IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KIAGE & MURGOR, JJ,A)

CIVIL APPEAL NO. 9 OF 2013

BETWEEN

INDUSTRIAL COLLABORATIVE LIMITED.....APPELLANT

AND

KENYA ANTI-CORRUPTION COMMISSION.....RESPONDENT

(Appeal from Ruling and Order of the High Court at Nairobi

(Msaga Mbogoli, J.) delivered 9th November 2010)

in

ELC Civil Suit No. 101 of 2007)

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JUDGMENT OF THE COURT

The appeal arises from a Notice of Motion dated 25th October 2009, where ***the respondent, the Kenya Anti Corruption Commission*** had sought orders for the consolidation of 14 applications in which ***the appellant, Industrial Collaborative Limited*** and 13 other defendants had sought to strike out the respondent's suits against them.

At the center of this dispute is a property known as LR No. 209/13539 Grant IR No. 76717 commonly known as Woodley Joseph Kan'gethe Estate *(the suit property)* about which the respondent had filed various suits against the appellant and 13 other defendants seeking declarations and orders for the cancellation of various leases granted to them in respect of portions of the suit property. The 14 suits *(the defendants' suits)* were as follows;

i. ELC No.101 of 2007 – KACC vs. Industrial Collaborative Ltd.

ii. ELC No.103 of 2007 – KACC vs. Brookside studios Ltd,

iii. ELC.No. 105 of 2008 – KACC vs. Carolizanne Gathoni Kuria & 2 Others.

iv. ELC No. 106 of 2008 – KACC vs. Hammerheads Ltd & 2 Others.

v. *ELC No. 107 of 2008 – KACC vs. Catherine Njeri Kuria & 2 Others.*

vi. *ELC No. 67 of 2007 – KACC vs. Abishax Heights Ltd.*

vii. *ELC No. 535 of 2008 – KACC vs. David Gahina Muriithi & 3 Others.*

viii. *ELC No. 1116 of 2007 – KACC vs Wariwax Generation Ltd.*

ix. *ELC No. 1117 of 2007 – KACC vs. Satellites Industrial Supplies Ltd.*

x. *ELC No. 1118 of 2007 – KACC vs. Parkside Medical Centre Ltd.*

xi. *ELC No. 1993 of 2007 – KACC vs Noel K. Wambua.*

xii. *ELC No. 124 of 2008 – KACC vs Jamma Consolidated Ltd.*

xiii. *ELC No. 402 of 2008 – KACC vs Emrose Academy & 3 Others.*

xiv. *ELC No. 29 of 2009 – KACC vs Yellow Horse Inn Ltd & 3 Others.*

In the suit herein, the respondent sought a declaration that the lease in respect of LR 209/13539/113, being a portion of the suit property made in favour of the appellant, was invalid, null and void having been fraudulently obtained. Further orders were sought for cancellation and expunging of the appellant's title registered as entry number 50 on 18th June 1999 in presentation book number 959, and the cancellation of the appellant's lease.

By way of a Chamber Summons filed on 10th July 2008, the appellant sought to strike out the respondent's suit on grounds that the Plaint offended against mandatory provisions of law, was incurably defective for misjoinder, was scandalous and frivolous, the suit was time barred and was an abuse of the court process. Alongside the appellant's application, the defendants filed 13 similar applications in respect of their respective suits.

Before the application to strike out was heard, the respondent applied for the applications arising out of the appellant's and the other defendants' suits, to be consolidated and heard together, for reasons that the respondent was the same, and suits concerned the same subject matter. It was further prayed that the court direct that the arguments and submissions of the parties in respect of *HCCELC No. 101 of 2007* be adopted in all the defendant's suits, and that the ruling consolidate all the applications. An alternative prayer requested an order for consolidation of the listed applications to enable the hearing and determination of the respective applications seeking to strike out the respondent's suit.

The motion was made on the grounds that all the suits listed were pending for hearing before the court; that they comprised similar pending applications to strike out the respondent's suits; that the grounds in support of the applications were similar; that on 7th October 2009, the High Court had issued directions for the respondent to be at liberty to file an application to consolidate the matters for expeditious hearing and disposal of the pending applications, and to enable the main suits to be set down for hearing; that it would be in the interest of the parties for all the applications to be heard together and that no prejudice would be suffered by the appellant or the defendants. The application was supported by the affidavit of Francis Gikonyo sworn on 22nd October 2009 under power of attorney of the respondent.

The appellant filed Grounds of Opposition on 17th November 2009 where it was contended that the application was bad in law, vague and without legal basis; that it did not satisfy the criteria for consolidation of suits as set out in ***orders XI*** and ***XXXVII*** of the retired Civil Procedure Rules; that the issues raised in the applications were dissimilar; that the defendants who are many and varied, are separate and distinct persons; that the defendants have a different point of view and are each entitled to be heard, and that the orders if granted, would occasion injustice to the defendants.

Also filed on the 9th February 2010 was a Notice of Preliminary Objection setting out similar grounds.

After considering the pleadings and hearing the parties' submissions, the High Court delivered a ruling allowing the consolidation of the appellant's and the other defendants' applications, and for the ruling in *ELC 101 of 2007* to apply to all the applications listed in the motion dated 28th October 2009.

It is this decision that has prompted this appeal on grounds that, the learned judge erred by ordering consolidation of 14 applications based on the respondent's application which did not conform to any provisions of the law under the Civil Procedure Act or Rules; by failing to uphold the criteria envisaged by ***order 21*** of the ***Civil Procedure Rules 2010*** on consolidation of suits and ***order 37*** of the ***Civil Procedure Rules 2010*** (formerly orders IX and XXXVII of the retired Civil Procedure Rules) on selection of a test suit; by failing to consider that issues raised in all the suits are not similar; by failing to consider that all the defendants are varied and distinct persons with different causes of action in each case; in upholding the argument that one case could be used in a completely different case between different parties; in failing to uphold the constitutional rights of the distinct defendants in respect of each case; and in failing to consider the tenets of natural justice to the extent that the appellant and the defendants were denied the right to be heard.

Highlighting the previously filed submissions, ***Mr. Muguro Irungu*** holding brief for Dr. Kariuki Muigua for the appellant asserted that central to the issue was the consolidation of the applications as directed by the court which counsel argued was improper and had no basis in law; that the Civil Procedure Rules provide for the consolidation of suits and not applications; that the defendants and grounds in all the applications are different; and that the result of the consolidation would affect the parties differently.

Learned counsel representing the respondent, ***Ms. Kibogy,*** holding brief for Mrs. Shamalla submitted that 15 applications had been consolidated into one for the purpose of expeditious disposition; that all the applications sought one relief which was to strike out the respondent's suits for failing to disclose a cause of action; that the court was requested to exercise its discretion and its inherent powers to consolidate all the 15 applications; that the suits are in respect of the suit property where the respondent is seeking to recover the property on behalf of the County Government of Nairobi. Counsel further submitted that there was commonality in all the applications as the grounds pleaded were similar; that *Civil Suit No. 101 of 2007* would be the lead file where the proceedings would be recorded and the ruling would apply to all the defendants' applications. Counsel finally submitted that the court was entitled to invoke its inherent jurisdiction to consolidate the applications.

We have considered the pleadings and the parties' submissions and are of the view that the issue for our consideration is whether or not the court below judiciously exercised its discretion to consolidate the appellant's and 13 other applications filed in the defendants' suits seeking to strike out the respondent's suits against them.

The power of the court being discretionary, the general principles stated in ***Mbogo & Another vs Shah [1968] E A 93*** are applicable in that, an appellate court has no jurisdiction to interfere with exercise of such discretionary power by the trial court unless the court has acted on wrong principles, has misapprehended the law or has acted on no evidence or that the learned judge was plainly wrong in arriving at the decision.

Mindful of these principles, we turn to whether the learned judge rightly exercised his discretion to order a consolidation of the 14 applications filed in respect of different suits.

The appellant has argued that ***orders XI*** and ***XXXVII*** make reference to consolidation of substantive suits and do not apply to applications. It is the appellant's further complaint that the respondent had improperly sought to consolidate the 13 applications with its application within a suit that had been filed separately against it by the respondent.

> ***Order XI*** stipulates;

"where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit.

(a) Order consolidation of such suits, and

(b) Direct that further proceedings in any of such suits be stayed until further order."

Clearly, the above provision is concerned with the consolidation of suits, while this case is concerned with the consolidation of 14 different applications. So that, what the respondent sought to do was to consolidate the 14 applications arising from 14 suits within the appellant's suit that was before the court at the time.

There is no dispute that the pleadings disclose that there were 14 applications arising from 14 different suits that involved different defendants. A consolidation of the various applications would have required the consolidation of the different suits. A review of the record does not disclose that the respondent had previously, or at any time sought or obtained an order under ***order XXXVII*** of the retired Civil Procedure Rules to join and consolidate the other defendants of the various suits in question in the appellant's suit, or that an order had been obtained for the lead file to be the appellant's file.

Without consolidating the appellant's suit with the other 13 defendants' suits, in the first instance, no foundation was established upon which to consolidate the defendants' applications with the appellant's application. Furthermore, the consolidation of the applications in the appellant's suit improperly detached the 13 applications from their respective suits, and unprocedurally superimposed them within the appellant's suit, with the result that any ensuing court orders would be incapable of enforcement within the respective suits.

Of further concern is that, when the application came up for hearing before the learned judge, despite the application for consolidation comprising persons or entities not party to the appellant's suit or the application, it is instructive that none of the other persons or parties to the defendants' suits were served with a hearing notice to appear in court or participate in the consolidation application. Essentially, none of these parties were afforded an opportunity to be heard prior to the decision of consolidation that was in breach of their constitutional rights under ***Article 50*** of the ***Constitution.***

In view of the above, the order of consolidation of the 14 applications was unprocedural and improper, and had the learned judge appreciated that without consolidation of the 14 disparate suits, the application for consolidation of the 14 applications was without basis, he would not have ordered for the consolidation of the applications. We find that in so doing, the learned judge misdirected himself, and we must interfere with that decision.

Accordingly, we allow the appeal herein, set aside the ruling of 19th March 2014 that allowed the respondent's Notice of Motion dated 25th October 2009. We substitute thereafter an order dismissing the Motion with no order as to costs. Each party shall bear own costs of this appeal.

It is so ordered.

Dated and delivered at Nairobi this 6th day of October, 2017.

R.N. NAMBUYE

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Deputy Registrar