



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

**ELC SUIT NO. 1000 OF 2012**

**JOSEPH OKOYO.....PLAINTIFF**

**VERSUS**

**EDWIN DICKSON WASUNNA.....DEFENDANT**

**RULING**

**The Defendant's Application**

The Defendant herein, in an application dated 6<sup>th</sup> August 2013, prays that **CMCC No. 9093 of 2005 - Kenya Electricity Generating Company Ltd vs. Edwin Dickson Wasunna** be transferred to this Court and be consolidated with the present suit, and that the said suits be heard and determined together. By consent of all the parties, **CMCC No. 9093 of 2005** was ordered transferred to this court on 3<sup>rd</sup> March 2013. Subsequent to the transfer, the Defendant now prays that the transferred suit be consolidated with this suit.

The Defendant's application is premised on grounds outlined in the application and an affidavit he swore on 16/8/2013. He claims that the dispute in both suits is in respect to the property known L.R No. 3734/703, Tende Drive, Lavington (hereinafter "the suit property"). Further, that he is a Defendant in both the suits. It is also the Defendant's disposition that the aforesaid suits raise common and/or substantive issues on law and facts, namely, ownership of the suit property; eviction of the Defendant; improvement made on the aforesaid suit property by the Defendant; refund and/or offsetting of value of the improvements; and purchase by the Defendant of the suit property. He also depones that there would be no prejudice caused to any party and such consolidation would be for the best interest of justice, time and costs saving. Additionally, that any possibility of two separate courts arriving at different decisions on the same issues will be avoided.

**The Responses**

This application was opposed by both the Plaintiff in this suit and the Plaintiff in **CMCC No. 9093 of 2005**. The Plaintiff herein swore a Replying Affidavit on 20/9/2013 wherein he deponed that he is not a party to **CMCC No. 9093 of 2005**, and has no interest in the claim arising out of the tenancy between the Defendant and KENGEN, the Plaintiff therein. Further, that he prays for judgment in the suit herein for a declaration that the Defendant's occupation of the land is illegal and an act of trespass to land; an order directing the Defendant to give up his illegal occupation of land in default of which he be at liberty to evict him; special damages for loss of user and/or mesne profit; and costs of the suit and interest thereon. The Plaintiff herein contends that the said prayers are specific to the Defendant and no purpose would be served by consolidating the suits. Consequently, an order of consolidation will prejudice the fair prosecution of this matter.

David Mwangi, the Legal Manager at KENGEN, which is the Plaintiff in **CMCC No. 9093 of 2005**, swore a Replying Affidavit on 10/9/2013 opposing the application to consolidate the suits. It is his disposition that KENGEN was until 12/8/2012 the registered owner of the suit property, and that the Defendant occupied the said property by reason of his employment. Further, that following the termination of his employment the Defendant sought time from KENGEN to arrange to vacate the suit property and on that basis, a lease was executed wherein by which the he was to pay a monthly rent of Kshs.40,000/=. Subsequently, the Defendant defaulted in the payment of rent and also refused to vacate the premises, which resulted in the proceedings filed in **CMCC 9093 of 2005**.

The deponent stated further that in **CMCC No. 9093 of 2005**, KENGEN sought vacant possession and mesne profits, while the Defendant sought judgment for Kshs.438,909.50/-, damages for wrongful attachment, an order restraining KENGEN from evicting him, costs and interest. Significantly, the deponent stated, title to the property was not an issue agitated by the Defendant in light of the fact that he occupied the house as an employee of KENGEN at the time. The deponent states that following the transfer of the property to the Plaintiff in this suit, KENGEN no longer wishes to pursue an order for vacant possession, but will pursue its claims for mesne profits to the period it was the owner of the property.

The Deponent contended that the Plaintiff's claim herein and that of KENGEN in **CMCC No. 9093 of 2005** are separate and distinct, and therefore do not comprise of the same or similar questions of law or fact. In that regard, consolidation of the suits will not assist in the expeditious disposal or just determination of the two matters, and will in fact create an unnecessary burden upon the two Plaintiffs who have no interest in each other's case. He deponed that whereas the two suits can be heard together, they are not proper cases for consolidation since undue hardship will be occasioned for reasons that:

- a. The consolidation of the suits will of necessity require an amendment of the pleadings as the matter will therefore proceed as one suit.
- b. The Plaintiffs have their respective advocates and it is not clear how the Defendant proposes that the conduct of the Plaintiffs' cases be undertaken.
- c. Each Plaintiff will want to enforce the orders that they obtain without undue hardship, which will not happen where a single decree is issued for the adverse orders and amounts they seek.

### **The Submissions**

This application was canvassed by way of written submissions. Adere & Co. Advocates filed submissions dated 18/3/2014 wherein counsel reiterated the issues on law and fact raised in the two suits are common in respect of ownership; eviction; claims for rent/mesne profit; improvements made on the premises; the claim by the Defendant that he has a valid offer to purchase the property and pursuant thereto he is in occupation thereof; and refund and/or offsetting of value of the improvement of suit premises. It is submitted for the Defendant that if the two suits run parallel there is likelihood of the two courts making conflicting decisions which will result to a clashing effect and hence greatly prejudice the Defendant.

Further, that it would amount to abuse of the process of the court and a waste of its judicial time if the two suits are not consolidated contrary to the overriding objectives as provided in sections 1A & 1B of the Civil Procedure Act. Counsel urged the court to exercise its inherent powers under section 3A of the Civil Procedure Act to give effect to the overriding objective under section 1A by consolidating the suits in the interest of justice and with a view of furthering expeditious disposal of cases.

M/s Kajwang & Kajwang, the Advocates for the Plaintiff herein, filed submissions dated 26/3/2014. Counsel referred the court to the case of **Nairobi HCCC No. 29 of 2009 (O.S)- R.M.G versus N. G. & another** where the court stated that:-

**“.....where there is a common question 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 be disposed of at the same time, consolidation should rise.”**

The Court went ahead to state:

**“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”.**

It was submitted for the Plaintiff that there are no common issues or points of law for determination in the two suits, in that, the suit between KENGEN and Defendant is founded on a tenancy agreement between them, and the possible reliefs that the Court can grant therein does not impact on the possible reliefs that the court may grant in the present suit. It is further submitted that the Plaintiff is the registered proprietor of the suit premises and his suit is founded on the enforcement of his right on that score, whereas KENGEN as revealed in its affidavit desires to pursue mesne profits. Further, that the two suits therefore do not raise common questions of law.

Counsel also submitted that the two suits clearly seek different reliefs since one is founded on tenancy while the other is founded on the right to ownership. Accordingly, this is not a case where the Court can exercise its discretion to consolidate. In support of this submission, counsel cited the case of **County Council of Nakuru v Simon Ole Kaminta and 3 others (2007) eKLR**, the court stated as follows:-

**“If the two are consolidated, it is obvious that it is not convenient for the determination of issues as one suit challenging the ownership of the property while the other suit challenges the exercise of the power of the transfer. The suits are not also between the same parties and consolidation would confuse the issues and further prolong the resolution of the matters in dispute.”**

Hamilton Harrison & Mathews Advocates for KENGEN filed submissions dated 31/3/2014. Counsel highlighted three issues, which in his view, were of significance for consideration by the court, namely: whether the suits were capable of consolidation given the nature of the orders sought by the Plaintiffs; the form that any decree issuing shall take after such consolidation; and how the decree will be enforced particularly on the award of mesne profits in the event the finding is in favour of the Plaintiffs. Further, that the test considering consolidation of suits is not whether the parties are the same but whether the same or similar questions of law or facts are involved in the suits.

Counsel outlined the salient features of each case submitting that the main issue in **CMCC No. 9093 of 2005** is whether the Defendant is liable for breach of the terms of the lease requiring him to pay Kshs.40,000/= per month to occupy the suit property, and whether KENGEN is entitled to mesne profits for the period the Defendant occupied the suit property and when it was the registered owner of the suit property whereas in the present suit, the orders sought were eviction, and damages in the form of mesne profits. In that regard, counsel submitted, the Plaintiff herein is a stranger to the lease agreement between KENGEN and the Defendant that forms the basis of the KENGEN’s claim.

Similarly, that subsequent to the transfer of the suit property to the Plaintiff, KENGEN has no interest over the property and is not involved in the dispute as to ownership of the suit property between the Plaintiff and Defendant. It was submitted for KENGEN that the suits cannot be said to have similar questions of law or facts to warrant an order for consolidation. Counsel referred the Court to the case of **Korean United Church of Kenya & 3 others vs. Seng Ha Sang (2014) eKLR** where the court observed that:

**“Consolidation of suits is done for purpose of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”**

It was counsel’s submission that this was not the case in the present circumstance as consolidation will

prejudice KENGEN since its residual claim is monetary and it is entitled to move the court through a summary process, but cannot do so if the suit is consolidated. Counsel also submitted that the proposed consolidation would not aid the court to save time and costs in view of the different stages the suits are at. Counsel stated that the KENGEN suit is ready for trial whereas the present suit is yet to go to the pre-trial stage, hence consolidation will cause unnecessary hardship to the Plaintiffs.

Counsel further submitted that the claim that there would be a likelihood that courts would come up with conflicting decisions is unsubstantiated particularly because the core issues are distinct. Counsel submitted on the issue of the delay likely to be caused, stating that an order of consolidation would necessitate that the pleadings be amended to enable the suit proceed as one. Secondly, that each party, including the Defendant are represented by different advocates in the two suits thus it would be unclear on how the conduct of the Plaintiffs' cases is undertaken. Counsel referred the court to the case of **Nyati Security Guards & Services Ltd v. Municipal Council of Mombasa (2004) eKLR** where the court held that:

**There was however situations where consolidation is undesirable .... The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such a situation the hearing will be longer and the purpose of saving time will be defeated.**

Thirdly, in the event that the finding is in favour of the Plaintiffs, the Court will issue a single decree and a single certification of taxation or costs posing a challenge on how to ascertain the costs due to each Plaintiff, and how each Plaintiff would enforce the decree. On the other hand, in the event that the finding is in favour of the Defendant, there will be a challenge as to which of the Plaintiffs the Defendant would pursue and for what order.

### **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 **CMCC No. 9093 of 2005 - Kenya Electricity Generating Company Ltd vs. Edwin Dickson Wasunna**. The Civil Procedure Rules mandate this court to consider consolidation of suits with a view of furthering expeditious disposal of cases under Order 11 Rule 3 (1)(h). The principles involved when a court is to consider consolidation of suits were 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, 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.

The common factors in the two suits are the Defendant and the suit property,– L.R No. 3734/703, Tende Drive, Lavington. At the institution of **CMCC No. 9093 of 2005**, KENGEN was the registered owner of the suit property and thus prayed for orders of eviction, outstanding arrears and mesne profits. During the pendency of the suit, KENGEN transferred the suit property to the Plaintiff herein, and has expressed its intention to amend its pleadings to pursue its claim for mesne profits only.

The Plaintiff herein, being the registered owner of the suit property now seeks orders of eviction as well as damages and mesne profits against the Defendant. This chronology of events in my view satisfies the condition that the rights or relief claimed are in respect of the same transaction. It is also my view that though the prayers sought by each party are different, the nature of the prayers and the circumstances of the suit are that they can conveniently be disposed of simultaneously. In any event the trial Court is empowered by the Civil Procedure Rules to make appropriate directions to ensure that there is an orderly hearing of the two suits.

It is also submitted for KENGEN that it intends to amend its pleadings to pursue a liquidated demand, and that its entitlement to a summary process will be curtailed in the event that consolidation is ordered. Order 36 of the Civil Procedure Rules makes provision for summary procedure. The same is however available where the Defendant has appeared and has not filed a defence. Even in such a circumstance, the Defendant has an avenue to defend the suit. In **CMCC No. 9093 of 2005** the Defendant has not only filed a defence, but in addition has made a counterclaim against KENGEN. This, in my view, inhibits the Plaintiff's opportunity to explore a summary process as there is thus need to proceed to a full hearing.

As regards the submission on delay, counsel for KENGEN submits that it will be prejudiced since its suit is ripe for hearing, whereas the other is yet to go for pre-trial conference. Whereas this maybe the case, it will also be of inopportune for the court to proceed with the suits separately, and in addition none of the two suits has commenced full hearing. On the issue of delay as a result of amending the pleadings to enable the suit proceed at once, it is my finding that the Plaintiffs do need not amend their pleadings to come up with one plaint nor abandon one in place of the other, and this is an issue that can also be addressed by directions. Lastly, on the aspect of the decree and certification of taxation, and award of costs, there is nothing to demonstrate that the trial court shall not properly address itself at the opportune time to give clarity as to what each party is entitled to.

The prayer for consolidation in the Defendant's application dated 6<sup>th</sup> August 2013 is accordingly allowed for the foregoing reasons, and it is hereby ordered as follows:

1. That the suit herein be consolidated with **CMCC No. 9093 of 2005 - Kenya Electricity Generating Company Ltd vs. Edwin Dickson Wasunna** which has now been given a new Environment and Land Court case number, being **ELC 403 of 2014**, 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 herein and the Plaintiff in **CMCC No. 9093 of 2005 (now ELC 403 of 2014) - Kenya Electricity Generating Company Ltd vs. Edwin Dickson Wasunna** shall be the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs respectively in the consolidated suit, while the Defendants in both suits shall be the Defendant in the consolidated suit.
3. The file for the suit herein shall be the lead file for purposes of filing of pleadings and recording of proceedings.
4. The costs of the application dated 6<sup>th</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 June, 2014.

**P. NYAMWEYA**

**JUDGE**