



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Civil Case 77 of 2005

DUTTO MARIA LUCIA.....PLAINTIFF

VERSUS

MAURIZIO RICOTTI.....DEFENDANT

RULING

The applicant is seeking in this application that this suit be consolidated with HCCC No. 93 of 2005.

The application is grounded on the fact that the two suits raise similar questions of law and fact and that there will be no prejudice to the 1st respondent if consolidation is allowed.

In their grounds of opposition the 1st respondent argues that the said HCCC. NO. 93 of 2005 has never been served upon them while the pleadings herein are closed. I have considered these submissions.

The principal question with which the court here is concerned is whether the two suits can be consolidated pursuant to Order 11 of the Civil Procedure Rules. From the annexed plaint, I have no doubt that Malindi HCCC No. 93 of 2005 was filed by the applicant in this Court on 23rd September, 2005.

For an application for consolidation of a suit to succeed, the court must be satisfied that;

- i) the two suits are pending and
- ii) they raise the same or similar questions of law or fact

So when is a case said to be pending? Strictly speaking the

Court becomes seized of an action on the issue and service of summons. A suit does not become a pending action until summons are served on the defendant.

In an old English case of **Helenslea, The Catalonia** (1881) PD 57 cited in **Arab Monetary Fund V Hashim and others** (No. 4) (1992) 4 All ER 860, Sir Robert Phillimore declined to consolidate two cross-actions on the grounds that the summons in one of the actions had not been served. He said as follows;

“Two suits can only, I think be consolidated after each of them has become a *lis pendens*; and it is clear that a suit in *personam* does not become a *lis pendens* until after service of the writ of summons”.

From this it can be said that two suits could only be consolidated after each of them had become a *lis*

pendens. In other words a pending suit. A suit in *personam* did not become a pending suit until after service of the summons.

Although the case dealt with an admiralty jurisdiction, I believe the principle it laid down is applicable in all cases of consolidation.

In the instant case the applicant has conceded that HCCC.No.93 of 2005 has not been served. It cannot therefore, in terms of the above authority be said to be pending. It may raise the same or similar questions of law or fact as the instant suit, but until it is served and the other party responds to it the similarities may not be discerned from the plaint alone.

For these reasons, the application dated 26th October, 2005 is incompetent and is struck out with costs.

Dated and delivered at Malindi this 28th day of February 2006.

W.OUKO

JUDGE

28.2.2006

Before

W.OUKO

JUDGE

Mr.Ole Kina

Mr.Owencha for Mr.Maosa

CC. Matu

Ruling delivered.

W.OUKO

JUDGE