



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI(NAIROBI LAW COURTS)**

**CIVIL CASE NO. 644 of 2004**

**JOSEPH WATHUA KIGWE.....PLAINTIFF**

**VERSUS**

**TOTAL KENYA LIMITED.....DEFENDANT**

**RULING**

Under Rule 1 of Order 37 of the Civil Procedure Rules (the Rules), where two or more persons have instituted suits against the same defendant and such persons under Rule 1 of Order I of the Rules could have been joined as co-plaintiffs in one suit, the court may, upon the application of any of the parties, if satisfied that the issues to be tried are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.

The test for selection of a test suit is therefore:-

- (i) that the defendant be the same in the several suits;
- (ii) that the plaintiffs in such suits could have been joined as co-plaintiffs in one suit under Rule 1 of Order 1 of the Rules; and
- (iii) that the issues to be tried in each suit be precisely similar.

Under Rule 1 of Order I, all persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise. The test for joinder of plaintiffs thus is:-

- (i) the right or relief alleged to exist in the co-plaintiffs, whether jointly, severally or in the alternative, must be in respect of or arising out of the same act or transaction or series of acts or transactions; and
- (ii) if the co-plaintiffs had brought separate suits a common question of law or fact would arise.

The Defendant in the present suit has applied by notice of motion dated 11th November, 2004 under the aforesaid Rule 1 of Order 37 for selection of Nairobi HCCC No. 2875 of 1998 as a test suit and for stay of the present suit pending hearing and determination of the test suit. The grounds for the application are that the issues to be tried in both suits are similar; that both suits arise from similar facts and are against the same defendant; that HCCC No. 2875 of 1998 has been substantially heard and will be concluded before the present suit; and that the outcome of HCCC No. 2875 of 1998 will have a bearing on the present suit and that therefore it is only fair and just that this suit be stayed to avoid a situation where there are two conflicting judgments of the court on two similar matters. Learned counsel for the Defendant made submissions along those grounds.

The Plaintiff opposes the application upon the grounds set out in the grounds of opposition dated 28th February, 2005. Those grounds do not quite address the relevant issues of law. But learned counsel for the Plaintiff did submit that the Plaintiffs in both cases are different and have different contractual relationships with the Defendant based upon two different licence agreements which the Plaintiffs in their respective suits allege have been breached by the Defendant in different aspects; that different reliefs are

sought; and that the two Plaintiffs could not have filed suit jointly.

I have considered the submissions of the learned counsels. I have also perused the pleadings in both cases, including affidavits filed in support of certain interlocutory applications made in the suits. I note that each plaintiff entered into a separate and distinct marketing licence agreement with the Defendant, though the agreements are similar in content, bear the same date and are in respect to the same service station. The right or relief alleged to exist in the Plaintiffs in their separate suits is thus not in respect of or arising out of the same act or transaction or series of acts or transactions. Though there will unquestionably be common questions of law in both suits, the issues of fact are likely to be quite different. I am therefore not satisfied that the plaintiffs in these two suits could have been joined as co-plaintiffs in one suit under Rule 1 of Order I of the Rules, or that the issues of law and fact to be tried in each suit are precisely similar. I must therefore refuse the application. It is hereby dismissed with costs to the Plaintiff. Order accordingly.

**DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF MAY, 2005.**

**H.P.G. WAWERU**

**JUDGE**

**DELIVERED THIS 27TH DAY OF MAY, 2005.**