



**Ethics and Anti-Corruption Commission v Sampdoria Investments Limited & 3 others;  
National Water Harvesting and Storage Authority & 2 others (Interested Parties) (Environment  
& Land Case E023 of 2023) [2025] KEELC 294 (KLR) (31 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 294 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE E023 OF 2023  
LL NAIKUNI, J  
JANUARY 31, 2025**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**SAMPADORIA INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**WILSON GACHANJA ..... 2<sup>ND</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**NATIONAL WATER HARVESTING AND STORAGE  
AUTHORITY ..... INTERESTED PARTY**

**COAST WATER WORKS DEVELOPMENT AGENCY ..... INTERESTED PARTY**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**RULING**

**I. Introduction**

1. This Honorable Court is tasked to make a determination of the Notice of Motion application dated 28<sup>th</sup> June, 2024. It was filed by Sampdoria Investments Limited, the 1<sup>st</sup> Defendant/Applicant herein and brought under the provision of Sections 1A and 3A of the *Civil Procedure Act*, Cap. 21 and Order 19 Rule 2 of the Civil Procedure Rules, 2010, Section 7 of the *Limitation of Actions Act* and Article 159 of *the Constitution* of Kenya, 2010.



2. Upon service of the application to the Plaintiff/Respondent, it filed grounds of opposition dated 22<sup>nd</sup> July, 2024.

## II. The 1<sup>st</sup> Defendant/Applicant case

3. The 1<sup>st</sup> Defendant/ Applicant sought for the following orders:-
  - a. Spent.
  - b. This suit be and is hereby struck out and/or dismissed.
  - c. In the alternative, this suit be and is hereby stayed or consolidated with Mombasa ELC No. E023 of 2024: Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 Others.
  - d. In the event of and upon such consolidation, the lead file be and is hereby selected/designated as Mombasa ELC No. E023 of 2024: Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 Others.
  - e. Patrick Chirongo, the Plaintiff's legal clerk be and is hereby summoned to appear before this court on a date appointed by the court for purposes of cross-examination on the contents of his Affidavit of Service sworn on 7<sup>th</sup> December 2023
  - f. Costs of this application and/or of the main suit be paid by the Plaintiff.
4. The application by the Applicants herein was premised on the grounds, testimonial facts and averments made out under the 31 Paragraphed Supporting Affidavit of –Mohamedraza S.rashid, the Plaintiff a Manager of the 1<sup>st</sup> Defendant/Applicant herein sworn and dated on the same day as the Application with nine (9) annexures marked as 'MR-1 to 9'. The Applicant averred that:
  - i. The 1<sup>st</sup> Defendant/Applicant was and is still the registered owner of the property known as L.R No. MN/l/10401 measuring 2.387 Hectares or thereabout and situate at Shanzu in Mombasa County (hereinafter 'the suit property'). Annexed in the affidavit and marked as 'MR - 2' a true copy of the title deed.
  - ii. The 1<sup>st</sup> Defendant held the suit property as a lessee from the Government of the Republic of Kenya for a term of 99 years with effect from 1<sup>st</sup> July 1997.
  - iii. The 1<sup>st</sup> Defendant/Applicant was allotted and/or allocated the suit property vide a Letter of Allotment Reference No. 61093/IX/24 dated 8<sup>th</sup> July 1997.
  - iv. Despite knowing well that the suit property was allocated to the 1<sup>st</sup> Defendant/Applicant by the Government of Kenya for valuable consideration, the Plaintiff commenced investigations into an alleged illegal demarcation/alienation of the suit property under the guise that the same was public land.
  - v. The Plaintiff invited the 1<sup>st</sup> Defendant/Applicant to appear before it to record a statement and explain how it acquired the suit property. Annexed in the affidavit and jointly marked as 'MR - 3' were true copies of the letters exchanged between the 1<sup>st</sup> Defendant and the Plaintiff regarding the Investigations.
  - vi. After a series of back and forth, the 1<sup>st</sup> Defendant/Applicant represented by himself appeared before the Plaintiff's officers at its Coast Region offices situate at ACK Cathedral along



Nkrumah Road Mombasa on 25<sup>th</sup> September 2023 and a statement was duly recorded. Annexed in the affidavit and marked as 'MR - 4' was a true copy of the statement.

- vii. Immediately he finished the interview and statement recording, he was surprised when the Plaintiff's officer who was in charge of the process pulled a pre-drafted and pre-signed letter written and dated much earlier on 22<sup>nd</sup> September 2023 from a drawer and slapped him with the same. In the said letter, it was alleged that the suit property was illegally and corruptly alienated and acquired by the 1<sup>st</sup> Defendant/Applicant. Annexed in the affidavit and jointly marked as 'MR - 5' were true copies of the letter dated 22<sup>nd</sup> September 2023 and the response by the Law firm of Messrs. Oluga & Co. Advocates dated 3<sup>rd</sup> October 2023.
- viii. The fact that the Plaintiff had an already-signed letter in its possession was a clear indication that the Plaintiff had already formed its opinion about the illegality of the title of the suit property even before hearing the 1<sup>st</sup> Defendant's/Applicant's side of the story. Accordingly, the purported investigations conducted by the Plaintiff were a sham and a manifestation of sheer bad faith because the Plaintiff had a premeditated outcome of the investigations.
- ix. Accordingly, the 1<sup>st</sup> Defendant/Applicant filed a case seeking redress, to wit, "Mombasa ELC No. E023 of 2024: Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 Others (hereinafter "ELC No. E023 of 2024")". Annexed in the affidavit and marked as 'MR – 3 to 6' was a true copy of the Plaintiff.
- x. The subject of the said ELC No. E023 of 2024 was the property known as L.R. No. MN/1/10401 which was also the subject of the instant suit.
- xi. The said ELC No. E023 of 2024 was currently active before this court and the same sought to determine ownership of the suit property which ownership is what the Plaintiff challenging in this suit.
- xii. This suit will automatically be defeated and rendered superfluous should the court make a finding in ELC No. E023 of 2024 that the 1<sup>st</sup> Defendant was the legal owner of the suit property.
- xiii. In the circumstances, it was imperative that this suit be struck out or stayed to pave way for the hearing and disposal of ELC No. E023 of 2024.
- xiv. Unlike this suit, ELC No. E023 of 2024 has interim orders issued by Justice L.L. Naikuni 3<sup>rd</sup> April 2024 and extended on 15<sup>th</sup> May 2024 hence the need to give the said case priority and concentrate on it rather than this one. Annexed and jointly marked as 'MR - 7' was true copy of the said orders.
- xv. The Plaintiff and all the parties in this case would not suffer any prejudice because they would have occasion to elucidate and canvass any issues raised in this suit in ELC No. E023 of 2024.
- xvi. Although this suit was filed earlier than ELC No. E023 of 2024, the Plaintiff slept on its rights and did not serve the 1<sup>st</sup> Defendant/Applicant with the summons and pleadings until 15<sup>th</sup> May 2024 by which time the 1<sup>st</sup> Defendant/Applicant had filed and served the Plaintiff with summons and pleadings in ELC No. E023 of 2024.
- xvii. He had seen an affidavit of service sworn on 7<sup>th</sup> December, 2023 by the Plaintiff's legal clerk, one Patrick Chirongo and more specifically Paragraph 3 thereof where he alleged to have called him on 13<sup>th</sup> October, 2023 and that he switched off his phone and refused to pick calls. The said allegation were not true because of the following reasons:-



- a. Patrick Chirongo did not call him on 13<sup>th</sup> October 2023 and/or on any subsequent date.
  - b. He was advised by Mr. Willis Oluga Advocate that service through whatsapp was now acceptable. Patrick Chirongo should have served him through WhatsApp assuming it was true that he declined to receive his call.
  - c. As far as service of documents was concerned, Patrick Chirongo and his employer EACC were not new to him. They had previously served him with letters and court documents and they knew where to find him. For instance, they served him with summons in the case of “ELC E044 of 2022: EACC – Versus - Milly Glass Works Limited & Another” and he accepted service. Further, EACC had previously served him with letter relating to this very suit property. For them to now allege that they were looking for him through phone was not true because they knew his physical location. Annexed in the affidavit and marked as ‘MR – 8’ was a true copy of the Affidavit of Service sworn on 7<sup>th</sup> December, 2023 by Patrick Chirongo.
- xviii. Further and in addition to what he had stated in the above paragraph, the Plaintiff was aware all along that for purposes of the suit property in dispute, the 1<sup>st</sup> Defendant/Applicant was being represented by the law firm of Messrs. Oluga & Company Advocates who engaged the Plaintiff in various correspondences on behalf of the 1<sup>st</sup> Defendant/Applicant. Mr. Willis O. Oluga, Advocate accompanied him to record statement at the Plaintiff’s offices. Despite knowing that the 1<sup>st</sup> Defendant’s advocates for purposes hereof was Messrs. Oluga & Company Advocates, the Plaintiff never served the said firm until 15<sup>th</sup> May 2024 (see separate affidavit by Mr. Willis O. Oluga). Annexed and jointly marked as ‘MR - 9’ were true copies of the summons and plaint served on 15<sup>th</sup> May 2024.
- xix. In light of the foregoing, it was manifestly clear that the contents of the Affidavit of Service sworn on 7<sup>th</sup> December 2023 by Patrick Chirongo were not true hence the process server should be summoned to appear before this court for purposes of cross examination on the same.
- xx. The Plaintiff had never taken any serious steps in this suit since its filing in 2023 unlike the 1<sup>st</sup> Defendant/Applicant who has taken active and quick steps in ELC No. E023 of 2024 by serving the pleadings and taking court’s directions whereupon the said case was scheduled for mention on 4<sup>th</sup> July 2024 to take the court’s further directions.
- xxi. The failure by the Plaintiff to serve summons in this case in good time necessitated and created room for the 1<sup>st</sup> Defendant/Applicant to file a separate suit (ELC No. E023 of 2024). The existence of the two suits had occasioned immense difficulty and prejudice for the 1<sup>st</sup> Defendant/Applicant who had to defend this suit and at the same time prosecute its own case.
- xxii. All the issues raised in this case were capable of being determined, resolved and disposed of successfully in ELC No. E023 of 2024 hence this suit should either be struck out, stayed or consolidated with ELC No. E023 of 2024.
- xxiii. The Plaintiff herein has perfected the art of indolence by prosecuting and pursuing the 1<sup>st</sup> Defendant/Applicant, 27 years after the 1<sup>st</sup> Defendant was allocated the suit property in the year 1997.



- xxiv. Further, the Plaintiff's indolence was manifested by the fact that the Plaintiff filed this suit in September 2023 and only served the 1<sup>st</sup> Defendant/Applicant with the summons and pleadings on 15<sup>th</sup> May, 2024.
- xxv. The Plaintiff did not serve the 1<sup>st</sup> Defendant/Applicant despite knowing where to find the 1<sup>st</sup> Defendant.
- xxvi. Further, the Plaintiff was aware that for purposes of the suit property, the 1<sup>st</sup> Defendant/Applicant had instructed the Law firm of Messrs. Oluga & company advocates to represent it but the Plaintiff deliberately failed to serve the said advocates.
- xxvii. The suit was statute barred since the 1<sup>st</sup> Defendant was allocated the suit property in the year 1997.
- xxviii. It was in the interest of justice that this application filed herewith be allowed and he urged the Honourable Court to allow the same.

### **III. The responses by the Plaintiff/Respondent**

5. While opposing the application and the Plaint dated 28<sup>th</sup> June 2024, The Plaintiff/Respondent filed 14 paragraphed Grounds of Opposition dated 22<sup>nd</sup> July, 2024 on the following grounds:-
  - a. The Application herein was frivolous, fatally incompetent, incurably defective, totally misconceived.
  - b. The Application by the 1<sup>st</sup> Defendant/Applicant herein was an abuse of the due court process brought with intend to subject the Plaintiff/Respondent and this Honourable Court with unnecessary court processes and waste of court time and resources that could be utilized in proceeding for hearing and determination of the suit herein. The 1<sup>st</sup> Defendant/Applicant was trying to circumvent trial process wanting to summarily dismiss this suit without according the parties and this Honourable Court an opportunity to determine this case on merit.
  - c. The Application herein was an afterthought filed after the Plaintiff/Respondent had filed a response to the 1<sup>st</sup> Defendant/Applicant suit "ELC No. E023 of 2024 - Sampdoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others" and after serving this pleadings with intend to frustrate the Plaintiff/Applicant with numerous court processes waste the Plaintiff's and this Honourable time and resources that would have otherwise been utilized to proceed with this case for hearing.
  - d. The Application herein had not met the threshold for striking out and dismissal of suit as no reasonable and substantive grounds has been provided in support of the said ground.
  - e. The Plaintiff/ Respondent filed this suit for recovery of property L.R. No. MN/1/10401 which the Plaintiff/Respondent established through investigations to be public land reserved for Government staff quarters to house staffs of 1<sup>st</sup> and 2<sup>nd</sup> Interested Party during its investigations.
  - f. The Plaintiff/Respondent's averred that investigations established that at all material times the suit has been occupied by staff of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties who pay their rent through check off system and the said land has been managed and maintained by the 1<sup>st</sup> and Interested Parties and was therefore not available for allocation to the 1<sup>st</sup> Defendant/Applicant.



- g. The Plaintiff/Respondent averred that the issues in the Application can be raised in the Defence in respect therefore. The same cannot be canvassed summarily to dismiss this suit. It would be in the interest of justice to grant every party an opportunity to present their case in a full hearing.
- h. The 2<sup>nd</sup> Defendant/ Applicant and its Directors are fully aware of the outcome of this investigation through a demand notice that was issued to it and declined service of the same and instead proceeded to file “ELC No. E023 of 2024 - Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others”. The Plaintiff/Respondent had been sued in that suit as the 5<sup>th</sup> Defendant.
- i. The 1<sup>st</sup> Defendant/Applicant in the “ELC No. E023 of 2024 - Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others”, the Applicant challenges the outcome of investigations and claim current ownership. The 1<sup>st</sup> Defendant/Applicant further sought conservatory orders therein while knowing well that the Plaintiff/Respondent had filed the suit herein challenging the initial allocation process to current ownership by it.
- j. The Plaintiff/ Respondent averred that this suit having been filed first and having challenged the fraudulent allocation and acquisition of the suit property by the initial allottee to the 1<sup>st</sup> Defendant /Applicant, it would be prudent that “ELC No. E023 of 2024 - Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others” was dismissed, and or stayed to pave way for the hearing and determination of this suit.
- k. The Plaintiff/Respondent invited this Honourable Court to review both cases extensively and dismiss this Application for lack of merit. The 1<sup>st</sup> Defendant/Applicant could be allowed to raise all the issues in the “ELC No. E023 of 2024 - Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others” in this suit as part of the Defence.
- l. The Plaintiff/Respondent averred that interim orders issued by this Honourable Court in “ELC No. E023 of 2024 - Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others” could not be used as a determinant for striking out this suit and or consolidating the same with the latter.
- m. The Plaintiff/ Respondent averred that the striking out and or dismissal of this suit and consolidating it with the “ELC No. E023 of 2024 - Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 others” would not only prejudice the efforts by the Plaintiff/Respondent to recover the suit property on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties but also defeat the public interest and expectation of recovering public land that had been irregularly and illegally acquired.
- n. In view of the above the Plaintiff/Respondent prayed that the Application dated 28<sup>th</sup> June 2024 be dismissed with costs to the Plaintiff/Respondent as it lacked merit and do pave way for the hearing and determination of this suit on merit.

## **I. Submissions**

- 6. On 1<sup>st</sup> October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 28<sup>th</sup> June, 2024 be disposed of by way of written submissions. Unfortunately, by the time the Honourable Court was penning down this Ruling, it had not been able



to access the written Submissions. Pursuant to that a ruling date was reserved on 31<sup>st</sup> January, 2025 by Court on its own merit accordingly.

## V. Analysis & Determination.

7. I have carefully read and considered the pleadings herein by the 1<sup>st</sup> Defendant/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
8. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has four (4) framed issues for its determination. These are:-
  - a. Whether the 1<sup>st</sup> Defendant has made out a case for striking out or dismissal of this suit?
  - b. Whether this instant suit should be consolidated with Mombasa ELC No. E023 of 2024: Sampdoria Investments Limited v. National Water Harvesting and Storage Authority & 4 Others.
  - c. Whether Patrick Chirongo can be summoned to appear before this court on a date appointed by the court for purposes of cross-examination on the contents of his Affidavit of Service sworn on 7<sup>th</sup> December 2023.
  - d. Who will bear the Costs of Notice of Motion application dated 28<sup>th</sup> June, 2024.

### Issue No. a). Whether the 1<sup>st</sup> Defendant has made out a case for striking out or dismissal of this suit

9. Under this Sub – heading, the Honourable Court will decipher on the substratum of whether or not to strike out this suit. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In the case of “Yaya Towers Limited – Versus - Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)” the court expressed itself thus:-

“A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

10. Further, under the provision of Order 2 Rule 15 (1) of Civil Procedure Rules, 2010 provides as follows:

- “1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
  - (a) it discloses no reasonable cause of action or defence in law; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or



(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under sub rule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.”

11. The court must be cognizant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises. Particularly so by hearing cases in a full trial where it is plain and obvious that a plaintiff discloses no reasonable cause of action or defence in law, where a plaintiff is scandalous, frivolous, vexatious, where a Plaintiff may prejudice, embarrass or delay the full trial of the action or where the Plaintiff is otherwise an abuse of the court process.

12. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of:- “Blue Shield Insurance Company Limited – Versus - Joseph Mboya Oguttu [2009] eKLR” restated these principles thus:-

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Limited – Versus - Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a Plaintiff on grounds that it did not disclose a reasonable cause of action against the Defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that Judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung – Versus - Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

13. This Court has carefully considered the pleadings by both parties. In the process, I have noted that analysing the suit has the potential of this court combing through the evidence which the Defendants/ Applicants wish to rely upon to determine whether or not they had disclosed a reasonable cause of action. For this reason stated above, I find the ground of striking out of the suit unmerited.





**Issue No. b). Whether this instant suit should be consolidated with Mombasa ELC No. E023 of 2024: Sampdoria Investments Limited v. National Water Harvesting and Storage Authority & 4 Others.**

14. Under this sub – heading, the main issue for consideration is on the consolidation of these two suits as pleaded per excellence. Accordingly, the jurisdiction to consolidate suits is donated by the provision of Section 81 (2) (h) of the *Civil Procedure Act*, Cap. 21 and Order 11 Rule 3 of the Civil Procedure Rules, 2010. In the case of “Prem Lala Nahata & Anor – Versus - Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551”, the India Supreme Court held:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”

15. The Civil Procedure Rules, 2010 mandates courts are to consider consolidations of suit. In so doing, courts to be guided by the following three (3) legal parameters. These are:-
- a. Do the same question of law or fact arise in both cases?
  - b. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions?
  - c. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?

16. I will be considering these principles indepth herein below. In the meantime, I have taken judicial notice of the myriad of Court cases and the underlying guidelines enshrined thereof on the issue of Consolidation of cases. These include in the case of “Law Society of Kenya – Versus – The Centre for Human Rights & Democracy, Supreme Court of Kenya Petition No. 14 of 2013 the SOK held that:-

“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”

17. While Maraga J, as he then was, held in the case of:- “Municipal Council of Mombasa – Versus - Municipal Council of Mombasa [2004] eKLR that:-

‘Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. 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.

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.
18. Extrapolating the brief facts of the present case is imperative herein. It was instituted by the Plaintiff vide a Plaint dated 22<sup>nd</sup> September, 2023. The suit property in question was L - shaped delineated in the Development Plan No. CT/12/225/88/1 dated 15<sup>th</sup> January, 1988. Accordingly, the 1<sup>st</sup> Defendant/Applicant filed a case seeking redress, to wit, “Mombasa ELC No. E023 of 2024: Sampdoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 Others (hereinafter “ELC No. E023 of 2024”)”. Annexed in the affidavit and marked as ‘MR - 6’ is a true copy of the Plaint. The subject of the said ELC No. E023 of 2024 was the property known as L.R No. MN/1/10401 which was also the subject of the instant suit.
  19. The said ELC No. E023 of 2024 was currently active before this court and the same sought to determine ownership of the suit property which ownership is what the Plaintiff challenging in this suit. This suit will automatically not only be defeated, rendered superfluous but otiose should the court make a finding in ELC No. E023 of 2024 that the 1<sup>st</sup> Defendant was the legal owner of the suit property. Whereas, from the face value the suit properties in these two suits appear, when the court conducted a dipper dive on them it has been relieved to court, they are one and the same thing property.
  20. Further the Plaintiff/Respondent contended that it filed this suit for recovery of property L.R. No. MN/1/10401 which the Plaintiff/ Respondent established through investigations to be public land reserved for Government staff quarters to house staffs of 1<sup>st</sup> and 2<sup>nd</sup> Interested Party during its investigations. The Plaintiff/Respondent’s averred that investigations established that at all material times the suit has been occupied by staff of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties who pay their rent through check off system and the said land has been managed and maintained by the 1<sup>st</sup> and Interested Parties and was therefore not available for allocation to the 1<sup>st</sup> Defendant/Applicant. The Plaintiff/ Respondent averred that the issues in the Application can be raised in the Defence in respect therefore. The same cannot be canvassed summarily to dismiss this suit. It would be in the interest of justice to grant every party an opportunity to present their case in a full hearing.
  21. Ideally, consolidation of suits will be ordered if 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*, Cap 21 Laws of Kenya. See the case of “John *Gakure & 148 Others – Versus - Dawa Pharmaceuticals Company Limited CA 299 of 2007*”.
  22. As regards the opposition to the application that the suits are at different stages of trial, that per se cannot be a bar to an order for consolidation. I take judicial notice that none of these suits have been heard. Thus, the issue of any party suffering any prejudice or being disadvantaged by the consolidation does not arise at all. Though, there are circumstances whereby part heard cases may still be consolidated. In the case of:- “Benson G. Mutahi – Versus - Raphael Gichove Munene Kabutu & 4 Others [2014] eKLR”, the court held: -

“It is also clear from a reading of the Court of Appeal’s decision in NGUMBAO – Versus - MWATATE & 2 OTHERS [1988] KLR 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore submissions of Mr. Muyodi that this case cannot



be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition.”

23. The provision of Article 159 dictates that justice should be dispensed without undue delay as well as well as the overriding objective of the Civil Procedure Act, Cap. 21 calls for the consolidation of these suits. Further there is an indication that the said consolidation of the suits would save time and meet the overriding objective of ensuring the just, expeditious, proportionate and affordable resolution of civil dispute as enshrined under the provision Sections 1A and 1B of the Civil Procedure Act, cap 21, sections 3 and 13 of the Environment & Land Act, No 19 of 2011, Sections 101 of the Land Registration Act, No 3 of 2012, section 150 of the Land Act, No 6 of 2012 and Articles 159 (1) & (2) of the Constitution of Kenya, 2010. In my view, the court is called to determine the same questions of law and facts on similar suit lands between the same parties, most importantly the documents that will be relied on, during trial are likely to be the same. This is a ripe case for consolidation and this court has broad discretion to order for consolidation of suits, where the issues, witnesses and evidence to be presented are found to be similar and proceed to determine the rights of all parties together.
24. From these cases and precedents, the legal ratio and holdings are that, the essence of consolidation essentially are:-
- a. to facilitate the efficient and expeditious disposal of disputes and
  - b. to provide a framework for a fair and impartial dispensation of justice to the parties. At all costs and as a matter of principles, consolidation of cases should never be meant to confer any undue advantage upon the party nor should it be intended to occasion any disadvantage towards the party that opposes it.
25. Based on the guidance by the Civil Procedure Rules, these cases in my view are proper and typical ones to be considered for consolidation. Therefore, the Court finds that where the suit lands are similar in both suits, the orders that will be issued will affect them equally and it is only logical that the same were consolidated. The prayer sought succeeds.

**Issue No. c). Whether Patrick Chirongo can be summoned to appear before this court on a date appointed by the court for purposes of cross-examination on the contents of his Affidavit of Service sworn on 7<sup>th</sup> December 2023**

26. Under this sub title there is a chronology of events before we examine whether or not this court can summon to appear before this court on a date appointed by the court for purposes of cross-examination on the contents of his Affidavit of Service sworn on 7<sup>th</sup> December 2023. I have re-evaluated the above material and now render the following view. The procedure for service of summons is clearly set out under Order 5 of the Civil Procedure Rules (“the Rules”). Rule 8 of the said Order specifically provides for personal service or service through the relevant defendant’s agent. Order 5 Rule 9 of Civil Procedure Rules is very clear on the manner in which service should be effected upon a Defendant in a suit. This rule requires that service should be made on the Defendant in person unless he has an agent empowered to accept service.
27. There is conflicting affidavit evidence regarding whether or not the Applicant was served with the summons and the Plaintiff in this case. This conflict could only have been resolved by the cross-examination of the Respondent’s material witness, that is the Process Server who alleges to have served the Applicant with the processes. The provision of Order 5, Rule 16 of the Rules expresses thus:-

“On any allegation that a summons has not been properly served, the court may examine the serving officer on oath, or cause him to be so examined by another court, touching his



proceedings, and may make such further inquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit.”

28. My understanding of the above provision is that a court of law has the discretion to call for the examination of a process server where there is doubt as to whether service was properly effected. There is nothing compelling a court to summon a process server for examination and it lies purely with the court’s discretion to decide whether or not to apply the said provision.

29. Further, the provision of Order 19 Rules 1 & 2 of the Civil Procedure Rules, 2010 states:

“Power to order any point to be proved by affidavit [Order 19, rule 1]

Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable:

Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorising the evidence of such witness to be given by affidavit.

2. Power to order attendance of deponent for cross-examination [Order 19, Rule 2]

1. Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

2. Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.”

30. Allowing cross-examination on an affidavit and documents drafted and filed is a matter of discretion, and cross-examination should be avoided unless exceptional circumstances exist. Any party wishing to cross-examine a deponent must convince the court that the cross-examination is justified. Given that Order 19 permits the use of affidavits as evidence, courts should avoid allowing cross-examination of the deponent’s affidavits unless the circumstances merit it. Additionally, this action may result in increased costs due to cross-examination during interlocutory proceedings and unduly prolonging the suit, which is not envisioned in under the provision of Sections 1A and 1B of the [Civil Procedure Act](#), Cap. 21.

31. In the case of:- “Republic – Versus - Kenya Revenue Authority Ex - Parte, Althaus Management & Consultancy Ltd [2015] eKLR”, the Court stated:-

“(14) [14] Cross - examination on the affidavit is a discretionary power conferred upon the court by the provision of Order 19 Rule 2 of the Civil Procedure Rules. It is not given as a matter of right and therefore any party who wishes to cross-examine a deponent must satisfy the court that there is a good reason for the purpose of examination. In other words, a party ought to lay down a proper legal foundation to justify his application for leave to cross-examine the deponent. As the requisite rules recognize the use of affidavits in evidence especially in the course of interlocutory applications, the courts ought not to readily permit cross-examination of the deponent’s affidavits otherwise if the courts become too willing to allow for cross-examination, the already limited



time available for applications would be further curtailed to the detriment of the wider interests of justice. Therefore, in order to ensure that no more time than is really necessary is further taken up by cross-examination, it is only in instances where the court is satisfied that the cross-examination is essential in enhancing the course of justice, that the court would allow deponents to be cross-examined.” (see also Ahmednasir Abdikadir & Co Advocates – Versus - National Bank of Kenya Limited (2) [2006] 2 EA 6).”

32. The law has allowed evidence to be proved by way of affidavits under Order 19. But under Rule 2 of the said Order, the Court may order a deponent of an Affidavit to attend court to be cross-examined. In as much as this Court is not a document examiner as per the rules of evidence, Section 48 of the *Evidence Act*, Cap. 80. Hence, this court is of the view that the prayer for cross-examination of the Process Server at this point is warranted and therefore this prayer is merited.

**ISSUE No. d). Who will bear the Costs of Notice of Motion application dated 28<sup>th</sup> June, 2024.**

33. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
34. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

**VI. Conclusion & Disposition**

35. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the following orders:-
- a. That the Notice of Motion application dated 28<sup>th</sup> June, 2023 be and is hereby partially found to have merit hence hereby allowed, strictly in respect to prayers 3 and 5.
  - b. That an order be and is hereby made consolidating Mombasa ELC No. E023 of 2024: Sampadoria Investments Limited – Versus - National Water Harvesting and Storage Authority & 4 Others and ELC Case No. E023 OF 2023: Ethics and Anti – Corruption Commission – Versus - Sampadoria Investments Limited & Others.
  - c. That an order do and is hereby made in adherence to prayer (b) ELC Case No. E023 OF 2023: Ethics and Anti – Corruption Commission – Versus - Sampadoria Investments Limited & Others being the suit was filed first will be the lead file.
  - d. That an order do and is hereby made summoning Patrick Chirongo, the Plaintiff’s legal clerk to appear before this Court on a date to be determined by Court on 3<sup>rd</sup> February, 2025 by Hon. Mr. Justice Olola for purposes of conducting the Cross - Examination on the contents of his Affidavit of Service sworn on 7<sup>th</sup> December 2023.
  - e. That there shall be no orders as to costs.



IT IS SO ORDERED ACCORDINGLY.

**RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL, MEANS SIGNED AND DATED AT MOMBASA THIS .....31<sup>ST</sup> .....DAY OF .....JANUARY..... .....2025.**

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**HON. MR. JUSTICE L. L. NAIKUNI  
ENVIRONMENT AND LAND COURT AT  
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiff/Respondent.
- c. Mr. Kilonzo Advocate for the 1<sup>st</sup> Defendant/Applicant.
- d. No appearance for the 2<sup>nd</sup>, 3<sup>rd</sup> & 4<sup>th</sup> Defendants/Respondents; 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Interested Parties,

