

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT NO. 100 OF 200

MOUNT KENYA SUNDRIES LIMITED1ST PLAINTIFF

SAPRA M. M.2ND PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

and

KENWIDE MEDIA LIMITEDTHIRD PARTY

R U L I N G

The defendant by a chamber summons dated 22nd October 2004 has come under Order 1 Rule 18 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The defendants' application have 6 prayers which are not opposed by the other parties. The plaintiff only opposes one prayer, that is prayer No. 5.

The court will grant prayers No.1, 2,3,4 and 6 since they are not opposed and because they are prayers that are valid for such an application for 3rd party directions.

The prayer opposed by the plaintiff is in the following terms:

“That this action be tried together with Nairobi MILIMANI HCC Civil Suit NO. 1882 of 2003 MT SUNDRIES LTD & SAPRA M.M. V KENYA PORT AUTHORITY, KENWIDE MEDIA SERVICES & GEORGE SUNGUN.”

The defendant's counsel argued that this suit and HCCC 1882 OF 2003 are based on the same factual legal dispute and it is just that the matter be adjudicated at the same time; this will result in saving of costs and will avoid conflicting decisions on that same facts. The plaintiff opposes the consolidation on the basis that the two suits are founded on different publications and different periods of publication. The other ground of opposition was on the basis that HCCC NO. 1882 OF 2003 has a 3rd defendant who is not a party in this action and such consolidation would be prejudicial to him.

I have considered counsel's submissions and the affidavit evidence. I noted that the application is brought under Order 1 rule 18 and in looking at that order I find that it does not provide the consolidation of suit. That power is in Order 11. I am aware that failure to state a correct order is not always fatal to an application but my main concern with this application is that an order is sought to consolidate this suit with HCCC 1882 of 2003 but the applicant failed to annex the pleadings of that suit. How then can this court exercise the power to consolidate when it does not have sight of that other suit? How can the court determine whether these two suits have the same or similar question of Law or fact.

The burden is squarely upon the defendant who desired to have the order granted to have provided

copies of the pleadings

. I therefore find that the defendant has failed to prove that this court should order a consolidation of the two suits The orders of this court are: -

(1) That the court grants prayers No. 1, 2, 3, 4, 6 of the chamber summons dated 22nd October 2004

. (2) That prayer No. 5 of the chamber summons dated 22nd October 2004 is dismissed with no orders as to costs.

Dated and delivered this 16th day of December 2004.

MARY KASANGO

JUDGE