



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

Misc. Civ. Case 369 of 2007

KHADIJA ADBALLA TIMAMY.....APPLICANT

VERSUS

SALEH SALIM ABOUD BAWAZIR.....RESPONDENT

RULING

The applicant, Khadija Abdalla Timamy, by her Notice of Motion dated 27th August 2007 seeks mainly transfer of Mombasa Chief Magistrate's Court Civil Case No. 2389 of 2007 to the High Court to be consolidated with HCCC No. 195 of 2007. The applicant is the defendant in both suits which have been instituted by the respondent, Saleh Salim Aboud Bawazir, as plaintiff. In the alternative, the applicant seeks stay of CMCCC No. 2389 of 2007 pending the hearing and final determination of the High Court case. The application is brought under Sections 6 and 18 of the Civil Procedure Act.

The reasons for the application are that the cause of action and the subject matter of both suits are the same, and that the parties are also the same. The application is supported by an affidavit sworn by the applicant which affidavit is an elaboration of the said grounds. The applicant has also sworn a further affidavit which was filed with the leave of the court in response to the affidavit sworn by the respondent in reply to the application. In the said replying affidavit, the respondent has denied that the cause of action and the subject matter of the two suits is the same.

When the application came up for hearing before me on 19th February 2009, counsel agreed to file written submissions which were in place by 13th March 2009. I have read the affidavits sworn in support of and in opposition to the application. I have also given due consideration to the submissions of Learned counsel appearing. Having done so, I take the following view of the matter. I will first dispose of what, in my view, are preliminary issues raised by counsel for the respondent. The first issue relates to the relief sought in the application. Counsel has taken objection to the application to transfer the Chief Magistrate's court case to the High Court on the ground that the term used in Section 18 of the Civil Procedure Act is "withdrawal" and not transfer. The failure to use the word "withdrawal" in my view is not fatal to the application as the end result of the order sought by the applicant if successful will be the transfer of the suit from the Chief Magistrate's Court to the High Court. I will entertain the application notwithstanding that the applicant has not first sought the withdrawal of the case from the Chief Magistrate's Court.

The second preliminary issue raised by counsel for the respondent relates to the alternative prayer of stay of the Chief Magistrate's Court case. In counsel's view, the application could only be made in the Chief Magistrate's Court case and the filing of this application is unprocedural and renders the application incompetent. That objection is again not on substance but form and does not vitiate the application. Turning now to the application itself it cannot be gainsaid that the plaintiff in the suit before the Chief

Magistrate's Court is also the plaintiff in the High Court case and the defendant is the same in both suits. In the High Court case, filed prior to the Chief Magistrate's court on 15th August 2007, the respondent seeks *inter alia* possession of flat No. 1 on LR No. Mombasa/XXV/4 and a mandatory injunction ordering the applicant to pull down and remove structural alterations and additions to the said flat. The respondent makes those claims because the applicant is alleged to be in possession, in breach of a lease in respect of the said flat dated 1st November 1991.

In the Chief Magistrate's Court case, the respondent seeks an order of injunction restraining the applicant from parking vehicles in parking bays allocated and/or assigned to other lessees on the same plot. The foundation of the claim is breach of the same lease over the same flat. The cause of action in both cases seems to have occurred since the assignment of the flat to the applicant by previous lessees.

It is not easy to appreciate why the respondent could not include all his claims in one suit particularly the High Court case which was first filed 7 days before the Chief Magistrate's court case was filed. Under Order II Rule 1 of the Civil Procedure Rules, a suit should include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The respondent is the plaintiff in both suits and the suits are filed against the applicant. The respondent alleges breach of the terms of the lease pursuant to which the subject flat was let out by the respondent. Both suits seek, *inter alia*, orders of injunction against the applicant. Indeed the order of injunction is the only one, apart from costs, sought in the suit before the Chief Magistrate. I am therefore persuaded that the matter in issue before the Chief Magistrate's Court is also directly and substantially in issue in the High Court suit.

For the proper administration of justice, a party should not be allowed to file parallel suits simultaneously in respect of the same subject matter or substantially the same subject matter. The suit before the Chief Magistrate may not be on all fours with the High Court case. But it defies logic to institute two suits against the same defendant when the reliefs sought can be obtained in one suit. If that were to be encouraged, it would lead to absurd results. For instance, should the plaintiff succeed in the High Court suit there would be no point in pursuing the Chief Magistrate's Court case. Should he succeed in the Chief Magistrate's Court case, he would be armed with a determination in his favour regarding the lease which he would be perfectly entitled to use to his advantage in the High Court case. So, to avoid one of the parties using the decision of one of the cases to advance his/her cause in the other, the applicant's Notice of Motion should be allowed. I do not see the prejudice that will be occasioned to the respondent by allowing the said application. I will therefore allow the application in terms of prayer (b) thereof.

Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF APRIL 2009.

F. AZANGALALA

JUDGE

Read in the presence of:

Munyi holding brief for Mwakireti.

F. AZANGALALA

JUDGE

24TH APRIL 2009