



IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL CASE NO. 45 OF 2014 (O.S)

(CIVIL SUIT NO. 207 OF 2012 (O.S))

IN THE MATTER OF :THE ESTATE OF

KALSUMBAI NAZERAJI JIWA

AND

IN THE MATTER OF : KUSLUMBAI NAZERALI TRUST

AND

IN THE MATTER OF : TITLE NO. MOMBASA/BLOCK XXXVIII/22

BETWEEN

YUSUF JIWA 1ST PLAINTIFF

NAUSHAD JIWA 2ND PLAINTIFF

AND

HUSSEIN NAZERALI JIWA 1ST DEFENDANT

ROSEMIN NAZERALI JIWA 2ND DEFENDANT

RULING

ON NOTICE OF MOTION DATED 11TH APRIL 2014

1. By Notice of Motion dated 11th April 2014 the Plaintiffs seek stay of proceedings in **Mombasa CMCC No. 618 of 2010** and **Mombasa CMCC No. 619 of 2010** pending the hearing and determination of this suit.

BACKGROUND

2. The Defendants in this suit Hussein Nazerali Jiwa and Rosemin Nazerali Jiwa (hereinafter called "**Trustees**") filed two suits in the Mombasa Chief Magistrate's Court, which suits are now sought

to be stayed by the Notice of Motion under consideration. In **Case No. 618 of 2010** Trustees sued Yusuf Jiwa (**Yusuf**) and in **Case No. 619 of 2010** they sued Naushad Jiwa (**Naushad**). The two suits before the Chief Magistrates are for the eviction of both Yusuf and Naushad from property MOMBASA/BLOCK XXVIII/22 (**the suit property**) and for them to pay mesne profit from December 2009 to date of vacation of the suit property. In their identical defences Yusuf and Naushad plead that the suit property is subject of a Trust and that under that Trust they are beneficiaries. This is how they pleaded-

- a. **The Defendant further avers that according to the Deed of Settlement dated 27th July 1956 and registered at Mombasa Lands Office on 11th August 1956 the said property was to be sold after 21 years and the proceeds distributed as set out in the said Deed of Settlement which provided inter-alia that $\frac{1}{3}$ of the proceeds would go to a Memorial Trust Orphanage for which the Defendant is one of the Trustees.**
- b. **The Plaintiffs are therefore acting in toto breach of the said Deed of Settlement and therefore not entitled to the reliefs sought.**

It is not denied by all parties that the suit property is the subject of a Trust and that the Trustees in this suit are the registered Trustees of that Trust.

3. By this present suit Yusuf and Naushad have sued the Trustees seeking the Court to make the following determinations amongst others-
 - **Whether Yusuf and Naushad are the grandchildren of the settler.**
 - **Whether the settler created a trust.**
 - **Whether Yusuf and Naushad are beneficiaries of that trust.**
 - **Whether the Trustee were obligated under the trust to sell the suit property.**
 - **Whether Trustees have abided by the instructions of the settler.**
 - **Whether Trustees are accountable to Yusuf and Naushad as beneficiaries of the Trust.**

SUBMISSIONS ON BEHALF OF YUSUF AND NAUSHAD

4. Yusuf in his affidavit in support of the Notice of Motion stated that it would be fair and just to stay the suits before the Mombasa Chief Magistrate's Court pending the determination of this suit. The Learned Counsel representing Yusuf and Naushad submitted that the Court should stay the Mombasa Chief Magistrate's Court suit so that the Court can determine in this suit whether the trust is illegal because such determination would have a bearing on the Mombasa Chief Magistrates Court suits.

SUBMISSIONS ON BEHALF OF THE TRUSTEES

5. The Learned Counsel for the Trustees referred to the replying affidavit filed in opposition to the application. Learned Counsel submitted that the stay application should have been filed before the Mombasa Chief Magistrate's Court and not before this Court. Further that in the suits before Mombasa Chief Magistrate's Court, the Trustees are represented by another firm of Advocates, namely Y. A. Ali Advocates who are not the Advocates in this case, and that Y. A. Ali Advocates had not been served with the application to stay the suits they had filed.
6. In giving the background to the actions Learned Counsel stated that the suit property was the subject of controlled tenancy whereby Yusuf was paying Kshs. 412/- per month for 3 bedroomed flat and Naushad was paying Kshs. 315 per month for a two bedroomed flat. That rent was later de-controlled and the Trustees filed the suits before Mombasa Chief Magistrate's Court against both seeking their eviction.

ANALYSIS

7. Section 6 of the Civil Procedure Act is the guiding Law in respect of the application before Court. That Section provides-

“6. No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

The Learned Author Stuart Sime in the book “A Practical Approach To Civil Procedure” 9th Edition in discussing stay of a suit where there is a concurrent claim stated viz-

“There is a general public interest in avoiding a multiplicity of claims. Sometimes it is simply an abuse of process to bring duplicate sets of proceedings, with the result that the later proceedings will be struck out (see *Buckland v Palmer* [1984] I WLR 1109). The following examples stop a little way short of being suitable for striking out, but stays may be imposed instead.”

8. From the above quotes it is clear that it is the subsequently filed suit that is stayed where it raises issues that are directly or substantially in issue in the previous suit and the reason why such stay should be granted is to avoid multiplicity of claims. It follows that if the issues raised in this suit are similar to those to be decided in the Mombasa Chief Magistrate’s Court suits it is this suit, and not the Chief Magistrate’s Suits, that would be stayed. Yusuf and Naushad therefore have the wrong end of the stick when they seek to stay the Chief Magistrate’s cases.
9. Looking at the issues raised in this suit and in the Chief Magistrate’s case I find no similarity whatsoever. In this case Yusuf and Naushad seek to be recognized as beneficiaries of the Trust and to be provided for if the Court determines they are beneficiaries. In the Chief Magistrate’s Court’s case Yusuf and Naushad are tenants of the suit property, which is the subject of the Trust, and the Trustees seek their eviction. Although Yusuf and Naushad allege in their Defence in the Chief Magistrate’s Court cases that the Trustee had acted in breach of the Trust in failing to sell the suit property, they do not deny they are tenants. It follows that the issue in the Chief Magistrate’s Court cases is one of Landlord and Tenants and the issues in this case relate to the claim of entitlement to benefit from the Trust. It is because of this finding that I find that the application has no merit.
10. I have perused the Magistrate’s Court file and noted that that case is part heard and is awaiting Defence hearing.

CONCLUSION

11. I make the following orders-

- a. **The Notice of Motion dated 11th April 2014 is dismissed with costs.**

Order accordingly.

DATED and DELIVERED at MOMBASA this 18TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE