



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1205 of 2000**

PROTEIN AND FRUITS PROCESSORS LTD PLAINTIFF

VERSUS

CREDIT BANK LIMITED 1ST DEFENDANT

PAUL MUTUNGI 2ND DEFENDANT

JOSEPH GIKONYO t/a GARAM INVESTMENTS 3RD DEFENDANT

RULING

By a Chamber Summons dated **15th May, 2006** brought under **Section 3A** of the Civil Procedure Act and **Order XI Rules 1 and 2** of the Civil Procedure Rules, the Plaintiff seeks to have this suit consolidated with **HCCC No.128 of 2003** on the grounds that the 1st, 3rd Defendants and Plaintiff are suing/sued in the same capacity in both suits, and that they are the determinant parties in the two suits, other parties not having entered appearance.

It is further contended that the two suits are grounded on an illegal or irregular auctioning of the Plaintiff's **LR 8827/11** by the 3rd Defendant under the instructions of the 1st Defendant. It is maintained that the consolidation of the two suits will result in all issues being brought before the court thereby saving costs and judicial time. It is contended that although the 2nd Defendant in the two suits are different persons, none of them has entered appearance in any of the suits.

The Defendants objects to the application contending that the same is misconceived and fatally defective, no pleadings in respect of any of the suits having been annexed to the application. The defendants maintain that the parties in the two suits are not the same 2nd Defendant being different and that the cause of action in the two suits are different as they are based on different auction sales. It was contended that since no judgment has been entered against the 2nd Defendant in any of the suits, they ought to have been served with the application.

Order XI Rule 1 of the Civil Procedure Rules provides 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, or of 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.”**

It is evident that in order for the court to confirm that the suits are “**pending in the same court**” and involve “**same or similar questions of law or fact**” the court must have the pleadings of the suits before it. In this case, the applicant has not availed copies of the pleadings and the court cannot blindly accept that, merely because it is alleged that the two suits are based on illegal or irregular auction of property, the facts or the issues of law involved are the same or similar. For this reason, I find that the application before the court is fatally defective.

Accordingly the same is struck out.

Orders accordingly.

Dated this 10th day of March, 2008.

H. M. OKWENGU

JUDGE

Delivered this 11th day of March, 2008.

R. N. SITATI

JUDGE

In the presence of:

Mr. Nyanchoga for Defendant.

Mr. Muriasi for Applicant.