CMCC No. 176 of 2013 and there can be justification in having the two cases being heard parallel to each other. That would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which requires under Section 1B that there be “efficient use of the available judicial and administrative resources...”**

12. In the Malindi Case (*supra*) the presiding judge, **Angote J.**, stated:-

**“A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process....”**

### **Analysis and determination:**

13. In the circumstances of this case, it is not in dispute that the subject matter of the suits and the parties involved are the same. The applicant explains that she was prevented from lodging a counter-claim in the former suit by the reason that her claim in this suit is premised on the activities of the 2<sup>nd</sup> defendant/respondent.

14. Being of the view that the explanation offered by the 1<sup>st</sup> defendant/applicant is reasonable and being fully in agreement with the observations of **Oloa J.**, in **Thiba Min Hydro Co. Ltd vs. Joseph Karu Ndwigwa**(*supra*) to the effect that the remedy to a plea of *sub judice* is not to strike out a suit but either to have it stayed or consolidated and being satisfied that in the circumstances of this case it is in the interest of justice to have the issues raised in the two suits heard together, I find the application to be merited and allow the same in terms of prayer (1).

15. Costs of the application shall be costs in cause.

**Dated, signed and delivered at Nyeri this 11th day of May, 2015**

**L N WAITHAKA**

**JUDGE**

**In the presence of**

Mr. Kahiga h/b for Mr. Wachira for the 1<sup>st</sup> Defendant/Applicant

Mr. Githinji h/b for Mr. Abwuor for the Plaintiff

Ms Wambui h/b for Mr. Gori for the 2<sup>nd</sup> Defendant.