



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 84 OF 2020**

**ISIOLO COUNTY.....APPLICANT**

**VERSUS**

**CHOKE CONSTRUCTION SUPPLIERS CO. LTD .....1<sup>ST</sup> RESPONDENT**

**NOYASU CONSTRUCTION CO. LIMITED .....2<sup>ND</sup> RESPONDENT**

**ADAN HASSAN EDIN T/A RAYAN**

**PROVISIONS STORES ..... 3<sup>RD</sup> RESPONDENT**

**DABASITI CONTRACTORS & SUPPLIERS LIMITED.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Summons dated 4/09/2020 brought pursuant to, *inter alia*, **sections 1A, 1B, 79G and 95 of the Civil Procedure Act, Order 43 Rule 2, Order 42 Rule 6 of the Civil Procedure Rules 2010, Article 159 (1) (a) and (d) of the Constitution of Kenya and section 133 of the County Government Act**, the applicant sought various orders including a stay of execution and/or consequential proceedings pending the hearing and determination of the intended appeal; leave to file appeal out of time against the whole judgment made on 10/04/2018 plus the ruling of and order given on 21/08/2020 by the Hon. S M Mungai (Chief Magistrate).
2. A preliminary objection dated 10/09/2020 was raised on the grounds that the said application was defective for joinder of appeals, causes of action and misjoinder of parties; that it offended the provisions of **Order 42 and 22 of the Civil Procedure Rules**; and that the applicant cannot contemporaneously seek parallel reliefs of review and appeal.
3. **Mr. Muriuki**, Learned Counsel for the respondents, argued that the applicant sought leave to file ten (10) appeals from ten (10) decrees which it had failed to produce. That the applicant ought to have filed distinct applications since the decrees was for different cases. That one of the decrees was against an entity called Ali Hussein t/a Ali Majid Shop who was not a party in these proceedings and no order could be issued against a non-party.
4. He further submitted that the applicant sought leave to appeal against a judgment and ruling. It ought to have filed two separate applications since they are two different causes of action. That a party cannot seek two parallel reliefs for leave to appeal and review contemporaneously.
5. **Mr. Ogola**, Learned Counsel for the applicant, submitted that on the issue of joinder of issues the ruling dated 21/08/2020 stated that the judgment was in ten (10) matters which were consolidated at the execution stage and benefitted for Kshs. 80 Million. That the only way to deal with it was to appeal against the consolidation order. That under **Order 1 Rule 9**, misjoinder is no ground to deny a party relief.
6. On appeal and review, Counsel submitted that review was in the lower court which had been stopped by the order of 2/09/2020 which had directed that all matters touching on the ten (10) cases had been overtaken by events.
7. That court has considered the record and the submissions of learned counsel. A preliminary objection is raised purely on a point of law and not on facts. See **Mukisa Biscuit Company v Westend distributors Limited [1969] EA 696**. According to the applicant, the application under consideration is defective for joinder of appeals, causes of action and misjoinder of parties which offends **Order 42 Rule 22 of the Civil Procedure Rules**.
8. The agreed facts are that, before the lower court ten cases by 5 different parties were heard and determined against the applicant. The applicant vide the application under consideration, sought leave to file an appeal out of time against the “whole judgment delivered on 10/04/2018” and ruling and the order given on 21/08/2020. Neither the alleged judgment nor ruling was produced. Further, the case number

for which the alleged judgment and ruling sought to be appealed against was not disclosed.

9. The nearest the disclosure of the cases before the lower court was made is in the heading of the document christened “Draft Memorandum of Appeal” dated 4/9/2020. In that document, it is stated as follows: -

***“THE APPELLANT above appeals to the High Court of Kenya at Nairobi from the ruling and order of the Learned Chief Magistrate in CMCC No. 26 of 2017, 27 of 2017, 28 of 2017, 29 of 2017, 30 of 2017, 31 of 2017, 32 of 2017, 34 of 2017, 35 of 2017 and 36 of 2017 delivered on 10<sup>th</sup> April, 2018 (Certified copy to be availed) and sets forth the following ...”.***

10. From the annexures to the respondent’s replying affidavit, the Court noted copies of separate decrees issued in the foregoing cases. Those decrees are in respect of 5 separate entities as follows: -

a) CMCC Nos. 26 & 27 of 2017, wherein the plaintiff was **Choke Construction Supplies Company Ltd (the 1<sup>st</sup> respondent)**. The decrees are dated 6/11/2018.

b) CMCC No. 28 of 2017, wherein the plaintiff was **Noyasu Construction Company Ltd (the 2<sup>nd</sup> respondent)**. The decree is dated 6/11/2018.

c) CMCC Nos. 29 & 30 of 2017, the plaintiff being **Adan Hassan Edin t/a Rayan Provisions Store (the 3<sup>rd</sup> respondent)**. The decrees are dated 10/4/2018.

d) CMCC Nos. 31 & 32 of 2017, the plaintiff being **Dabasiti Contractors and Suppliers Ltd (the 4<sup>th</sup> respondent)**. The decrees are dated 10/4/2018.

e) CMCC Nos. 34, 35 & 36 of 2017, the plaintiff being **Ali Hussin Ali t/a Ali Majid Shop**. The decrees are dated 10/4/2018.

11. The complaint by the respondent is that, there was misjoinder as the plaintiff in (e) above was not joined and further that, there were different causes of action. Under **Order 1 Rule 9 of the Civil Procedure Rules**, misjoinder or non-joinder of parties is no ground to terminate a suit. The application cannot be terminated on that ground as the Court is called upon to determine the rights of the parties before it. The principle under the aforesaid **Order 1** is also replicated in **Order 42 Rule 22** concerning appeals.

12. However, there is one issue that goes to the root of the application before Court. The applicant has consolidated different suits against different parties and made an omnibus application for leave. There is no evidence that the above suits were ever consolidated. The Court agrees with the respondents that what the applicant should have done was to file individual application in respect of each suit. At least there should have been an application against each of the 5 parties since the issues in respect of each case is different.

13. It is clear that the decrees were issued separately and on separate dates. The joinder of the parties in the miscellaneous application while the parties are in respect of different suits makes the application fatally defective. If there was an order for consolidation post decree, which has not been shown, that would be a misnomer and the applicant should have appealed against that order of consolidation. This is so because each party has a different right inuring from its decree.

14. In consolidating the decrees for the different parties in one application, the respondents are prejudiced on how to face the applicant’s claim.

15. For the foregoing reasons, I find the preliminary objection to be meritorious and allow the same. The Summons is therefore struck out with costs to the respondents.

**DATED** and **DELIVERED** at Meru this 29<sup>th</sup> day of October, 2020.

**A. MABEYA, FCI arb**

**JUDGE**