



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**ENVIRONMENTAL AND LAND DIVISION**

**ELC CIVIL NO. 782 OF 2013**

**MWANTHI MUGWE.....1<sup>ST</sup> PLAINTIFF**  
**JOEL KAMAU MWANGI ..... 2<sup>ND</sup> PLAINTIFF**  
**DOMINIC WAMBUA .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**ALI SHEIKH MOHAMMED.....1<sup>ST</sup> DEFENDANT**  
**FARAH MOHAMMED BARROW..... 2<sup>ND</sup> DEFENDANT**  
**CITY COUNCIL OF NAIROBI..... 3<sup>RD</sup> DEFENDANT**  
**GOLDEN LIME INTERNATIONAL LIMITED.....4<sup>TH</sup> DEFENDANT**  
**ABDI RASHIA ABSISHARIFO.....5<sup>TH</sup> DEFENDANT**  
**ADAN HAJI ISSAK.....6<sup>TH</sup> DEFENDANT**  
**MOHAMUD SHEIKH .....7<sup>TH</sup> DEFENDANT**

**As consolidated with**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 589 OF 2008**

**ALI SHEIKH MOHAMMED BARROW**

**T/A ALFA TRADERS .....PLAINTIFF**

**VERSUS**

**CITY COUNCIL OF NAIROBI .....1<sup>ST</sup> DEFENDANT**

**GOLDEN LIME INTERNATIONAL LTD ..... 2<sup>ND</sup> DEFENDANT**

**MWANTHI MUGWE**

**JOEL KAMAU MWANGI**

**DOMINIC WAMBUA (sued on their own behalf and on behalf of**

**400 other former stall owners and traders in**

**L.R.NO. 36/VII/1037) .....3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 4<sup>TH</sup> DEFENDANT**

**Consolidated with**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CONSTITUTION & JUDICIAL REVIEW DIVISION**

**MISC CIVIL APPLICATION NO. 37 OF 2009**

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR**

**JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION**

**REPUBLIC ..... APPLICANT**

**VERSUS**

**THE REGISTRAR OF TITLES ..... RESPONDENT AND**

**THE CITY COUNCIL OF NAIROBI .....1<sup>ST</sup> INTERESTED PARTY**

**BLUE SEA SHOPPING MALL LIMITED .....2<sup>ND</sup> INTERESTED PARTY**

**GOLDEN LIME INTERNATIONAL LTD.....3<sup>RD</sup> INTERESTED PARTY**

**MWANTHI MUGWE, JOEL KAMAU &**

**DOMINIC WAMBUA .....4<sup>TH</sup> INTERESTED PARTY**

**RULING**

The court on 19<sup>th</sup> February 2014 ordered **HCCC NO. 24 of 2007** and **HCCC NO. 615 of 2008** which had been stated to be consolidated with **HCCC NO. 589 of 2008** and **H.C J/R NO. 37 of 2009** dismissed. **HCCC NO. 24 of 2007** which operated as the lead file in the said consolidated suits transferred to the Environment and Land Division and was renumbered **HC ELC NO. 782 of 2013** (the present case file).

The 2<sup>nd</sup> Defendant, Golden Lime International Limited (**HCCC 589 of 2008**) following the dismissal of **HCCC NO. 24 of 2007** and **HCCC NO.615 of 2008** on 7<sup>th</sup> March 2014 filed a Notice of Motion of even

date seeking among other orders a temporary injunction restraining the plaintiffs, the 1<sup>st</sup> and 4<sup>th</sup> Defendants from in anyway interfering with or dealing with all those parcels of land known as **L.R.NO.36/VII/1037** and/or **L.R.NO.36/VII/48** situate at Eastleigh in Nairobi and ordinarily known as Eastleigh open Air market pending the hearing and determination of the suit. The 2<sup>nd</sup> Defendant also sought leave of the court to file an amended defence and counterclaim. The 2<sup>nd</sup> Defendant grounds its application on the grounds set out on the face of the application and on the affidavit sworn in support thereof by one **Mohamud Sheik Hussein** on 7<sup>th</sup> March 2014 and the supplementary affidavit sworn on 11<sup>th</sup> April 2014.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants, **Ali Sheikh Mohamed** and **Farah Mohamed Barrow** in **ELC 782 of 2012** being the previous **HCCC NO. 24 of 2007** filed grounds of objection dated 20<sup>th</sup> March 2014 where they took the following preliminary objections:-

1. The 2<sup>nd</sup> Defendant Golden Lime International Limited is a trespasser to private property, and the 2<sup>nd</sup> Defendant being a Defendant cannot in law seek the equitable remedy of injunction against a co-defendant.
2. The Court of Appeal in a ruling dated 11<sup>th</sup> February 2011 in Civil application Number 124 of 2009 (**UR79/09**) issued a restraining order against the Applicant herein restraining it from undertaking any activities in relation to the suit property. This application is a flagrant contempt of the said order of the court of Appeal.
3. The applicant's entire case is premised on some purported Public Private Partnership agreement, the same:-
  - a. Has expired after lapse of 3 years after the Applicant herein failed to fulfill the conditions therein.
  - b. The County Government of Nairobi has realized that the suit property is private property and has cancelled the purported public private partnership.
4. The Application is frivolous, vexatious and a classic case of abuse of court process. It is desperate and misguided effort to acquire private property in a manner and process contrary to the law.
5. The application and especially its evidential and legal foundations are suspect and waiting and is outside the principles established in **Giella –vs- Cassman Brown** and does not lie in law and in equity.
6. The Applicant is a volunteer and equity does not aid a volunteer.

The instant application by the 2<sup>nd</sup> Defendant in **HCCC NO. 589 of 2008** is filed in the lead file of the stated consolidated suits. The lead filed was **HCCC NO. 24 of 2007** which was renamed **ELC NO. 782 of 2013** when it was transferred to the Environment and Land Division of the High Court. The plaintiff's suit in **ELC NO. 782 of 2013** was struck out and ordered dismissed by the court on the application of the 4<sup>th</sup> Defendant in that suit who are also the 2<sup>nd</sup> Defendant in HCCC NO. 589 of 2008 which is stated to have been consolidated with the struck out and dismissed suit. The plaintiffs in the struck out and dismissed suit are also the 3<sup>rd</sup> Defendants in **HCCC NO. 589 of 2008**. The same grounds upon which the plaint in **ELC NO. 782 of 2013** was struck out would equally in my view apply in regard to any pleadings filed by the 3<sup>rd</sup> Defendants in **HCCC NO. 589 OF 2008**. They would be liable to be struck out. The Applicant in the instant application makes generous reference to pleadings, information and materials that were tendered in **HCCC 24 of 2007 (ELC NO. 782 OF 2013)** yet this suit was dismissed without proceeding to hearing on merits.

The Applicant tendered written submissions dated 7<sup>th</sup> May 2014 in response to the preliminary objection taken by the plaintiff/Respondents. The plaintiff/Respondents did not file any submissions. The court heard oral submissions on 8<sup>th</sup> May 2014 from **Mr. Ahmed Nassir Advocate** for the plaintiffs and from **Mr. Lakicha Advocate** for the 2<sup>nd</sup> Defendant/applicant. **Mr. Ahmed Nassir** submitted that his clients had been subjected to endless litigation and that the present application by the Applicants was a perpetuation of that trend and was an abuse of the court process. Counsel submitted that the consolidated

suit having been dismissed there was no suit where the Applicant could make the present application. **Mr. Ahmed Nassir** argued once the suits were consolidated the issues were merged such that the dismissal of the lead case would automatically lead to the collapse of the other cases. He maintained there was no pending case for the court to proceed with as the court could not separate the suits once they had been consolidated.

**Mr. Lakicha Advocate** in response to **Mr. Ahmed Nassir's** submissions submitted that four cases had been consolidated and that only two of them were dismissed which meant that the two which were not dismissed remained pending **Mr. Lakicha Advocate** argued that only **HCCC NO. 24 of 2007 (ELC 782 of 2013)** and **HCCC NO. 615 of 2008** were ordered dismissed which meant that the other suits survived which included **HCCC NO. 589 of 2008** in which the present application is made. He contended that the dismissal of two of the suits that were subject of the order for consolidation did not affect the remaining suits which continue to be alive.

The court has reviewed the record of **HCCC NO. 24 of 2007 (now HC ELC NO. 782 of 2013)** which is acted as the lead file and has not come across any order directing the consolidation of the subject suits namely:-

- i. **HCCC NO. 24 of 2007 Mwanthi Mugwe & 2 others –vs- Ali Sheik Mohamud & 7 others.**
- ii. **HCCC NO. 589 of 2008 – Ali Sheikh Mohamed & 2 others –vs- City Council of Nairobi & 2 others.**
- iii. **HCCC NO. 615 of 2008 – Mwanthi Mugwe & 2 others –vs- Golden Lime International Ltd & City Council of Nairobi.**
- iv. **HC (JR) Misc. App NO. 37 of 2009. Republic –vs- Registrar of titles & 4 others.**

Indeed apart from the lead file no other file relating to the other files has been availed during the several times the present application came up for directions before me. What is clear from the record is that there was in each of the suits an interlocutory application for injunction prior to 15<sup>th</sup> January 2009 when **Hon. Justice Kihara Kariuki** (as he then was) dealt with the matters.

**Hon. Justice Kihara Kariuki** on 15<sup>th</sup> January 2009 while dealing with the matter on a mention for directions observed:-

**“I have listened to the various submissions of all learned counsel and also perused the court record. It would appear that the following applications are pending hearing in these suits:-**

- a. **In HCCC NO. 24 of 2007 the plaintiffs chamber summons filed on 5<sup>th</sup> April 2007. The parties are agreed that there is an order of injunction issued by Mutungi J, on 10<sup>th</sup> April 2007 which is still in force.**
- b. **In 589 of 2008 there is the plaintiff's chamber summons filed on 28<sup>th</sup> November 2008 and the plaintiffs Notice of Motion filed on the 13<sup>th</sup> January 2009. It is also not in contention that an order to maintain the status quo was made by Osiemo J, on the 3<sup>rd</sup> December 2008.**
- c. **In HCCC NO. 615 of 2008 there is the plaintiff's chamber summons filed on the 21<sup>st</sup> December 2008 and no orders have been issued in connection therewith”.**

The learned Judge after further address by the respective counsel of the parties directed that all the parties be heard in regard to their respective applications and proceeded to make directions as follows:-

**“I accordingly order as follows:-**

- a. **The Defendants in all the three suits shall by the close of business tomorrow 16<sup>th</sup> January 2009 be served with the said pending and other pleadings (unless already served).**
- b. **All the Defendants shall file their grounds of opposition and or replying affidavits within the next seven (7) days of service.**
- c. **The plaintiffs in all the suits may, if they wish respond as appropriate to the replying**

**affidavits by filing or serving their respective further affidavits within four (4) days of service.**

- d. Counsel are encouraged to file or serve skeletal arguments but authorities shall be filed and served within three days of the hearing.**
- e. The said applications shall with the consent of all the parties be heard together on the 3<sup>rd</sup> February 2009 at 11.00a.m.”**

The Judge consequently made an order for the parties to observe and maintain the status quo in regard to the suit property that existed as at the date he made the order pending the hearing of the applications on 3<sup>rd</sup> February 2009. My own view of the matter is that the Judge did not make a formal order consolidating the three suits and the position remains that it is only the three highlighted applications that he ordered to be heard together. The fact that the parties thereafter conducted themselves as if the three suits were consolidated does not render the suits to be so consolidated. I have perused the court record of **HCCC NO. 24 of 2007 (now ELC NO. 782 of 2013)** which was treated as the lead file for purposes of handing the three interlocutory applications and the proceedings and I am not able to find any order consolidating the three suits. Indeed there are no proceedings and/or pleadings relating to **HCCC NO. 589 of 2008** and **HCCC No. 615 of 2008** before the 15<sup>th</sup> January 2009.

This court, it is correct handled an application brought by the 1<sup>st</sup> Defendant in **HCCC NO. 615 of 2009** and also the 4<sup>th</sup> Defendant in **HCCC NO. 24 of 2007**, Golden Lime International Ltd, where the applicant sought to dismiss these suits on the basis that the plaintiffs in the suit who purported to have authority to bring a representative suit did not have authority to bring the suits as he purported to represent even persons who were deceased and who had no personal representatives. The court held that the authority the plaintiffs presented to bring these suits were defective and proceeded to strike out and dismiss the suits (**HCCC NO. 24 of 2007 and HCCC NO. 615 of 2008**). Although the application was purported to be made in the consolidated suits it is my view that since it dealt with the competency of the two suits it could properly be handled as a preliminary issue just like the initial interlocutory applications that **Kariuki J**, had ordered to be heard together.

In the present application **HCCC NO. 24 of 2007 (now ELC NO. 782 of 2013)** having been ordered dismissed there is no file on which the applicant can file the present application. As I have stated the pleadings of **HCCC NO. 589 of 2008** were never combined in this file as no order of consolidation was made. Thus my view is that the instant application cannot properly be made in the present file as there is no case pending in **ELC NO. 782 of 2013**. I agree with counsel for the applicants that the suits that were dismissed were **HCCC NO. 24 of 2007** and **HCCC NO. 615 of 2008** and that **HCCC NO. 589 of 2008** remains outstanding and awaiting to be determined. I equally agree with counsel for the Respondent, **Mr. Ahmed Nassir** that where suits are consolidated the court would be obliged to try the suits together which trial would in the majority of cases result in one judgment or as the case may be in separate judgments. My view is that where a consolidation is ordered the issues are merged and it would be inappropriate to cherry-pick and deal with any of the cases individually and separately leaving the others to be dealt with at a later date. The essence of consolidation is so that the suits are tried together and a determination made at the same time. In hindsight the Applicant perhaps should have allowed the dismissed suits to proceed to hearing and taken issue of their competency at the hearing whereupon the court would have made a determination in the final judgment.

As it is my view that there was no consolidation of the suits my position that the instant application cannot be sustained as it is made in the wrong file where no suit exists as the suit was dismissed. The Applicant ought to have made the application in **HCCC NO. 589 of 2008**.

In the event the suits had been consolidated I would agree with **Mr. Ahmed Nassir** that the parties would be bound to have proceeded to trial and the judgment/decision of the court would affect all the parties. It would have been inappropriate once the suits had been consolidated to choose which suit to deal with first and which later. Thus the dismissal of **HCCC NO. 24 of 2007** and **HCCC NO. 615 of 2005** would of necessity have affected the other suits.

In the premises I would uphold the preliminary objection and I order the Applicant's application struck out and dismissed with no order as to costs.

Ruling dated signed and delivered this...23<sup>rd</sup>.....day of.....**October**.....2014.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

.....For the Plaintiffs

..... For the Defendants

..... For the interested parties