



**Youth Limited v Kihiko & 2 others (Environment and Land Case Civil Suit 160 of 2019) [2024] KEELC 13214 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13214 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 160 OF 2019  
OA ANGOTE, J  
NOVEMBER 14, 2024**

**BETWEEN**

**YOUTH LIMITED ..... PLAINTIFF**

**AND**

**DANIEL NJOROGE KIHICO ..... 1<sup>ST</sup> DEFENDANT**

**HENG YU INTERNATIONAL LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**KENYA RAILWAYS CORPORATION ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 3<sup>rd</sup> Defendant has filed a Notice of Motion application dated 3<sup>rd</sup> May 2024 under Article 159(2) of *the Constitution* of Kenya, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 11 Rule 3 of the Civil Procedure Rules. The 3<sup>rd</sup> Defendant has sought for the following orders:
  - a. That an order do issue staying the proceedings in ELC Case No. E392 of 2022 Youth Limited v Kenya Railways Corporation and the arbitration proceedings in Youth Limited v Kenya Railways Corporation.
  - b. That an order do issue consolidating the instant suit with ELC Case No. E392 of 2022 Youth Limited v Kenya Railways Corporation.
  - c. That if the application is allowed, this Honourable Court to give any further orders and/or directions as the ends of justice may require.
  - d. That the Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice.
  - e. That the cost of this application be provided for.



2. The application is supported by an Affidavit sworn by Phillip Mainga, the 3<sup>rd</sup> Defendant's Managing Director. The grounds of the application are that the Plaintiff filed this suit seeking a permanent injunction against the Defendants restraining them from dealing with the property known as LR No. 209/6445.
3. It was is the 3<sup>rd</sup> Defendant's case that the Plaintiff also filed ELC Case No. E392 of 2022 against the 3<sup>rd</sup> Defendant over the same suit property seeking the same orders; and that the Plaintiff and the 3<sup>rd</sup> Defendant are further parties to arbitration proceedings over the same suit property. Philip Mainga deponed that these suits relate to the same property, raise the same questions of law and facts and the same rights and reliefs are sought in the two suits.
4. The 3<sup>rd</sup> Defendant's Managing Director deponed that the essence of consolidation is to facilitate the expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. He urges that the multiplicity of suits may result in contradicting court orders emanating from the court, and that no prejudice will be suffered by the parties.
5. The Plaintiff has opposed the application through Grounds of Opposition dated 21<sup>st</sup> May 2024, in which it has argued that the application is meant to interfere with contempt proceedings against the Applicant and the arbitration hearing scheduled for 6<sup>th</sup> June 2024 and that the arbitration hearing began at the instance of the 3<sup>rd</sup> Defendant in its Preliminary Objection dated 27<sup>th</sup> January 2023.
6. It was averred that the application is a gross abuse of court process; that there has been inordinate delay in filing the application and the Plaintiff's claim in ELC 392 of 2022 has nothing to do with the other suits and that those suits can be consolidated without including ELC 392 of 2022.

### **Submissions**

7. Counsel for the 3<sup>rd</sup> Defendant submitted that this court's power to order consolidation of suits stems from the provisions of Order 11 Rule 3(1)(h) of the Civil Procedure Rules.
8. Counsel submitted that the suits relate to the same suit property, similar parties and raise the same questions of law and facts and that in both suits, the Plaintiff has sought a declaration that the Defendants have trespassed on the suit property, damages for the suit property and a permanent injunction restraining the Defendants from dealing with the suit property.
9. Counsel for the 3<sup>rd</sup> Defendant submitted that consolidation of the suits will enable expeditious resolution of the two suits and will facilitate the proportionate determination of the suits, ensuring no conflicting pronouncements as to who is the legal proprietor of the suit property.
10. Counsel for the Plaintiff submitted that in E392 of 2022, the 3<sup>rd</sup> Defendant filed a Notice of Preliminary Objection on 27<sup>th</sup> January 2023 referring the matter to arbitration; that the 3<sup>rd</sup> Defendant filed an application staying the arbitration and that in ELC 392 of 2022, the 3<sup>rd</sup> Defendant failed to show cause why he should not be cited for contempt.
11. Counsel for the Plaintiff submitted that on the date of showing case, the 3<sup>rd</sup> Defendant moved to the Court of Appeal and obtained stay orders and that the Applicant wants to circumvent E392 of 2022 and set aside its orders using an application for consolidation.
12. Plaintiff's Counsel further submitted that consolidating the suits will give undue advantage to E392 of 2022, and will result in a significant change of its nature and substance, violating the Plaintiff's right to a fair hearing, which includes the right to determine the nature and substance of the case to file against a Defendant.



13. Counsel submitted that the suit property is owned by the 3<sup>rd</sup> Defendant and is leased to several lessees; that the breaches that have led to the suits herein refer to the various leases against the various Defendants; that the 3<sup>rd</sup> Defendant is not a party to ELC 392 of 2022; and that the suits refer to different transactions and leases, despite being on the same property and cannot therefore be consolidated to form one suit.

### **Analysis and Determination**

14. The issues for the consideration of the court are as follows:
- a. Whether this court should allow consolidation of this suit with ELC Case No. E392 of 2022
  - b. Whether this court should stay proceedings in ELC Case No. E392 of 2022 and the arbitration proceedings.
15. The Plaintiff has opposed this application on two grounds: that it was filed after undue delay and that the application is an abuse of court process. This court takes judicial notice that the 3<sup>rd</sup> Defendant, who is the Applicant herein, was joined in this suit on 14<sup>th</sup> March 2024. This application was filed on 3<sup>rd</sup> May 2024. This court is thus not persuaded that there has been undue delay in the filing of the application.
16. The 3<sup>rd</sup> Defendant in this suit has sought consolidation of this suit with ELC Case No. E392 of 2022, Youth Limited vs Kenya Railways Corporation. Consolidation of suits is provided for under Order 11 Rule 3(1)(h) of the Civil Procedure Rules as follows:
1. With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—
    - a. ...
    - h. consider consolidation of suits.”
17. As held by the Supreme Court in *Law Society of Kenya vs Centre for Human Rights & Democracy & 12 Others* [2014] eKLR, the pith of consolidation is to ensure efficient and expeditious disposal of suits:
- “The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.”
18. The test for consolidation, as contended in *EAN Kenya Limited vs John Sawers & 4 Others* (2007) eKLR, is whether the same or similar questions of law or fact are involved in the suits:
- “But of course 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. I am satisfied that similar issues of law and fact arise in both suits. For reasons of expediency both suits will be best heard together.”



19. This was similarly held in *Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others* [2014] eKLR as follows:

“The Civil Procedure Rules mandate Courts to consider consolidation of suits and in so doing, to be guided by the following :-

1. Do the same question of law or fact arise in both cases?
2. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?
3. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?”

20. This court is guided by the above decisions. In considering whether to grant the order for consolidation of suits, the court has to consider whether there is a common question of law or fact in the suits; the reliefs or rights sought arise from the same or a series of transactions, or for any other reason, such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the *Civil Procedure Act*.

21. In this suit, the parties are Youth Limited, Daniel Njoroge Kihiko, Heng Yu International Ltd and Kenya Railways Corporation Ltd. This suit concerns ownership of LR No. 209/6445 situated in Kileleshwa Nairobi measuring 1.8690Ha. The Plaintiff asserts that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed upon the suit property in 2019 and have put construction materials and equipment thereon.

22. The 1<sup>st</sup> Defendant is claiming ownership of the suit property while the 2<sup>nd</sup> Defendant is claiming rights of tenancy or licensee acquired from the 1<sup>st</sup> Defendant. The Plaintiff on the other hand is seeking for a permanent injunction to restrain the Defendants from trespassing and interfering with the suit property, eviction orders against the Defendants, damages for trespass and mesne profits.

23. In ELC E392 of 2022, the Plaintiff Youth Limited has sued Kenya Railways Corporation for trespass onto LR No. 209/6445, which it asserts took place in 2022. They claim that the Defendant broke into the suit property and carted away goods and chattels belonging to the Plaintiff and its sister company, Royal Media Services.

24. They assert that the Defendant took forceful occupation of the suit property. The Plaintiff's claim is that it is the registered proprietor of LR No. 209/6445 vide long term lease registered on 21<sup>st</sup> November 2017 for a term of 45 years from 1<sup>st</sup> October 2011. This lease, according to the Plaintiff, was transferred to them by the Defendant, Kenya Railways Corporation.

25. The Plaintiff has sought a permanent injunction restraining Kenya Railways Corporation from trespassing, occupying, claiming ownership and interfering with the property; an order for the Defendant to unconditionally return the goods confiscated on 19<sup>th</sup> November, 2022; a declaration that the trespass and forceful occupation of the suit property by the Defendant is illegal and damages for trespass and illegal occupation.

26. It is apparent that a similar issue arises in both suits, which is the question of ownership of the suit property, LR No. 209/ 6445, which is claimed by Youth Limited, Kenya Railways Corporation and Daniel Njoroge Kihiko. The determination of this issue is also fundamental to the claim of trespass which has been raised by the Plaintiff, Youth Limited.

27. This court's attention is however drawn to the fact that the parties in ELC E392 of 2022 were referred to arbitration on 27<sup>th</sup> April 2023, and the said arbitration is yet to be concluded. It is further noteworthy



that the proceedings in ELC E392 of 2022 were stayed awaiting the outcome of the arbitration proceedings.

28. This court also notes that the court in ELC E392 of 2022 heard an application for contempt against the 3<sup>rd</sup> Defendant herein, Kenya Railways Corporation and found the said party to be in contempt. The 3<sup>rd</sup> Defendant has since appealed against the said decision. On 12<sup>th</sup> July 2024, the Court of Appeal allowed the application to stay further proceedings in ELC E392 of 2022 pending hearing and determination of the interlocutory appeal.
29. Consequently, these suits cannot be consolidated, as the proceedings in ELC E392 of 2022 have been stayed, pending the conclusion of the appeal, and the determination of the arbitration proceedings. It would therefore not be appropriate for this court to consolidate these suits at this juncture, until the order of stay is lifted.
30. As to the 3<sup>rd</sup> Defendant's prayer to stay the proceedings in ELC E392 of 2022 and the arbitration proceedings, the same must also fail because the proceedings have already been stayed by the Court of Appeal.
31. The application dated 3<sup>rd</sup> May 2024 is therefore struck out, meaning that a similar application may be filed once the Court of Appeal lifts the orders of stay.
32. Costs of the application shall be borne by the 3<sup>rd</sup> Defendant.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**O. A. ANGOTE**

**JUDGE**

In the presence of;

Mr. Ochieng holding brief for Mutungi for 1<sup>st</sup> Defendant

Ms Tusima for 3<sup>rd</sup> Defendant/Applicant

Ms Achieng for Plaintiff

Court Assistant - Tracy

