



**HENRY A.A OMOLLO T/A HENRY  
WOODWORKS.....PLAINTIFF/APPLICANT**

**VERSUS**

**KOALA (K) LTD.....DEFENDANT/  
RESPONDENT**

**RULING**

By Notice of Motion Application dated 13<sup>th</sup> May 2010 brought under Order XI rules 1 &2, Order XLVI Rules 4,5 &6, Order L Rules 1 & 15 of the Civil Procedure rules and Sections 3A, 12, 15, 17 & 18 the Plaintiff/Applicant prays for the following orders:

- 1. That this Honourable Court be pleased to transfer Kwale SRMCC No. 37 of 2009 AND PMCC NO. 69 of 2009 to High Court Mombasa for hearing and final disposal.**
- 2. That the same cases subsequent to transfer be consolidated with HCCC No. 52 of 2009.**
- 3. That the cost of this application be provided for.**

There is an affidavit in support of the Application sworn by Ephraim Henry A.A Omollo dated 7<sup>th</sup> June 2010.

The main grounds in support of the application are that the Applicant is Plaintiff in **Kwale case No. 37 of 2009 against Koala (K) Ltd** with regard to land reference No. Kwale/Diani Complex/903. There is a second case **SRMCC 69 of 2009 Kaola (k) Ltd** against the applicant as Defendant over the same property.

That there is a Third case in this court HCCC No. 52 of 2009 by Darad Shopping Centre against the Applicant over land reference No. Kwale/Diani Beach/1019.

The applicant avers that he is a party to all the 3 cases whereas in 2 Koala (K) Ltd is also a party.

It is for this reason that the Applicant seeks for transfer of the 2 suits in Kwale and subsequently to be consolidated with HCCC No. 52 of 2009.

The Application is opposed. There is a replying affidavit sworn by Caroline Okoth, Manager of Darad Shopping Centre Limited dated 6<sup>th</sup> July 2010. She states that the application is frivolous, vexatious and an abuse of the Court process. That the parties in HCCC No. 52 of 2009 are different from the parties in SRMCC 69 of 2009 and SRMCC 37 of 2009 (Kwale). That the subject matter in the suits are also different. She further states that Darad Shopping Centre Limited was not a party to the suits in Kwale.

There is also a Replying Affidavit by the Defendant/Respondent sworn by Meshack Owaka dated 4<sup>th</sup> October 2010. He states that the application is fatally defective, frivolous and an abuse of the Court process.

He further states that the 3 suits (stated above) are completely different. In the suits in Kwale Magistrates Court subject matter of the property is Kwale/Diani Complex/903 whereas the subject matter in HCCC NO. 52 of 2010 is Kwale/Diani Beach/ 1019. The parties to the suits are not the same. He states that the Defendant herein is not privy to any dealings between the Applicant and Darad Shopping Centre Limited as regards Kwale/Diani Beach/1019. Therefore the Applicant should not drag the Respondent in to HCCC No. 52 of 2010. That the Defendants does not wish to have the 2 cases in Kwale magistrate's Court to be consolidated with HCCC No. 52 of 2010.

The parties by consent agreed to file written submissions.

In their submission counsel for the Defendant's, Koala (K) Ltd reiterated the grounds in the replying affidavit. Counsel states that consolidation under Order XI rule 1 is only available where 2 or more suits are pending before the same court and similar questions of law or fact are involved. Counsel states that it's clear from the applicants affidavit that the suits sought to be consolidated are not pending before the same court. He further states that the parties to suits are different and also the subject matter is not the same. He urges the court to dismiss the application with costs.

Counsel for the Plaintiff in HCCC No. 52 of 2010 Darad Shopping Centre Limited in his submissions states that the application is frivolous and an abuse of the Court Process. He reiterates that the parties and the subject matter in the suits are not similar. On the prayer to transfer the 2 suits Kwale SRMCC 37 of 2009 and PMCC 69 of 2009 to High Court Mombasa Counsel states that the Respondent is not a party to the said suits and that the suits having been filed in court without jurisdiction they cannot now be transferred to a court with Jurisdiction. In support of this argument counsel referred to case of the **Omwoyo Vs. African Highlands and Produce Co. Ltd (2002) 1 KCR 698.**

Consolidation of suits is provided for under Order XI rule 1 of the civil procedure rules ( the old civil procedure rules) which states as follows:

**“ where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved the court may either upon the application of one of the parties, on its own motion, at its discretion, and upon such terms as may seem fit-**

**a) order a consolidation of such suits, and**

**b) direct that further proceedings in any of such suits be stayed until further order”**

I have considered the application and the grounds both in support and in opposition by the parties.

This is a case where there three different parties are involved in 3 separate suits. Two of the parties are involved in 2 suits over the same subject matter in Kwale. The suits are both filed in Kwale Magistrate's Court and deal with the same subject matter that is Kwale/Diani Complex/903. In the Third suit HCCC No. 52 of 2010 only the applicant is the common factor but the Plaintiff is a different company not involved in the 2 suits in Kwale. The subject matter is also different, that is Kwale/Diani Beach/1019.

The Court has powers to transfer suits from one Magistrate's Court to another. In the same way the High Court can order for the transfer of a suit from a Magistrate's Court to itself for disposal.

Section 18 (1) (b) of the Civil Procedure Act (Cap 21) Laws of Kenya states that on application by any party after notice to the other parties the High Court may withdraw any suit or other proceeding pending in any court subordinate to it and thereafter try or dispose of the same.

I have carefully considered all the issues raised by the parties. I am not convinced that applicant has demonstrated any reasons why the suits filed in Kwale Magistrates Court should be transferred to the High Court. The Plaintiff in HCCC No. 52 of 2010 is not a party to the 2 suits in Kwale. The subject matter in HCCC No. 52 of 2010 is also not the same as that of the 2 suits in Kwale. Therefore consolidation will not be appropriate in the circumstances.

The Notice of Motion Application dated 13<sup>th</sup> May 2010 is hereby dismissed with costs to the Respondents.

Dated AND Signed At Nairobi This 2<sup>ND</sup> Day Of AUGUST 2012

**M.K IBRAHIM**  
**JUDGE**

DATED AND Delivered At Mombasa ON THIS 28<sup>TH</sup> DAY OF AUGUST 2012.

**J.W. MWERA**  
**JUDGE**

Delivered in the presence of: Both sides represented