



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 718 of 2012

MURBAN MOVERS LIMITED PLAINTIFF

VERSUS

TORNADO CARRIERS LTD. DEFENDANT

RULING

1. The Application for determination before this court is the Notice of Motion by the Plaintiff dated 13 November 2012. It is brought under **sections 17 and 18** of the *Civil Procedure Act* as well as **Order 51** of the *Civil Procedure Rules* and **section 3A** of the *Civil Procedure Act*. The Application seeks an order for the consolidation of the following suits:

- (a) This suit
- (b) CMCC No. 2863 of 2011 – Tornado Carriers Ltd versus Murban Movers Ltd and Jade Petroleum Ltd (Mombasa)
- (c) CMCC No. 2864 of 2011 – Tornado Carriers Ltd versus Murban Movers Ltd and Jade Petroleum Ltd (Mombasa).

In the grounds in support of the Application the Plaintiff noted that this suit is pending before this Court in Nairobi while the other two suits are pending in the Chief Magistrate’s Court as Mombasa. It maintained that all the suits were based on the same transport contract dated 11 March 2011, entered into at Nairobi and executed as between the parties that is the Plaintiff and the Defendant herein. The Plaintiff maintained that the suits raised similar questions of fact and law and they all arise from the same set of facts and evidence.

2. The Application was supported by the Affidavit sworn by the General Manager of the Plaintiff one **Kamaljit Singh** and is dated 2 November 2012. Having made reference to the 3 suits the deponent stated that all the suits arose from a general contract dated 11 March 2011 (hereinafter “the contract”) signed between the Plaintiff and the Defendant covering the delivery of various consignments within the East African region. The deponent annexed a copy of the contract to his Affidavit. He stated that this High Court case involved a payment of US dollars 35,758.87 for loss of petroleum products that were in transit between Mombasa and Kampala (the Plaintiff maintaining that they were delivered to the wrong person in Kampala). The two suits in Mombasa were in respect of transport services provided by the Defendant which were not paid for by the Plaintiff due to the Defendant’s failure and breach of the contract. He attached copies of the Plaintiffs and the Plaintiff’s (in this suit) pleadings by way of Defence in the Mombasa suits. Mr. Singh stated that this suit amounted to a set-off as against the claims lodged by the Defendant in the Chief Magistrate’s Court in Mombasa. He deponed to the fact that the monetary value of the consignment involved in this suit was way above the transportation costs claimed by the Defendant in

the Mombasa suits. He concluded his Affidavit in support by stating that in his opinion, the two suits raised similar questions of fact and law and indeed arise from similar evidence. It was interesting to note that the deponent of the Affidavit in support of the Application made no mention of the fact that in the Mombasa suits there was a second defendant in each case being Jade Petroleum Limited.

3. On 23 January 2013, the Defendant filed Grounds of Opposition which detailed as follows:

“(i) THAT the application is belated, an afterthought and is mischievous.

(ii) THAT the causes of action in the suit herein and Mombasa CMCC No. 2864 of 2011 and CMCC No. 2863 and the suit herein are different.

(iii) THAT consolidating the aforesaid matters with the suit herein will greatly prejudice the Defendant herein.

(iv) THAT this matter should have been filed in Milimani subordinate court for hearing and disposal.

(v) THAT the application ought to be dismissed with costs due to the foregoing”.

4. On the same day, Mr. Muma appeared before me as counsel for the Plaintiff and Mr. Ngira appeared representing the Defendant. Mr. Muma noted that the Plaintiff in the suit presently before this court was also the Defendant in the two suits in Mombasa. The subject matter of all the suits involved the transportation of oil. He noted that the Defendant herein is a transporter while the Plaintiff is an oil company, importing and distributing oil products. As far as this suit is concerned, counsel informed the court that it involved a certain load of oil transported by the Defendant to Kampala and it was the Plaintiff's contention that the same was delivered to the wrong person in Kampala hence the Plaintiff refusing to pay for delivery. He noted that the Defendants thereupon filed two suits in Mombasa one seeking monies for transportation of product to Nairobi and the other for the transportation of product to Kampala. Ideally, the Plaintiff herein should have filed a counterclaim in the Mombasa suits as its lack of payment was pre-dictated by wrong delivery. However, the Plaintiff was precluded from so filing because of the pecuniary jurisdiction of the Chief Magistrate's Court in Mombasa. The Application sought by the Plaintiff was that the two suits in Mombasa should be transferred to Nairobi and consolidated together. He submitted that the witnesses all reside in Nairobi and the contract was entered into here. In his opinion, all cases were based on the same facts, same law, same evidence as was further elaborated in the Supporting Affidavit to the Application. Mr. Muma stated that he had filed a List of Authorities upon which he relied in support of the Application. He drew the court's attention to the **Nyati Security Guards and Services Ltd versus Municipal Council of Mombasa** case as referred to in the Judgement of the **Khaminwa J.** in the case of **APA Insurance versus C. W. Wanjihia & Co. Advocates (2009) eKLR.**

5. In his turn, Mr. Ngira for the Defendant noted that for the two cases filed in Mombasa, the cause of action was transport charges which the Plaintiff herein had incurred but did not pay the Defendant. In the case before this court, the cause of action was non-delivery of the oil transported by the Defendant. In counsel's view it is possible for two different causes of action to emerge from one contract, which is the position in this matter. He also noted that the parties in the Mombasa cases and the parties in the Nairobi case were not entirely the same. In the Mombasa cases, there was another defendant involved. He also noted that the cases had been filed by different firms of advocates. He concluded by saying that the Defendant did not oppose the transfer of the two suits in Mombasa to Nairobi but was simply opposed to the consolidation. To this end, he noted that the parties were different, the causes of action were different and it would be against the interests of the Defendant herein to have the matters consolidated.

6. In considering this matter, I can do no better than adopt the words of my learned brother **Waweru J.** in the case of **John Mwangi Karanja v Alfred Ndiangui (2011) eKLR** as follows:

“With the enactment of Sections 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These sections provide as follows:

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.

1B (1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims –

- (a) the just determination of the proceedings;**
- (b) the efficient disposal of the business of the Court;**
- (c) the efficient use of the available judicial and administrative resources;**
- (d) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and**
- (e) the use of suitable technology.**

It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes governed by the Act (Section 1A (1)).

The court itself is enjoined by subsection (2) of the section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions”.

In any event, learned counsel for the Defendant states that his client has no objection to the 2 suits in Mombasa being transferred to Nairobi for consideration and determination. Accordingly I have no hesitation in so ordering.

7. However, what of consolidation of the 3 suits? Again I would adopt the words of my learned brother **Mboghli Msagha J** in the case of **Maina versus Maina and another (2011) eKLR:**

“The Civil Procedure Rules have been amended and the new rules are now in operation. In the old rules either party had the power to apply for consolidation and the court also had the same power provided that the ends of justice will be met by the said order. In the new rules however under Order 11 rule 3 (1) (h), the court has been given full power to consider the consolidation of suits.”

The principles involved when a court is to consider consolidation of suits was amply set out in the **Nyati Security Guards** case as above, such being as follows:

- (i) Same question of law or fact in both or all of them, or**
- (ii) The rights or reliefs claimed are in respect of the same transaction or services transactions**

or

(iii) For some other reason, it is desirable to make or order a consolidation.

To my mind, having perused the pleadings in the Mombasa cases as attached and exhibited to the Affidavit in support of the Application, I do believe that this is an instance where consolidation would make sense. I have no doubt that all three suits and the claims therein emanate from the contract as between the Plaintiff and Defendant herein. I believe that there is a common question of law and fact in all three suits. I confess to being a little concerned by the presence of the second Defendant, Jade Petroleum Ltd in the Mombasa suits but I don't see how it will be prejudiced in any way by the consolidation of the same. Similarly, I cannot agree with the counsel for the Defendant herein when he says that the Defendant will be prejudiced. Counsel made that statement but gave no reasons therefore.

8. As a consequence of the above, I allow the Plaintiff's Application by way of Notice of Motion dated 30 November 2012. I direct that the two cases in Mombasa being *CMCC No. 2863 and 2864 of 2011* be transferred from the Chief Magistrate's Court in Mombasa to this court where the same shall be consolidated with this case and heard together. In all the circumstances, I make no order as to costs.

DATED and delivered at Nairobi this 6th day of February 2013.

**J. B.HAVELOCK
JUDGE**