



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

JUDICIAL REVIEW APPLICATION NO. 2 OF 2016

**IN THE MATTER OF: APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF
CERTIORARI & PROHIBITION**

AND

IN THE MATTER OF: COMPANIES ACT CAP 486 LAWS OF KENYA

AND

IN THE MATTER OF: CIVIL SUIT NO 290 OF 2015

BETWEEN

REPUBLICAPPLICANT

AND

GEOFFREY KARIUKI NJUGUNA)

ESTHER WANJA NGANGA)

PETER MWAURA KAMAU)

JULIUS MWANGI KURIA)EX PARTE APPLICANTS

GEORGE NDERITU KAGUORA)

JOYCE RUKARIA GITAU)

RICHARD NJOGU NDUNGU)

VERSUS

THE RESIDENT MAGISTRATE'S COURT

AT KIAMBU2ND RESPONDENT

AND

DR. SAMUEL THINGURI WARWATHE1ST INTERESTED PARTY

BEATRICE WAIRIMU KAMAMIA.....2ND INTERESTED PARTY

KENYA NATIONAL CHAMBER OF COMMERCE AND INDUSTRY

(KNCCI) LIMITE.....3RD INTERESTED PARTY

RULING

INTRODUCTION AND BRIEF HISTORY

1. The comprehensive history and procedural posture in this matter is given at length in a ruling dated today (29/07/2016) in the “sister” file to wit Kiambu High Court Judicial Review Application No. 1 of 2016 (“JR No. 1”). There is no point in rehashing that history in this ruling since the outcome of the application I am considering here is to consolidate this Judicial Review Application with JR No. 1. The context of this ruling will, therefore, be provided by that history.

2. The question I have to answer here is whether this Judicial Review Application should be consolidated with JR No. 1. I invited the parties to address me on the question *suo motto* owing to the remarkable similarities of parties, subject matter and prayers in the two cases. Indeed, the parties are exactly the same; the subject matter is exactly the same; and the prayers sought exactly the same. If ever there were a cogent case for consolidation of two matters, it is this one. Yet, a named Interested Party – Dr. Simon Thinguri Warwathe – objected to the consolidation hence the necessity of this short ruling.

3. JR No. 1 was initiated by the National Office of the Kenya National Chamber of Commerce and Industry (KNCCI) to challenge a decision made by a Magistrate’s Court in CMCC No. 290 of 2016. The main ground upon which the Judicial Review Application is predicated is the alleged lack of jurisdiction on the part of the Magistrate’s Court to entertain a matter involving a company registered under the Companies’ Act. In CMCC No. 290 of 2015, Dr. Warwathe and one Beatrice Wairimu Kamamia were the Plaintiffs and the beneficiaries of certain orders granted by the Court. The seven *ex parte* Applicants herein were the defendants in that matter. All the nine individuals involved in CMCC No. 290 of 2015 (the 2 Plaintiffs and 7 Defendants) became the named Interested Parties in JR No. 1.

4. After leave was granted to KNCCI to bring the Judicial Review Proceedings in JR No. 1 but before the substantive application was heard, KNCCI sought to withdraw the Judicial Review Application. The application to withdraw became hotly contested and is determined by this Court in the ruling accompanying this one as mentioned before. Suffice to say that the attempts by KNCCI to withdraw the entire suit in JR No. 1 was declined even though it was permitted not to participate in any further proceedings in the case.

5. Meanwhile, the *ex parte* Applicants herein, apprehensive that the withdrawal of JR No. 1 might be permitted – and, in any event, desirous to obtain certain interlocutory orders – proceeded to file the present Judicial Review Application (“JR No. 2”).

6. When the matter (JR No. 2) first came before me, I declined to grant the interlocutory orders sought but, since I was acutely aware of the similarity of the issues and parties, I asked the *ex parte* Applicants to serve the suit papers and then for all the parties to address me on the question of consolidation. When the parties appeared before me on 21/07/2016, the *ex parte* Applicants supported consolidation while Dr. Warwathe, appearing in person, opposed it.

ARGUMENTS BY THE PARTIES AND ANALYSIS

7. Mr. Mose, for the *ex parte* Applicants, in arguing for consolidation, argued that both Judicial Review Applications presented the same question of law. He argued that the factual positions are the same as well. He argued that the purpose of consolidation is to prevent the resolution of similar issues in ways which might be conflicting and therefore embarrassing to the Court. Consolidation in appropriate cases, he also argued, saves judicial time and achieves the overriding objectives of the civil justice system by

expediting resolution of disputes and ensuring that the resources expended in a given conflict is proportionate to the dispute. He referred the court to a number of cases which enunciate the correct test to use in determining whether consolidation is appropriate. He principally relied three cases: **R.M.G. vs N.G. & Another** (Nairobi HCCC No. 29 of 2009 (OS); **Joseph Okoyo v Edwin Dickson Wasunna** (Nairobi ELC No. 1000 of 2012; [2014] eKLR) and **Ahmed Zain Mohammed v Zain Ahmed Zain & 4 Others Mombasa HCCC No. 532 of 2001; [2003] eKLR**). I have read these decisions carefully.

8. Dr. Warwathe argued that this Judicial Review is exactly the same as JR No. 1. His position was that the filing of this matter and the determination of whether it should be consolidated is premature since we needed first to know if JR No. 1 will be withdrawn or not. It follows that Dr. Warwathe did not necessarily disagree with the correct legal test for consolidation.

9. Fortunately or unfortunately, Dr. Warwathe's point is rendered moot by the accompanying ruling in which I have declined leave to withdraw JR No. 1.

10. I am therefore left to apply the test for consolidation that has emerged from our jurisprudence. While the cases cited apply to "ordinary" civil suits to which Civil Procedure Rules apply, the principles applicable are the same in all types of cases. The test is best captured in the **R.M.G. vs N.G. & Another** Case in the following paragraph:

The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This would mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously.

11. This same test is broken down in **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa [2004] eKLR** as follows:

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 questions 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.

12. In this case, the common questions of law and fact in the two suits are obvious. Indeed, even Dr. Warwathe acknowledges so. It requires little further analysis, then, to conclude that this is an appropriate case for consolidation: the singular question of law presented by both applications is the same: whether the magistrate's court had jurisdiction to entertain CMCC No. 290 of 2016 and if not, whether the ruling given in the case should be quashed. The parties named in both applications are the same save for the shuffling of who is the ex parte Applicant and who is the Interested Parties in the respective applications.

DISPOSITION AND ORDERS

13. It follows, then, that in view of the common issues, prayers and parties, it is only appropriate that Kiambu High Court Judicial Review Application No. 1 of 2016 be consolidated with Kiambu High Court Judicial Review No. 2 of 2016 for purposes of being heard and determined together. The file for Kiambu High Court Judicial Review Application No. 2 of 2016 (this file) shall be the lead file for purposes of filing any further pleadings as well as for purposes of recording of the proceedings. For purposes of identification, the parties shall be referred to by their respective roles in this file (as the lead file). For avoidance of doubt, to the extent that the Kenya National Chambers of Commerce and Industry has withdrawn from participating in Kiambu High Court Judicial Review Application No. 1 of 2016, the ex

parte Applicants herein shall be treated as the *ex parte* Applicants in the prosecution of the consolidated matter.

14. The costs of this application shall be in the cause.

Orders accordingly.

Dated and delivered at Kiambu this 29th day of July, 2016.

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JOEL NGUGI

JUDGE