



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE 75 OF 2008
NYAMONDI OCHIENG-NYAMOGO
WILLYS NYAMODI NYAMOGO both trading as
NYAMOGO & NYAMOGO ADVOCATES.....PLAINTIFFS
VERSUS
THE CO-OPERATIVE INSURANCE CO. (K) LTD.....DEFENDANT

R U L I N G

The Co-operative Insurance Co. (K) Limited, hereinafter referred to as “*the applicant*” has filed a Chamber Summons application dated 23rd February 2009 expressed to be brought pursuant to the provisions of Order XI rule 1 & 2 of the civil procedure rules and all enabling provisions of the law. The application seeks as against **Nyamondi Ochieng Nyamogo** and **Willys Nyamodi Nyamogo** both trading as **Nyamogo & Nyamogo Advocates** hereinafter referred to as “*the respondents*” orders that:

- “1. This suit be consolidated with Nyeri HCCC No. 76 of 2008, Nyeri HCCC No. 77 of 2008, Nyeri HCCC No. 78 of 2008, Nyeri HCCC No. 95 of 2008, Nyeri HCCC No. 96 of 2008, Nyeri HCCC No. 97 of 2008, Nyeri HCCC No. 98 of 2008 and Nyeri HCCC No. 99 of 2008 for eventual hearing and final disposal and this suit be the pilot file.**
- 2. The consolidated suits be stayed pending hearing and final determination of References from taxation lodged by both parties in Nyeri High Court Misc. Application No. 2000 of 2006, Nyeri High Court Misc. Application No. 201 of 2006, Nyeri High Court Misc. Application No. 202 of 2006, Nyeri High Court Misc. application No. 203 of 2006 and Nyeri High Court Misc. application No. 205 of 2006, challenging the very same alleged taxed costs subject matter of each of the suits**
- 3. The costs of this application be in the cause.”**

In support of the application, the applicant advanced the following grounds:-

- “(a) All the suits are pending before this court.**
- (b) All the suits are between the same parties.**
- (c) All the suits are for recovery of taxed costs allegedly arising from the same instructions under a**

single claim number to defend series of personal injury claims arising from the same accident.

(d) All the suits involve the very same, indeed identical questions of law and fact. Even the pleadings are duplicated and identical, word for word.

(e) The court previously has, for convenience, heard common submissions, then written and delivered a single common ruling to apply to all the suits, in light of the above.

(f) Any further proceedings in all the suit will deal with the very same, identical questions of law and fact and therefore inevitably result in similar decisions.

(g) It is only logical and convenience that all the suit be consolidated in the circumstances to avoid duplicating proceedings nine times over.

(h) There is no valid reason why the plaintiffs did not file a single suit for recovery of all the alleged taxed costs in the above circumstances instead of instituting a multiplicity of suits on the same, identical questions of law and fact.

(i) Both parties to all the said suits have lodged separate References challenging the very same alleged taxed costs subject matter of each of all the suits.

(j) The alleged taxed costs subject matter of each of all the suits are not final and conclusive as the same have been challenged by way of references to a judge, which are yet to be adjudicated upon.

(k) The said suits for recovery of taxed costs the merits for and the quantum of which is yet to be conclusively determined cannot proceed to full hearing and final conclusion, until the references are heard and determined and the subject matter of each of all the suits conclusively determined.

(l) It is therefore necessary that the consolidated suits be stayed pending hearing and final determination of the References from taxation lodged by both parties in the above circumstances.”

The application was further supported by the affidavit sworn by one, **Karen Njagi** an advocate of this court and the legal officer – claims of the applicant company. In pertinent paragraphs, she depones:-

“1.

2.

3. That I have perused my Company’s records and noted that the plaintiffs herein filed the following multiplicity of suits against my company, all suits pending before this court, all between the same parties, all for recovery of alleged taxed costs, all the taxed costs were party and party costs awarded on the same day arising from the same instructions under a single claim number to defend a series of personal injury claims arising from the same accident all taxed within the same or related miscellaneous causes for taxation:

i. *Nyeri HCCC No.75 of 2008, for recovery of alleged costs taxed in Nyeri High Court Misc. Application No. 205 of 2006.*

ii. *Nyeri HCCC No.95 of 2008, for recovery of alleged costs also taxed in Nyeri High Court Misc. Application No. 205 of 2006.*

iii. *Nyeri HCCC No.76 of 2008, for recovery of alleged costs taxed in Nyeri High Court Misc. Application No. 201 of 2006.*

iv. *Nyeri HCCC No.97 of 2008, for recovery of alleged costs also taxed in Nyeri High Court Misc. Application No. 201 of 2006.*

v. Nyeri HCCC No.77 of 2008, for recovery of alleged costs taxed in Nyeri High Court Misc. Application No. 202 of 2006.

vi. Nyeri HCCC No.98 of 2008, for recovery of alleged costs also taxed in Nyeri High Court Misc. Application No.202 of 2006.

vii. Nyeri HCCC No.78 of 2008, for recovery of alleged costs taxed in Nyeri High Court Misc. Application No. 203 of 2006.

viii Nyeri HCCC No.99 of 2008, for recovery of alleged costs taxed in Nyeri High Court Misc. Application No.203 of 2006.

ix.Nyeri HCCC No.96 of 2008, for recovery of alleged costs also taxed in Nyeri High Court Misc. Application No. 200 of 2006.

4. That I have perused all the pleadings in the above suits. I am advised by my Company's Advocates on record in the above suits herein sought to be consolidated, M/S Kantai & Co. Advocates, which I verily believe that all the suits involve the very same, indeed identical questions of law and fact. Even the pleadings are duplicated and identical, word for word, save for minor adjustments.

5. That I am informed by my Company's Advocates on record in all the above Miscellaneous Causes for taxation M/S Mwaura & Wachira Advocates, which I verily believe, that the alleged costs claimed in all the suits were party and party costs awarded on the same day on 16th April 2008, in two interlocutory applications dated 29th September 2006 and 23rd October 2006 respectively, filed within the very same Miscellaneous causes for taxation from which the above suits arose.

6. That I verily believe that there is no valid reason why the plaintiffs did not file a single suit for recovery of all the alleged taxed costs in the above circumstances instead of instituting a multiplicity of suits on the same, identical questions of law and fact.

7. That I am advised by my Company's Advocates on record in the above suits herein sought to be consolidated, M/S Kantai & Co. Advocates, which I verily believe, that the court previously has, for convenience, heard common submissions, then written and delivered a single common ruling to apply to all the suits, in light of the identical pleadings and identical questions of law and fact.

8. That I verily believe that any further proceedings in all the suits will deal with the very same, identical questions of law and fact and therefore inevitably result in similar decisions. I verily believe that it is only logical and convenient that all the suits be consolidated in the circumstances to avoid duplicating proceedings nine times over.

9.

10.

11.

12. That I therefore truly believe that it is necessary that the suits be consolidated and stayed pending hearing and final determination of the References from taxation lodged by both parties in the above circumstances.

In support of the application, **Mr. Kinyanjui**, learned advocate for the applicant orally submitted that the matters in dispute in all the cases were identical, parties are the same and so are the defences. As far as

he was concerned order XI rule 1 dealt with consolidation. Consolidation can even be ordered by the court suo moto. For convenience it was desirable that the suits be consolidated and then stayed pending the outcome of the references filed. The only references struck out were the respondent's references. In support of his submissions, **Mr. Kinyanjui** referred the court to several authorities cited in his list of authorities that he had filed in court.

The application was opposed. A replying affidavit sworn by **Nyamondi Ochieng-Nyamogo** was filed. In pertinent paragraphs he deponed as follows:-

“1.

2.

3. That first and foremost, in response to the

allegations contained in grounds i, j, k and l of the “Grounds for the Application” I state that “both parties” to these suit ARE NOT parties to the References, as alleged, in fact the defendant herein is neither a party to the said References nor the taxation from which the said References arose!

4. That in response to paragraph 2 – 8 of the said “Affidavit”, and to put the record straight, I state that the “multiplicity of suits” complained of by the defendant themselves arose from an equal multiplicity (nine (9) in total) of proceedings/ suits/references which “the defendant’s advocates M/S Mwaura & Wachira” brought, against the plaintiff, and lost, before three (3) different judges of this honourable court. In the circumstances it is simplistic, in the extreme, to suggest, even believe, that any further proceedings arising therefore need necessarily “deal with identical questions of law”.

5. That I verily believe that to now turn around and blame the plaintiff for following in their own footsteps, as inferred in paragraph 4 hereof, is a classic case of a pot calling a kettle black!

6. That contrary to the defendant’s allegations in paragraph 9 of the “Affidavit” and its unfortunate, if woeful, understanding of the law of taxation of bills of costs, as contained in paragraphs 10, 11, 12 and 13 of the “Affidavit”, I candidly state that there are no references pending, by the defendant herein against the plaintiff herein, before any competent court or at all in this country.

7. That, indeed, there are references, in which the plaintiff herein is a party, but the taxed costs giving rise to these references have not been stayed and, in any event, if there was to be a stay, the same would be sought either in the taxation or in the reference, by a party to the taxation/reference, and never elsewhere and certainly never by a stranger that the defendant herein is.

8. That I verily believe that in seeking a stay of the taxed costs, the defendant herein becomes a busy body/mischief maker since it was neither a party to the taxation nor the reference, and the relevant party to those proceedings has never sought for a stay.

9. That in any event, the law is settled that costs cannot be stayed since in the event of an appeal, reference or whatever further proceedings succeeding, the same can be ordered refunded.

10. That as for staying HCCC 95, 96, 97, 98 and 99 of 2008 pending the determination of the References, I state that there are no References filed and pending in respect of these suit since the only such References were dismissed, on a technicality, by Hon. Lady Justice Mary Kasango on 27/1/2009. That was one (1) long month before filing the present Chamber Summons and the only reason the defendant is unaware of this is because it is not a party to the said References nor was it represented therein.

11.

12. That the said HCCC 95, 96, 97, 98 and 99 of 2008 already have a hearing date, being 29th July 2009. I verily believe that it is mate, and just, that the said Chamber Summons, dated 28/10/2008, is not allowed to interfere with this hearing date, (29/7/2009), since it is by a non party to these suits, it has not been served on the plaintiff herein and since it has no hearing date, (almost a year after it was filed), even the defendant does not have the vaguest idea when it will ever be heard and determined, if at all.

13. That the defendant has not demonstrated what prejudice it would suffer if these suits were to be heard and determined notwithstanding the fact that the References, to which it is not a party, are still pending.

14. That I verily believe that if HCCC 75 – 99 of 2008 were to be consolidated, and stayed, it would be tantamount to staying HCCC 95 – 99 of 2008, which already have a hearing date, yet there are no References pending against them and I swear this Affidavit in support of my prayer that this Chamber Summons be disallowed with costs.

In opposition to the application, **Mr. Nyamogo** orally submitted that consolidation sought was merely an attempt to delay the hearing of those suits. He submitted that the suits were not identical. That it was the applicant who was the cause of the multiplicity of the suits. Though there were references pending, parties thereto were different. That the applicant has not met the standard required for consolidation. The suits are different. No prejudice will be occasioned to the applicant. For all these submissions, the learned advocate referred the court also to the several authorities he had cited in his list of authorities filed in court as well. Finally the learned advocate submitted that the applicant had come under section 3 & 3A of the Civil Procedure Act. This was in violation of order 50 Rule 1 of the Civil Procedure Rules. The application was thus fatally defective.

I have now had the occasion to carefully read and consider the application, the supporting and replying affidavits together with annexures thereto, rival oral submissions and cited authorities as well as the law.

The application is expressed to be brought under Order XI rule 1 & 2 of the civil procedure rules. That order and rule deal with consolidation and stay of suits. That being the case there was no need on the part of the applicant to invoke the provisions of section 3 & 3A of the civil procedure Act in the application. As I have had occasion to state in the past, a party can only invoke sections 3 & 3A of the civil procedure Act if there is no provision of the law that can take care of an application and or matter. Had the applicant only invoked the said sections of the civil procedure Act, I would have had no hesitation whatsoever in striking out the application as being fatally defective and or incompetent. Luckily for the applicant it had also cited the correct provisions of the law in support of the application.

As I understand it, consolidation can be ordered where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved. In such situation the court may either, upon application by one of the parties, or on its own motion and at its discretion and upon such terms as may deem fit order the consolidation of such suits. Thereafter the court may direct that further proceedings in any such suits be stayed until further orders. As can be gathered from these provisions of the law, consolidation can be ordered where there are two or more suits pending in the same court and the said suits involve the same or similar questions of law or fact. Accordingly it is not necessary as argued by the respondent that the said suits must of necessity involve the same parties. There is no denying that there are nine or so cases pending in this court. The particulars of those cases are set out in paragraph 3 of the supporting affidavit of the applicant. Much as in those suits parties are not the same and the same goes for the references, there is no denying that they involve the very same and indeed identical questions of law and fact. Indeed the pleadings as correctly submitted by **Mr. Kinyanjui**, are a replica of each other save for perhaps in changes in names and figures here and there. Indeed they all involve recovery of alleged taxed costs. I have not doubt in my mind therefore that the said suits deal with the very same, identical questions of law and fact and therefore it is only logical and convenient that they be consolidated for ease of hearing and disposal as they are anchored on more or less the same causes of action. In fact consolidation may go along way in saving the court at the hearing, its valuable judicial time as a determination of the test suit will apply mutatis mutandis to the other suits. Further it is not that there has

not been consolidation in these matters before. In the past there have been applications which have arisen in these matters. Those applications have been consolidated and heard as one. None of the parties herein has ever objected to that cause being taken. In saying so, I of course have in mind my ruling in **Nyi HCCC No. 95/08 Nyamogo v/s Co-operative Insurance (K) Ltd.** I did not discern any prejudice that was occasioned to the respondents. If anything it had the effect of speeding up the hearing and final determination of those applications. If I do not consolidate these nine or so suits, it will mean that this court will be bogged down into hearing the said suits nine times over which in essence will be a duplication of efforts.

As for stay of the consolidated suits pending the hearing and final determination of the references from taxation lodged by the applicant, I do not think that the applicant has made out a case to warrant the grant of such a prayer. It has not been suggested that if stay of proceedings is not granted, the references will be rendered nugatory. Nor has it been suggested that if the consolidated suits proceed to hearing and finally the decision is in favour of the respondent and the applicant is compelled to pay out the amount, it may not be able to recover the amount so paid in the event of the references being successful. The respondent I would imagine is a prominent firm of advocates. I do not think that they are as poor as a church mouse. I believe that they will be in a position to refund the applicant whatever outlay that it would have been paid to them in the event that a refund is found necessary. As stated by **Ojwang J** in **Kenya Pipeline Company Limited v/s Nyamogo & Nyamogo Advocates, NBI HCCC No. 1142 of 2005 (UR)** “..... even where the respondent’s new suit (HCCC No. 1142 of 2005) to (sic) turn out in their favour and against the applicant herein, the fact that a refund of paid-up costs would be necessary is no reason in law to justify stay of execution of costs at this stage” I agree with these observations save to substitute the word stay of execution with stay of proceedings as sought in this case. In any event and as correctly submitted by **Mr. Nyamogo** the law is settled that costs cannot be stayed since in the event of appeal, reference or whatever further proceedings succeeding, the same can be ordered refunded. See generally **HC. Misc Appl. No. 862 of 2003, S. Gichuki Waigwa v/s Nina Marie Ltd (UR), Francis Kaboa v/s Nancy Wambui & Anor, civil application number NAI 298 of 1996 (UR).**

Further I do not think that references set out in prayer 2 sought in the application can be stayed in these proceedings. Indeed if there is to be stay at all, it is my view that the same ought to be sought either in the taxation files leading to those references or in one of the references.

For all the foregoing reasons, I would grant prayer one of the application. However HCCC 95 of 2008 which is already scheduled for hearing on 29th July 2009 shall be the pilot file and not this court file. Prayer 2 of the application is however denied. Each party to bear its or their own costs of this application.

Dated and delivered at Nyeri this 18th day of June 2009

M. S. A. MAKHANDIA

JUDGE