



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 503 OF 2012

KENYA ARMED FORCES OLD COMRADES

**ASSOCIATION REGISTERED
TRUSTEES.....PLAINTIFF**

VERSUS

THE REGISTERED TRUSTEES

**OF AGAPE FELLOWSHIP
CENTRE.....DEFENDANT**

RULING

This court (Mwilu J. now JA) gave directions on 17/9/2012 that the applications dated 4/9/2012 and 6/9/2012, be heard together and that the application dated 9/8/2012 to await the outcome of two the earlier applications. It was subsequently agreed between the parties that the two applications shall be disposed off by way of written submissions.

Application dated 4/9/2012

The Defendant filed this application seeking an order for stay of proceedings in this suit pending the hearing and final determination of *HCCC 1267 of 2001, Kenya Armed Forces Old Comrades Association Registered Trustees v Nairobi City Council; The Registered Trustees of Agape Fellowship Centre & 3 Others*. The application is premised on grounds that there exists a suit filed in this court *HCCC 1267 of 2001* in which the subject matter is the same as the subject matter in the current suit and that both the Plaintiff and Defendant herein are parties to the said suit. The Defendant avers that the Court in *HCCC 1267 of 2001* granted interim orders against the Plaintiff herein and therefore the orders sought in this suit are meant to circumvent the interim orders granted in *HCCC 1267 of 2001*. The Defendant contends that this suit is therefore prejudicial and an embarrassment to the integrity and honor of this court and also and abuse of the court process. Consequently it is in the interest of justice that the orders be granted.

The application is supported by an affidavit sworn on 4/9/2012 by John Karanja, a Pastor of the Defendant Church. The deponent reiterated that there is a suit *HCCC 1627 of 2001* pending before court filed by the Plaintiff herein against the Attorney General and the City Council of Nairobi and that its subject matter is an access road. The deponent stated that the Defendant herein and 3 other parties filed separate applications seeking joinder to the suit and subsequently, sought and obtained an injunction

barring the Plaintiff from occupying and constructing on the access road and further sought and obtained a mandatory injunction to compel the Plaintiff to demolish a wall built cutting off the access road. It was the deponent's averments that on 5/7/2010 the Plaintiff's advocate gave an undertaking that the contempt of court actions by the Plaintiff would cease and the Defendants would be allowed access to the access road as ordered by the Court on 28/9/2009. Further that the Court on 12/10/2009 ordered that the status quo that would obtain would be to that the Defendants do continue to access the access road until the applications were heard and determined.

The deponent stated that the Court order joining the Defendant herein to *HCCC 1627 of 2001* has not been varied or set aside to date. Further that, this suit is an abuse of the court process for reasons that; it a suit involving similar parties; there are orders in favour of the Defendants *HCCC 1627 of 2001* which order restores the use and benefit of the access road as delineated in the Part Development Plan No. 242 and 382; the Plaintiff having been unable to vacate the said orders has only commenced this suit in an attempt to circumvent the orders granted in *HCCC 1627 of 2001*; the instant suit offends the provisions of Section 6 of the Civil Procedure Act; and any orders issued herein stand to adversely affect and prejudice not only the Defendants but also third parties who use and benefit from the access road. The deponent reiterated that it is only just that this suit be stayed pending the outcome of *HCCC 1627 of 2001*.

Application dated 6/9/2012

Kenya Freedom from Hunger Council for National Development of Nairobi Registered Trustees brought this application seeking an order for joinder as a Defendant to the suit herein and a further order that there be a stay of these proceedings pending the hearing and determination of *HCCC 1627/2001*. The application is premised on grounds that the dispute herein relates to a public access road and that the Plaintiff has encroached on that public access road. The Applicant averred that it is the registered owner of property known as L.R. No. 209/9666 located at Madaraka Estate, Nairobi which is adjacent to the access road in dispute and therefore the Applicant is entitled to the use of the said road.

Michael G. Ojiambo, the General Secretary of the Applicant swore a Replying Affidavit on 6/9/2012 in support of the application. The deponent stated that the Plaintiff's action has been ongoing since 2001 when *HCCC 1627 of 2001* was instituted. Further that there is pending an application dated 23/6/2006 joinder of the Applicant to the said suit but that the Applicant enjoys certain orders made by the Court in respect of the public access road. The deponent stated that it is important to join the Applicant to this suit in the interest of justice and to ensure that the Applicant is protected. The deponent reiterated that the suit herein is a duplication of the same disputes over the same public access road and regarding the same adjacent properties of land. Thus, to ensure that the Court does not proceed to try the matter which is substantially the same as the one in *HCCC 1627 of 2001*, the deponent prayed that the suit herein either be stayed or the two suits be consolidated.

Response

Colonel (Rtd) Peter Ngugi Ikenye, the General Manager of the Plaintiff, swore a Replying Affidavit on 3/10/2012 in response to the Defendants' applications. The deponent admitted that the Defendant herein together with other third parties had filed an application for joinder in *HCCC 1627 of 2001* but that they are not yet parties to the said suit and as such they have no *locus standi* to make any application on the basis of the said suit. He deposed further that the parties as well as the issues in dispute are not the same in both suits as alleged by the Defendant and consequently, there is no nexus whatsoever between this suit and *HCCC 1627 of 2001*. The deponent referred to the citation of *HCCC 1267 of 2001* made by the Defendant in the application and deposed that the Plaintiff is not aware of and has not been party to such suit.

Submissions

Musyimi & Company Advocates for the Defendant filed submissions dated 3/6/2013 wherein counsel reiterated the contents of the applications and affidavits. Counsel submitted that the Defendant owns a property that is served by the access road in question and therefore by carving and encroaching on

the access road, the Plaintiff is curtailing on the Defendant's right to enjoy their properties. As regards consolidation of suits, counsel submitted that notwithstanding that parties to two suits are different, provided that the issues of law and fact are the same, and for purposes of expediency, the suit ought to be consolidated. In support of this submission, counsel cited the case of **EAN Kenya Limited v John Sawera & 4 Others (2007) eKLR** where the Court found that:

“the test to be applied is not whether the parties are the same but where the same or similar questions of law or fact are involved in the suits.”

Hamilton Harrison & Mathews Advocates for the intended Defendant filed submissions dated 13/3/2013. Counsel submitted that the court has unfettered discretion on joinder of parties. Counsel cited the case of **Benson Mwangi Wangai v Ibrahim Ndwiga & another (2005) eKLR** where the court observed that it will readily allow a party to be joined to proceedings provided that the said party's presence before Court is necessary in order to enable the court effectively and completely adjudicate and settle all questions involved in the suit joinder of a party to a suit. As regards the prayer for stay of proceedings and in the alternative consolidation of the two cases, counsel submitted that it would depend on how the court views the matters before it. Counsel submitted that consolidation would mean that the two suits are heard simultaneously and stay of proceedings would ensure that no conflicting judicial decision relating to the matters in the two suits resulting to absurdity of court decisions. Counsel cited the cases of **Kenline Agencies v Barclays Bank of Kenya HCCC No. 94/2004** where the court order stay of proceedings finding that to *allow the suit to proceed would be to entertain the danger of two courts reaching diverse decisions on the same issue*. **Rosaline Njeri Macharia v Guardian Bank Limited & Others HCCC No. 938/2000** where the court in finding that *the issues of law and issues of fact are interwoven in both cases.....it was desirable that the two cases be disposed together*.

Wachira Ndung'u & Company Advocates for the Plaintiff filed submissions dated 4/6/2013. Counsel reiterated that the two suits have no nexus between them as the present suit is against the Defendant for orders of injunction on grounds of trespass whereas in HCCC 1627 of 2001 in which the Plaintiff seeks injunction against the City Council of Nairobi restraining it from demolishing its wall, it has no claim against the Defendant whose application for joinder thereto is pending determination. Consequently, the Defendants and the causes of action in both suits are different. Counsel submitted that though the land, the subject matter is the same there were no issues in common that would justify the two suits to be consolidated. In respect to the application for joinder, counsel submitted that the Applicant has failed to demonstrate what interest it seeks to pursue in this matter and further that there is no cause of action that has been laid out against the Applicant.

Determination

There are two issues for determination, namely, joinder of the Applicant as a Defendant to this suit and secondly, an order of stay of these proceedings or, in the alternative, consolidation of the present suit with HCCC No. 1627 of 2001. In respect to joinder, the Applicant avers that he is an owner of a property that is adjacent to an access road, the subject matter of this dispute. The Applicant states that it is in interest of justice that it should be joined in order to safeguard its interest as any orders made herein may be prejudicial to it noting that it enjoys some orders granted in HCCC No. 1627 of 2001. Order 1 Rule 10(2) of the Civil Procedure Rules provides for joinder of parties. Other than assisting the Court to effectively and completely adjudicate and settle all questions involved in the suit, the Applicant must demonstrate that it has a direct interest in the subject matter See **Joseph Leboo & 2 Others v Director Kenya Forest Services & Another [2013] eKLR** and **Kenya Anti-Corruption Commission v Kimumu Service Station Ltd & 2 others [2014] eKLR**. On perusal of the court record, I find that the Applicant, being a property owner of a property adjacent to the road subject matter of this dispute, has established that it has an interest in subject matter.

On the second prayer, I have perused the court record in HCCC No. 1627/2001. The issue in dispute pertains to a section of a parcel of land which the Plaintiff avers that is part of its property and the Defendants claim to be a public access road. The dispute in the instant suit, is about an access route which the Plaintiff claims the Defendant wants to create to pass through it property. I see no distinctiveness in

the suit herein with HCCC No. 1627/2001. Both suits relate to an access road the Plaintiff, Defendant and intended Defendants being owners of properties adjacent to the said road. As correctly pointed out by the Applicant in its submissions, the purpose for stay of proceedings is that there is no conflicting judicial decision relating to the matters in the two suits resulting to absurdity of court decisions. Consolidation of two suits, on the other hand, will ensure that both suits are heard simultaneously. Both these procedures are available to the court once it establishes, as it has, that the issues of fact and law for determination in two suits filed in separate courts of concurrent jurisdiction are similar. This court opts to have the two suits consolidated for reasons to be explained shortly.

The principle of consolidation of suits was re-stated in the case of **Stumberg and another vs. Potgieter (1970) EA 323** where the court held:

“Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

It is noteworthy that the provision of Order XI of the repealed Civil Procedure Rules is not in the current rules of procedure. This however, does not limit the court from exercising its inherent powers to make necessary orders to ensure efficient disposal of suit. See the case of **R M G v N G Interested Party S P Limited & M D Limited [2013] eKLR** where Musyoka J. observed.

“This should not be construed to mean that the principle stated in Stumberg and another vs. Potgieter (supra) is no longer good law so far as consolidation and stay of suits is concerned. The court can apply the principle through the inherent powers of the court. “

Ordinarily, I would order the suit herein to be consolidated with the lead suit, that is, that which was filed first in time. However, the Court takes judicial notice of the changes in the law pertaining to determination of disputes in relation to occupation of and title to land following the enactment of the Constitution which establishes this Court. Therefore, and so as to avert any application on jurisdiction of the Civil Division of the High Court to deal with the dispute herein, HCCC No. 1627/2001 should be consolidated with the instant suit.

From the foregoing, I direct as follows:

- 1. The Applicant’s application dated 6/9/2012 is hereby allowed in terms of prayer 1 of the Application.***
- 2. High Court Civil Suit No. 1627/2001 shall be consolidated with the present suit and be heard by the Environment and Land Court.***
- 3. Costs of the applications shall be in the cause.***

Dated, signed and delivered this 28th day of March 2014

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....For the Applicant/Intended Defendant

.....Court Clerk