



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 490 OF 2011

AYUB SULEIMAN OMAR PLAINTIFF

VERSUS

SALIM SHEIKHAN SALIM DEFENDANT

RULING

1. The Application before Court is the Defendant's Notice of Motion dated 22 June 2012. It prays that this suit be stayed pending the hearing and determination of **HCCC No. 53 of 2010 – Salim Sheikhan Salim versus Superstar Parcels Services Ltd & Ayub Suleiman Omar (Interested Party)**. The Application is supported by the Affidavit of the Defendant again sworn on 22 June 2012. The grounds upon which the Application are based is that the issues raised by the Plaintiff in this suit are directly and substantially in issue in *HCCC No. 53 of 2010* which suit is between the same parties and covers the same subject matter. In his Supporting Affidavit, the Defendant related what had transpired in *HCCC No. 53 of 2010* where he had joined himself as an Interested Party. He had made a claim therein for Shs. 11,927,577 .80 which he claimed were monies lent or advanced by him to the company known as Superstar Parcel Services Ltd. (hereinafter "the Company"). Having obtained summary judgement the Defendant had instructed the firm of auctioneers to attach 2 motor vehicles belonging to the Company.
2. However by a consent order issued on the 21 September 2010, the interlocutory judgement was set aside and the Company was allowed to defend the suit. The Defendant then set out the issues in the previous suit which he saw as follows: –
 - a. Fraud by the directors of the Company.
 - b. The question of ownership of the motor vehicles registration numbers KBB 617M and KBB 618M.
 - c. Loss of profits and capital injection by the directors in the Company and
 - d. Claim of Shs. 12 million by the parties

The Defendant prayed that the said issues be canvassed and determined in the previous suit before proceeding with this one.

3. In his Replying Affidavit dated 19 September 2012, the Plaintiff herein emphasized, from the outset, that the Orders sought by the Defendant's Application were meant to prevent the court from determining the real issues between the parties herein and to prevent the ends of justice from being met. So far as suit *HCCC No. 53 of 2010* is concerned, the Plaintiff stated that it had long been overtaken by events as the said motor vehicles had already been "sold" and transferred into the name of the Defendant thus rendering the whole suit academic. The Deponent then went on to

reflect on what had transpired as regards the said motor vehicles and what he called a “sham” auction sale in which the Defendant herein had purchased the said motor vehicles from the auctioneer. He maintained that the said motor vehicles had been owned by him and that the consent entered into on the 21 September 2010 was between the Plaintiff therein and the Company and not with him as the Interested Party therein. Despite his protestations as above, the Plaintiff detailed that the issues between the parties in this suit can be properly ventilated and determined, as the previous suit had long been overtaken by events in the sense that the said motor vehicles had been transferred into the name of the Defendant herein. Finally in winding up his said Affidavit, the Plaintiff stated that in his opinion and upon advice received from his advocates on record, it was in the interests of justice that instead of staying the present suit, the court would rather make an order that the two files be consolidated, so that the court could have the benefit of looking at both files together and, that way, not only will justice be done but will also be seen to have been done.

4. Before this court on 15 November 2012, the parties agreed, by consent, that the Defendant’s said Application would be dealt with by written submissions on either side. Indeed, the Defendant filed his written submissions on 23 November 2012. After detailing the background to the Plaintiff herein and the prayers sought by the Plaintiff, he noted that the Defendant and the Plaintiff herein were joint directors in the Company and that fraud had been pleaded as regards the above-mentioned motor vehicles which had originally been transferred and/or registered in the name of the Company. In *HCCC No. 53 of 2010* as per the bundle attached to the Defendant’s Supporting Affidavit in support of the Application, he also noted that the parties hereto were both joint directors and equal shareholders in the Company and that the issue of fraud regarding the dealings in respect of the aforementioned vehicle had also been pleaded. The court would see that the pleadings therein involved the Defendant in this suit as plaintiff and the Company as the defendant. The Plaintiff herein had been enjoined as an Interested Party.
5. As regards the applicable law, the Defendant noted that he had moved the court under the provisions of **sections 3, 3A and 6** of the *Civil Procedure Act* as well as the provisions of **Order 2 Rule 15** of the *Civil Procedure Rules 2010*. Under the general provisions of the *Civil Procedure Act*, the Defendant submitted that this court has wide powers to make such orders as the ends of justice may require or to prevent an abuse of the court process. The court was referred to the case of **Saldanha & Ors versus Bhailal and Company & Ors (1968) EA 28** and observed that **Dalton J.** had detailed therein that, despite the fact that a specific procedure is provided by rule, such cannot operate to restrict the court’s inherent jurisdiction. Such a dictum had been approved by **Spry JA** in the case of **Rawal versus Mombasa Hardware Ltd (1968) EA 392** as well as **Law Ag V-P** in the case of **Abdul & Anor versus Home and Overseas Insurance Company Ltd (1971) EA 564**. The Defendant then moved on and quoted verbatim the provisions of **section 6** of the *Civil Procedure Act*. The Defendant maintained that the matters in issue in this suit as well as in *HCCC No. 53 of 2010* were basically the same and had strict reference to the entire subject in controversy. Again the court was referred to the Court of Appeal case being **Jadva Karsan versus Harnam Singh Bhogal (1953) 20’s EACA 74**. As regards “matters in issue” as between the two cases, the Defendant saw such as follows: –
 - a. Of the subject matter being the aforementioned motor vehicles.
 - b. The directors of the Company each holding equal shareholding
 - c. In this suit, the Plaintiff claimed an interest in the return and/or ownership of the aforementioned motor vehicles or a sum equivalent to their value.
 - d. In *HCCC No. 53 of 2010*, the Defendant claimed an interest in the ownership of the aforementioned motor vehicles which had originally been transferred and registered in the name of the Company.
 - e. *HCCC No. 53* is still subsisting and has not been fully determined by this court.
6. As regards **Order 2 Rule 15** of the *Civil Procedure Act*, the Defendant submitted that this court has power to strike out these proceedings as being an abuse of the process of the court. In its opinion, the Plaintiff, by filing this suit while *HCCC No. 53 of 2010* remains still to be determined, is an abuse of the process of court. In the opinion of the Defendant, here was a classic example that can lead to duplication of proceedings and eventually miscarriage of justice. The

- Defendant concluded that the Application should be allowed as prayed so as to pave the way for the hearing and full determination of *HCCC No. 53 of 2010*. The Defendant did not concur with the Plaintiff that this was a suitable matter for this court to order a consolidation of the two suits.
7. The Plaintiff filed his written submissions on 29 November 2012. He maintained and stressed that he had strongly contested the manner in which the judgement had been obtained in *HCCC No. 53 of 2010*. He emphasised that the consent order issued in that suit on 21 September 2010 had been arrived at as between the Defendant herein (the Plaintiff in that suit) and the Company and had only been brought to his attention after the aforementioned motor vehicles had been attached, “sold” and transferred into the name of the Defendant herein. He accused the Defendant of entering into cahoots with the Company to the detriment of the Plaintiff herein. The Plaintiff also maintained that the Defendant had totally misapprehended the specific requirements of **section 6** of the *Civil Procedure Act*. The Plaintiff submitted that the incident suit could not be consolidated as prayed for by the Defendant as it did not meet the specific requirements of the said section. The Plaintiff maintained that a careful read of the two suits clearly show that the matters in issue and the relief claimed are not the same. He maintained that the differences were as follows: –
 - a. The Plaintiff in HCCC No. 53 of 2010 was claiming in his capacity as a shareholder and a member of the defendant Company.
 - b. His claim therein arose from monies lent and/or advanced to the defendant Company for the latter’s operations.
 - c. The Plaintiff therein detailed and alleged fraudulent transfer of unnamed assets to undisclosed third parties.
 - d. The said Plaintiff had referred to an alleged attempt by the defendant Company, to transfer the said motor vehicles allegedly belonging to the plaintiff therein to another unspecified company.
 - e. In HCCC No. 53 of 2010 the plaintiff’s claim therein was the Shs. 11,927,577.80 together with interest thereon.
 8. In contrast, the Plaintiff in this suit, had claimed fraud against him by the Defendant the subject thereof being the two motor vehicles registration numbers KBB 617M and KBB 618M. The relief claimed was the return of the two motor vehicles or their monetary value which when computed total Kenya Shs. 12 million. The Plaintiff maintained that the particulars of fraud in the present suit are very specific as against the Defendant and are radically different from the generalities as detailed in the other suit. The Plaintiff underlined that in *HCCC No. 53 of 2010* the relief claimed was Shs. 11,907,577.80 which monies were the sums allegedly lent by the Plaintiff to the Company to facilitate its operations. In this suit being *HCCC No. 420 of 2011*, the relief claimed by the Plaintiff herein is for the return of the two motor vehicles registration numbers as above, or in the alternative, an equivalent monetary value of the said motor vehicles amounting to Kenya Shs. 12 million when computed.
 9. The Plaintiff maintained that the orders sought by the Application in reliance of **Order 2 Rule 15** were not tenable. The said Rule provided for striking out pleadings on the grounds given thereunder whereas the Application before this court prayed for a stay of proceedings not a striking out thereof. As regards the Plaintiff’s suggestion that the two suits be consolidated, he referred the court to the Indian case of **Dr. Guru Prasad Mohanty versus Bijay Kumar Das AIR 1984 Ori 209**. The Plaintiff urged the court to be persuaded by this Indian authority and to adopt the same in its finding. The Plaintiff went on to say that in considering the consolidation of suits the court should look upon the following:-
 - a. That some common question of law or fact arises in both or all of them.
 - b. That the right to relief claimed therein is in respect of or arising out of the same transaction or series of transactions or
 - c. That for some reason it is desirable to make an order.

The Plaintiff concluded that the court may order the causes or matters to be consolidated on such terms as it thinks just, or may order them to be tried at the same time or one immediately after the other, or may order them to be stayed until after the determination of any of them. The Plaintiff urged the court to consolidate the two matters for the ends of justice.

10. As stated by the Defendant in his submissions, the crux of the Application before court lies in **section 6** of the *Civil Procedure Act* which reads as follows:

“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, were such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant relief claimed.”

I have reviewed the Saldanha, Rawal & Abdul cases as cited by the Defendant herein but apart from matters pertaining to inherent jurisdiction, all three of those cases dealt with dismissal of suits for want of prosecution. I don't find the same relevant in the circumstances of this Application before court, despite the Application being said to have been brought under **Order 2 Rule 15** of the *Civil Procedure Rules, 2010*. The Defendant has not prayed for the pleadings of the Plaintiff herein to be struck out in the body of the Application. However, the Jadva Karsan case has considerable bearing in view of the interpretation of what the section means by “matter in issue”. The court held that:

“(1) ‘Matter in issue’ in section 6 of the Civil Procedure Ordinance does not mean any matter in issue in the suit, but is reference to the entire subject matter in controversy; it is not enough that one or some issues are in common. The subject matter in the subsequent suit must be covered by the previous suit, not vice versa.”

It was somewhat unfortunate that the Plaintiff herein did not attach to his submissions a copy of the Indian case cited of Dr. Guru Prasad Mohanty. However, that precedent dealt with the question of consolidation of suits under the *Indian Civil Procedure* and not stay of proceedings. It appears to me however that the proposition that the Plaintiff was attempting to lay before this court was that it has a wide discretion to refuse an application for stay but, in the alternative, order a consolidation of suits where it is satisfied that there is a common question of law or facts arising in both suits and that the reliefs claimed are in respect of or arising out of the same transaction or series of transactions. As regards consolidation of suits, the old **Order XI** has been replaced by the new **Order 11** which under **rule 3 (1)** details:

“With a view to furthering expeditious disposal of cases and case management the court shall within 30 days after the close of pleadings convene a Case Conference in which it shall..... (h) consider consolidation of suits;”

From my understanding of both sets of proceedings in the two different cases before this court, a Case Conference has yet to be called with respect to either suit. The Plaintiff's suggestion in that regard would seem to be somewhat premature.

11. I have perused the pleadings in both this suit and indeed in *HCCC No. 53 of 2010*. Both suits involve the same parties being the Plaintiff and Defendant herein as well as the Company. In my opinion with regard to the *Civil Procedure Act*, there is little or no matter as to the capacity of parties in each of the suits, be they plaintiff, defendant and/or interested party. It is interesting to note that in the Plaintiff in this suit, the Plaintiff herein refers extensively to the pleadings and proceedings in *HCCC No. 53 of 2010*. To my mind, I have little or no doubt that the issues between the Plaintiff and the Defendant in this suit and as between the Plaintiff, the Company and the Interested Party in *HCCC No. 53 of 2010* are one and the same. Obviously the reliefs sought are different but that is only to be expected where there are different plaintiffs and defendants in both suits. The differences not only seem to revolve around the aforementioned motor vehicles but also in relation to the operation of, as well as the shareholding and directorships, in the Company. In such circumstances, it would be my inclination to allow the Defendant's Application dated 22 June 2012 but I make no order as to costs as regards thereto.

12. However, among the documents filed by the Plaintiff on the 12 June 2012 as regards this suit, I have noted the Memorandum and Articles of Association of the Company registered as C. 163175.

I have also noted the Memorandum and Articles of Association of Super Start Parcel Services Ltd registered as C. 148070. The pleadings reveal that there is some conflict as between the two companies but in both cases the Articles of Association detail that in case of differences between shareholders etc. all matters in that regard should be referred to arbitration. This would include questions relation to the said motor vehicles as well as the operation and shareholding of the Company. It seems to me best that these matters be decided upon in the forum which the parties themselves have chosen. Article 31 of the Company's Articles of Association reads as follows: –

“Whenever any differences arise between the company on the one hand and any of the members, their executors, administrators, or assigns on the other hand, touching the true intent or construction, all the incidents, or consequences of these Articles, or of the statutes, or touching anything then or thereafter done, executed, committed or suffered in pursuance of these Articles, or any claim or account of any such breach, or alleged breach or otherwise relating to the premises, or to these Articles or to any statutes affecting the Company or to any of the affairs of the Company, every difference shall be referred to the decision of an arbitrator to be appointed by the parties in difference, or if they cannot agree upon a single arbitrator to the decision of two arbitrators, of whom one shall be appointed by each of the parties in difference.”

I consider this to be a most all-embracing provision and under the powers vested in this court by **Order 46 Rule 20** and for the attainment of the overriding objective envisaged under **sections 1 A and 1B** of the *Civil Procedure Act*, I direct that both this suit and *HCCC No 53 of 2010* shall be referred by the parties to arbitration in accordance with the Articles of the Company as quoted above. Order accordingly.

DATED and delivered at Nairobi this 30th day of the January, 2013.

J. B. HAVELOCK

JUDGE