



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. CASE NO. 420 OF 2008

SIGMA FEEDS LIMITED PLAINTIFF

VERSUS

METCOURT HOSTELS LIMITED DEFENDANT

RULING

Before me is a Notice of Motion dated 18/4/13 which seeks the following orders:

1. Spent.
2. That this Honourable Court be pleased to order the consolidation of this suit with ELC. No. 740 of 2011 Sigma Feeds Limited versus Metcourt Hostels Limited and 8 others.
3. Further proceedings in ELC. No. 740 of 2011 be stayed pending hearing and determination of this application.
4. The costs of this application be in the cause.

The application is based on the grounds appearing on the face thereof and the Supporting Affidavit of Kirtesh P. Shah sworn on 18/4/13. He disclosed that he is a Director of the Plaintiff and that he instituted the present suit on 28th August 2008 on account of, *inter alia*, informal demands and eventual termination of the Plaintiff's tenancy on the property known as L.R. No. 2259/66 Karen Estate, Nairobi (hereinafter referred to as the "Suit Property") and then threatened demolition of the Plaintiff's business premises erected on the Suit Property. He further stated that he applied for an injunction against the Defendant from effecting the said threats and the same was granted by Justice Ang'awa on 23/10/08. He further averred that in full disregard of the injunctive orders, the Defendants proceeded to demolish the Plaintiff's business premises erected on the Suit Property prompting the plaintiff to institute contempt proceedings against the Defendant.

He further swore that he filed ELC. No. 740 of 2011 against the Defendants. He further indicated that the present suit and ELC. No. 740 of 2011 relate to the same cause of action being damages emanating from the wrongful termination of the tenancy and the illegal demolition of the Plaintiff's business premises on the Suit Property. He further indicated that it was in the interest of Justice that these two suits be consolidated.

The Plaintiff filed a further Affidavit sworn by the same Kirtesh P. Shah on 10/6/13 in which he swore that both the present suit and ELC. No. 740 of 2011 raise similar questions of law and all arise from the same set of facts and involve the same property being the Suit Property.

The application was opposed by the Defendant which filed its Grounds of Opposition and Replying Affidavit sworn by Peter Kirigua on 7/6/13. In their Grounds of Opposition, the Defendant opposed the application on the following grounds.

1. The application is against the well laid down principles of consolidation of suits.
2. The application is an abuse of the Court process specifically initiated to scuttle the hearing of this suit which has been pending for more than 5 years.
3. The issues for determination in ELC. No. 740 of 2011 are substantially different from the issues in the present suit.
4. The cause of action in ELC. No. 740 of 2011 is substantially different from the cause of action in the present suit.
5. The parties in both suits are different.
6. The claims and defences in both suits substantially differ.

In his Replying Affidavit, Peter Kirigua, the Managing Director of the Defendant stated that the two suits are substantially different because the present suit relates to termination of tenancy while ELC. No. 740 of 2011 relates to enforcement notice emanating from Nairobi City Council and damages for claim of unlawful demolition.

Both counsels for the Plaintiff and Defendant made their oral submissions in respect of this application all of which I have taken into consideration.

Various authorities were also cited. I wish to point out the Ruling delivered in the ***Civil Suit No. 992 of 1994 Nyati Security Guards & Services Ltd. Vs. Municipal Council of Mombasa*** in which it was stated 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 question of law or fact arises in both or all of them; or***
2. ***The rights of relief claimed in them are in respect of or arise out of the same transaction or a series of transactions, or***
3. ***for some other reason it is desirable to make an order for consolidating them.”***

I have studied the pleadings in both suits. Both Suits are pending before the same court being the Environment and Land Court. A reading of the pleadings reveals that the parties in this present suit are the same as the parties in ELC. No. 740 of 2011 except that ELC. No. 740 of 2011 has an additional 8 parties. Further the two suits relate to the same subject matter being the Suit Property. Both suits arise from the same set of facts. Both cases have to do with the intention by the Defendants to evict the Plaintiff out of the Suit Property after the purchase of the Suit Property by the Defendant in the first instance through the termination of the Plaintiff’s tenancy and in the second instance through the demolition of the Plaintiff’s business premises erected on the Suit Property. These are a series of interconnected transactions which gave rise to the two suits, all filed by the Plaintiff against the Defendants. The facts that the relief sought in each case differ does not diminish the fact that the two suits are substantially connected.

To that extent therefore, I find that the two suits being the instant suit and ELC. No. 740 of 2011 meet all the criteria set out above for consolidation. I therefore consolidate the two suits and direct that the instant suit be the lead suit. I therefore allow the application.

SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2013

MARY M. GITUMBI

JUDGE