



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: G.B.M. KARIUKI, SICHALE & OTIENO-ODEK, JJA)

CIVIL APPEAL NO. 37 of 2012

BETWEEN

ANNE WAMBUI GITHURIAPPELLANT

AND

MAKFAM INVESTMENTS LIMITED1ST RESPONDENT

SAMUEL GAKURU P/A GAKURU & CO. ADVOCATES2ND RESPONDENT

EQUITY BANK LIMITED3RD RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Sitati J.) delivered on 10th November 2010

in

Land & Environment Division

C.C. No. 403 of 2009)

JUDGMENT OF THE COURT

1. The appellant filed **High Court Civil Case No. 403 of 2009** against all the three respondents herein. On the other hand, the 1st respondent filed **High Court Civil Case No. 393 of 2009** against the appellant. The subject matter in the two suits relate to a dispute over **Land Parcel No. 14675** in Kiambu.
2. By two separate applications before the trial court, the appellant and respondent in their respective suits sought injunctive orders restraining each other from dealing or developing the disputed parcel of land. The 1st respondent also sought vacant possession of the suit property. The two applications were heard together and the learned judge made the following order the subject of this appeal :

“In respect of the Preliminary Objection raised against the application filed in HCCC No. 403 of 2009, I agree with counsel for the 1st defendant that this court is barred by the provisions of

Section 6 of the Civil Procedure Act from proceeding with this latter suit because the matter in issue is also directly and substantially in issue in HCCC No. 393 of 2009. The plaintiff has admitted that she was served with pleadings in HCCC No. 393 of 2009 relating to the same subject matter. In my considered view therefore and as rightly pointed out by counsel for the 1st defendant, there was no justification for the filing of HCCC No. 403 of 2009. The explanation given by the plaintiff in bringing this suit is not convincing. Accordingly, I order that HCCC No. 403 of 2009 be stayed pending the hearing and determination of HCCC No. 393 of 2009 or until further orders of the court.”

3. The appellant is aggrieved by the stay of HCCC No. 409 of 2009 and has lodged this appeal citing the following grounds in the memorandum of appeal:

“a. that the learned judge erred in staying prosecution of ELC No. 403 of 2009 without appreciating that there were two other defendants named in ELC No. 403 of 2009 who were not parties to ELC No. 393 of 2009.

b.that the 2nd and 3rd defendants in ELC No. 403 of 2009 had not made any application to stay the suit and the learned judge erred in awarding costs in favour of the 2nd and 3rd defendants in ELC No. 403 of 2009.

c. that the learned judge failed to appreciate the relevance and distinct facts and issues between ELC 393 of 2009 and ELC 403 of 2009.

d. the learned judge erred in fact in failing to appreciate that evidence and circumstances of the case required injunctive orders be granted in favour of the appellant to protect her interest in the suit property.”

4. At the hearing of this appeal, learned counsel Ms Berryl Ouma appeared for the appellant while learned counsel Mr. Gathaara appeared for the 2nd respondent. The 1st and 3rd respondents though served with the hearing notice did not attend.
5. Counsel for the appellant reiterated the grounds in support of appeal urging that there were parties in ELC Case No. 403 of 2009 who are not parties in ELC No. 393 of 2009; that the learned judge erred in ordering stay of ELC No. 409 of 2009 without appreciating that the interest of the appellant over the suit property was prejudiced by the stay order; by staying ELC No. 403 of 2009, the trial court prejudiced the interest and claim of the appellant against the 2nd and 3rd respondents ; that the trial judge failed to note that the 3rd respondent has a charge in its favour registered over the suit property and the 3rd respondent is not a party in ELC No. 393 of 2009; that all the parties in ELC No. 403 of 2009 have distinct interests and roles over the suit property and it is fair and just that the two cases ought to have been consolidated and that the trial judge was urged to consolidate the two cases but erred in failing to appreciate the nature and distinct interest of each party over the suit property. Counsel for the appellant urged this Court to set aside the ruling and orders made on 10th November 2010 and substitute the same with an order consolidating ELC No. 393 of 2009 and ELC No. 403 of 2009.
6. Counsel for the 2nd respondent associated himself with submissions made for the appellant. It was submitted that procedural steps should not be a hindrance to realization of a just and fair hearing and a determination of the dispute on merit and that by consolidating the two cases, each party will have an equal opportunity to state its case. It was further submitted that the learned judge erred by invoking a procedural step of staying ELC No. 403 of 2009 thereby causing delay in the hearing and determination of the dispute between the parties.
7. We have considered the grounds of appeal and submissions by counsel. Counsel for the appellant cited various authorities. In ***Stumberg and another -v-Potgieter [1970] EA 323***, it was stated that 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 not in dispute that two separate suits were filed over the same suit property; what is common in the two cases is the suit property, the appellant and the 1st respondent.

8. The issue in contention is who between the appellant and the 1st respondent is entitled to the suit land or a portion of it. The role of the 2nd respondent in the dispute cannot be understated; likewise, the legality and continuity of the charge registered over the suit property in favour of the 3rd respondent is a matter in dispute between the appellant and all three respondents.
9. In **Mbogo & Another -v- Shah [1968] EA 93 at 96**, it was stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.
10. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Delaying or postponing the hearing of one suit to commence after the other when the subject matter in dispute is the same and competing interests are involved in the different suits does not save time. The test is not whether the parties are different; the test is whether the same or similar questions of law or fact are involved in the suits (See **Ean Kenya Limited – v- John Sawers & 4 others [2007] eKLR**).
11. In our view, the two suits, the subject of this appeal, raise similar questions of law and fact. The competing claims of the appellant and the 1st respondent are intertwined with the role of the 2nd respondent in the transaction between the parties. The trial court in declining consolidating simply stated that the explanation given by the appellant in filing ELC 403 of 2009 was not convincing. No reason is given why the explanation is said not to be convincing. Had the trial court given due weight to the fact that it would not be possible to determine and resolve the dispute between the appellant and the 1st respondent without addressing the alleged role of the 2nd respondent and the charge over the suit property by the 3rd respondent, the learned judge would have arrived at a different decision.
12. The 2nd respondent having allegedly played a pivotal role in the dispute between the appellant and the 1st respondent, and there being common questions of fact and law arising in the two suits, it is in our view expedient and time saving to hear and try ELC No. 393 of 2009 and ELC No. 403 of 2009 together and prevent the prospect of the 2nd and 3rd respondents being mentioned in ELC 393 of 2009 where they are not parties. It would have been appropriate for the appellant to apply to join the 2nd and 3rd respondents to ELC No. 393 of 2009; however, this is water under the bridge and at this late stage, consolidation of the two suits would be in order. We are convinced that no prejudice shall be suffered by any party if the two suits are heard together.
13. For reasons given above, we hereby set aside in entirety the ruling and orders of the High Court dated 10th November 2010 and substitute the same with an order that ELC Case No. 393 of 2009 be and is hereby consolidated with ELC Case No. No. 403 of 2009. The consolidated suits shall be heard by any judge other than **Sitati, J.** Each party to bear its own costs in this appeal.

Dated and delivered at Nairobi this 31st day of July, 2015.

G.B.M. KARIUKI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR