

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 715 OF 2009

PRIDE PROPERTIES LIMITED PLAINTIFF

VERSUS

CONSOLIDATED BANK OF

KENYA LIMITED 1ST DEFENDANT

GAMI PROPERTIES LIMITED 2ND DEFENDANT

RULING

1. When Mr. Nyachoti appeared before Court this morning for the hearing of the above suit he sought an adjournment based on two grounds:
 - a. The principal witness for the Plaintiff Company Mr. M. R. Gudka, was unable to travel to Nairobi from Kisumu owing to a medical condition as certified by Dr. Shah. Apparently, the witness was suffering from problems with his legs that did not enable him to stand for any length of time. The note from the doctor made the request of this Court that the witness be allowed to give his evidence sitting down.
 - b. The more compelling reason put forward by Counsel was that there was currently before the Environmental and Land Division of this Court an application to consolidate this suit with HCCC No. 342 of 1995. That application had come before Gacheru J. this morning and the file had been referred to this Court in view of the pending hearing before the same. Counsel was of the opinion that the application for consolidation should be heard first and determined prior to the hearing before this Court proceeding. He noted that the subject matter of both suits was the same as regards the suit property L. R. No. 4858/3, Nairobi.
2. Miss Mutua holding brief for Mr. Issa for the 2nd Defendant submitted that the issues raised in the other suit *HCCC No. 342 of 1995* were separate and distinct from the issues in this suit before Court. The date herein was taken by consent when the matter was mentioned on 7th October 2013 and by that time, the Plaintiff's application for consolidation of the two suits had already been filed. Miss. Mutua wondered why the Plaintiff had not raised the matter of consolidation on that date. In her view, this was just another instance of the Plaintiff attempting to delay the hearing of the suit as the Plaintiff had waited until today only to bring up the subject of the consolidation. Counsel maintained that Mr. Issa was ready to proceed with the hearing with one witness. If the Court was of a mind to allow the adjournment, then the suit should come back for hearing on the other day fixed for the same – 5th December 2013. Counsel felt that in those circumstances, the interim Orders currently enjoyed by the Plaintiff should be lifted.
3. Mr. Misige, learned counsel for the 1st Defendant shared the sentiments of Miss. Mutua. The date of the hearing today had been taken by consent. Last time before Court, the Defendants had conceded to the Plaintiff's application for amendment to the Plaint as they wanted the matter to proceed towards hearing. This suit was now 4 years old and the Plaintiff had been well aware of the issues in *HCCC No. 342 of 1995* even when this suit was filed. The issues in that suit were not the same as herein and were not included in the Statement of Issues filed before this Court. Mr. Misige suggested that the hearing should proceed on 5th December 2013 but that the injunction

- that the Plaintiff had been enjoying, should be discharged.
4. Mr. Nyachoti, in response, reminded the Court that the injunction had been ordered after the *inter-partes* hearing of the application therefore and had been allowed pending the hearing and determination of the suit. In his opinion, the injunction could not be lifted without an appropriate application for review. As regards the consolidation application, it was the 1st Defendant who had been the one pushing forward the same. He suggested that the Defendant should be allowed to file their responses to the consolidation application as giving evidence from the bar was not permissible. He still maintained that that application should be heard first. As far as the allegation that service of the consolidation application had been late, counsel explained that no sooner had the same been filed than the Court file disappeared. The Plaintiff was not deliberately delaying the hearing of this suit. Indeed, today's date had been taken by consent but the prevailing circumstances as regards the hearing had changed.
 5. I have considered the submissions by all three counsel. I have also noted the application to consolidate and the Supporting Affidavit as regards thereto. Obviously that Affidavit has not been responded to and I am of the opinion that the same should proceed before the Environmental and Land Division of this Court as soon as possible. There is no doubt that the suit property L.R. No. 4858/3 features in both suits. There would also appear to be no doubt that the suit property was charged to Nationwide Finance Co. Ltd in March 1983 and that the 2nd Defendant herein took over the operations and undertaking of Nationwide. It seems therefore that there may be some justification the consolidation but that is not for this Court to decide. As stated, the application for consolidation rests with the Environmental and Land Division of this Court and should proceed before the same as soon as possible. As a consequence, I feel justified to allow the Plaintiff's application for adjournment of the hearing, not only today but also on 5th December 2013. That date is vacated accordingly. Further, I take Mr. Nyachoti's point that the interim Orders of injunction herein were granted after *inter-partes* hearing to extend until the hearing and determination of this suit. In any event, by the postponement of the hearing of this suit will give time for the Plaintiff's said principal witness to recover from his ailments.
 6. As a result, I direct that the parties shall go back before the Environmental and Land Division of this Court in the personage of Gacheru J. in order that the Honourable Judge may give directions as to the filing of Replying Affidavits to the application for consolidation of *HCCC No. 342 of 1995* with this suit. In my opinion, that application should be heard and determined first before the hearing of this suit proceeds. Order accordingly. Costs in the cause.

DATED and delivered at Nairobi this 3rd day of December, 2013.

J. B. HAVELOCK

JUDGE