



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NUMBER 1241 OF 2006

UMEED ALI ERAJ & ANOTHER. APPLICANTS/PLAINTIFF

VERSUS

KWIK FIT TYRES AND AUTO CARE LIMITED.RESPONDENTS/DEFENDANT

R U L I N G

On the 8th February, 2011 the plaintiffs' counsel Mr. Kiboi asked informally that this case be consolidated with Nairobi HCCC No. 465 of 2006. Because counsel for the defendant Mr. Gichamba indicated that they were likely to object to consolidation, I ordered that a formal application be filed.

As a consequence of my above order, the plaintiffs' counsel filed this Notice of Motion on 16th February, 2011. The Notice of Motion was filed under Order 11 rule 3(h), Order 51 Rule 1 of the Civil Procedure Rules as well as section 1A and 1B of the Civil Procedure Act (Cap. 21 Laws of Kenya).

The prayers in the application are as follows: -

- 1. THAT this suit be consolidated with Nairobi HCCC No. 465 of 2006, between Quick fit Tyres and Autocare Ltd -vs- Umeed Ali Eraj and Mirabeau Da Gama Rose being a suit also pending in this honourable court for final determination and disposal.***
- 2. THAT the costs of this application be in the cause.***

The application has grounds on the face of the Notice of Motion. The grounds are that the two suits arise from the same subject matter of the tenancy agreements on a land LR. No. 1870/IX/53 between the plaintiffs and defendants; that the suits relate to similar law and facts and rely on the same documents; that the subject matter is the same; that no prejudice would be occasioned to the defendant; and that the consolidation will assist the court in resolving the dispute between the parties in a just, proportionate and expeditious manner.

The application was filed with a supporting affidavit sworn by Maria Bernadette Quadros on 15th February, 2011. It was deponed in the said affidavit, inter alia, that the deponent was substituted as executor in the estate of the late Yusuf Ali Eraj in the place of Da Gama Rose. That the two suits arise from lease or tenancy agreement on the same land belonging to the estate of the late Dr. Yusuf Ali Eraj situated in Westlands – Nairobi. That the second lease agreement expired on 31st May 2006 by effluxion of time. That in October 2006, the plaintiffs herein instituted this present suit for trespass claiming vacant position, mesne profits, and eviction orders as owners of the suit premises. That the defendants, on the

other hand, had instituted Civil Suit HCCC No. 465 of 2006 on 4th May 2006 against the plaintiffs herein seeking interim orders against an unlawful eviction or selling, alienating, disposing or transferring of the suit properties pending arbitration as provided under clause 3 (9) of the lease agreement. That the court dismissed the application on 25th April 2007 in a ruling delivered by Hon. Justice Aganyanya. That it was a term under clause 6 of the second lease/tenancy agreement that should the landlord wish to sell the premises, the tenant will be given first option to purchase which option should be exercised within 21 days of the notice. However, no such offer was made by the applicants who are the plaintiffs herein during the subsistence of the lease. That both applicants agreed in their pleadings and various applications that the two suits are similar and arise from the same subject matter.

It was deponed that it was clear that the two suits were similar in substance, and arose from the same facts and raised common questions of law and facts and it was therefore proper that they disposed off at the same time. That in the interests of justice, the two suits should be consolidated to avoid duplication of proceedings and to ensure that there are no conflicting decisions in the two suits.

It was also deponed that no prejudice or hardship would be visited upon the defendants, should this application be allowed.

The applicants through their counsel M/s Kemboy and Company advocates filed written submissions on 25th February, 2011. It was contended that initially the lease was for a term of 5 years and 5 months from 1995 at the rate of Ksh. 2 million for the entire term. That the defendants lawfully put up business premises. That the second lease commenced on 1st November, 1999 for a fixed term of 6 years 7 months. That the lessee had an option to renew the lease upon giving three months notice prior to expiration of the lease. That should the lessor opt to sell the suit premises, the lessee would be given the first option to purchase. That the lease expired by effluxion of time on the 31st May, 2006 at a time when the defendants paid or neglected to exercise their option to renew and the lessor having given the requisite termination notice.

It was also contended that the defendants were required to give up possession of the suit premises but instead, on 4th May 2006, filed HCCC No. 465 of 2006 seeking interim orders pending arbitration to prevent the plaintiffs herein from evicting them from the suit premises. They sought interim orders pending arbitration to prevent the lessor who are the plaintiffs herein, from evicting them from the suit properties.

It was contended that on the 2nd October, 2006 the plaintiffs filed the present suit by which they seek to obtain vacant possession of the suit premises. In their defence the defendants admits that this suit is similar to HCCC No. 465 of 2006. The defendants also acknowledged that the subject matter in both suits is the same.

Counsel contended that in terms of Order 11 Rule 3 (h) of the Civil Procedure Rules, these two suits should be consolidated to prevent unnecessary duplication. Counsel emphasized that Section 1A and 1B of the Civil Procedure Act (Cap 21) says out the overriding objective in the administration of justice, and empowers the courts to facilitate expeditious, proportionate and affordable resolution of disputes. Reliance was placed in the case of **Stumberg and Another versus Portgieter [1970] EA 323**. In that case the court decided that where there are common questions of law and facts having sufficient importance, consolidation will be ordered. Counsel also relied on the case of **Daws Versus Daily sketch [1960] ALLER 397** where the English court stated that where there are no common questions of law and fact, consolidation would not be appropriate. Counsel also relied on the case of **Muturi Investment Ltd Versus National Bank of Kenya Ltd [2006] ECLR (Civil Suit No. 199 of 2005)** wherein the court held that where there are common questions of law and fact and the cases relate to the same parties and relies on the same documents, the cases should be consolidated.

The application is opposed. A replying affidavit sworn by Kirit Kharkhar was filed on between 28th February, 2011. It was deponed, inter alia, that by a replying affidavit sworn on 30th May 2008 by Maria Quadros while replying to a Chamber Summons application, the defendants stated in paragraph 5 of the

affidavit that this suit and the other suit were completely different. It was deponed that the plaintiffs filed this suit knowing too well of the existence of the defendants' suit in their attempt to obstruct the course of justice. It was deponed that the defendants claim in suit HCCC No. 465 of 2006 was based on a claim of ownership as relates the suit property, while the claim raised in the plaintiffs suit herein is for vacant possession and profits. That though the subject matter was similar the prayers and reliefs sought by the parties in the two cases were distinguished and consolidation would result in the dispute being crowded, thus frustrating the just determination of suit No. 465 of 2006. That justice and equity dictates that the instant suit be stayed until the determination of the defendants suit which was filed earlier. That the defendants' suit No. 465 of 2006 be listed for hearing forthwith.

The defendants, through their counsel Rachier and Amolo filed written submission on 28th February 2011. A summary of the facts were given. It was contended that the two suit were distinguished in nature and sought different prayers. Consolidation could be ordered only where similar issues arose between parties and where it was convenient to hear the suit as one. Counsel asked the court to be guided by the principles of natural justice to answer that the consolidation would not prejudice any party. It was emphasized that in a replying affidavit dated 25th February 2011 the deponent who is Maria Quadros expressly stated in paragraph 5 that the two suits were completely different. Therefore, the same party cannot now turn around and submit to the contrary.

It was also argued that the application should fail because the applicants have not indicated what prejudice they will suffer if the two suits are heard separately. Reliance was placed on the case of **Helen Ogajas versus Mugo Mathai and Joshua Kangogo [2007] eKLR** wherein, in a case for a declaration of ownership of parcel of land within the same area, and court held that the complaints were different and that consolidation of the two suits would crowd the issues. Reliance was also placed on the case of **Re-estate of Walter Karanja (deceased) 2008 eKLR** where the court felt that there were no similarities between the two cases and that the fact that the cases were between two parties could not be a basis of consolidation.

Counsel argued that Order 11 rule 3 (h) of Civil Procedure Rules was intended to avoid duplicity of suits in court, but that in order for the rules of justice to prevail no prejudice should be caused to any of the parties.

On the hearing date, Mr. Gichamba appeared for the defendants and relied on the submissions filed. Counsel for the application Mr. Kemboy did not appear in court, though he was aware of the hearing date. I decided to give a ruling date on the basis of submissions filed.

Indeed, this court has jurisdiction to consolidate cases. Such jurisdiction is clearly spelt out under Order 11 rule 3 (1) (h) which provides that with a view of 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, inter alia, consider consolidation of suits: -

From the provisions of the law, the court has powers to consolidate suits, even in the absence of a formal application for consolidation of suits. It can do so during the case conference. In the present case, the court ordered that a formal application be filed in order to bring out the issues in contest for consideration.

It is admitted by all parties that the subject matter is the same parcel of land. The parties in the two suits are same. The lease or leases in question are the same. The reliefs sought in the two suits are different. The complaints in the two suits are also different.

Counsel for the defendant has argued that this is not a matter for consolidation because consolidation would crowd issues in dispute.

The matters to be considered in the consolidation of cases were aptly addressed in the case of **Muturi Investments Ltd versus National Bank of Kenya (Ltd)** (supra). In that case Kasango J, stated, inter alia, that : -

“Having examined the pleadings I am of the view that the two actions have a common question of law

and of the facts in that they relate to the same pleadings and hence the documents which shall be relied shall also require similar interpretation from the court. It is clear to me that to order the suit to be heard separately will mean that the evidence submitted by the parties will be duplicated in both cases. There is, therefore, the danger and every likelihood that the different could reach different decisions in the two cases. I find no substance in the argument offered by the plaintiffs for what is at state is not the distinctions of Muturi or Mamba but rather the interpretation of the documents relating to the common pleading.”

In the present case, the complaints are different. The reliefs in the two cases are different. However, the subject matter is the same premises. The documents for legal interpretation relating to the rights and obligations of the parties is the same lease agreement. Each of the parties considers that the said lease agreement created a certain status and some certain legal rights, which are the subject of litigation in both cases. The parties are the same.

I have not been told why the earlier suit filed by the defendants herein has not been fixed for hearing to-date. Both suits were filed in the year 2006, which is about 5 years now.

I do not agree that consolidating the two suits will prejudice any of the parties, or that it will crowd the issues. The issues to me are clear and can be handled in the same proceedings, even if some issues are addressed first before others. Some of the issues could determine the whole case, but that is for the decision of the court, which will handle the matters. Leaving the two cases proceed separately and not consolidating them will, in my view, be prejudicial to the interest of justice. This is because even before any of these two suits is heard and determined, there is the likelihood of applications being made in either or both of the two suits which will in fact crowd issues and will be costly both in terms of time and money for the parties as well as the court.

In those circumstances, I find that it is in the best interests of justice for the two suits to be consolidated, for the just and expeditious disposal of the same.

I, therefore, allow the application and grant the prayers sought. The two cases will, therefore, be consolidated and heard together. Costs in the cause.

Dated and delivered at Nairobi this 26th day of July 2011.

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GEORGE DULU
JUDGE

In the presence of

No appearance for the plaintiff

Mr. Gichamba for the defendants

C Muendo – court clerk