



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 531 OF 2001**

**AHMED ZAIN MOHAMMED.....PLAINTIFF**

**-VERSUS-**

**1. ZAIN AHMED ZAIN.....1ST DEFENDANT**

**2. KAIYALAL PANDYA**

**T/A PANDYA & TALATI ADVOCATE.....2ND DEFENDANT**

**3. PREMIER SAVINGS & FINANCE LTD.....3RD DEFENDANT**

**4. THE CHIEF LAND REGISTRAR.....4TH DEFENDANT**

**5. DIAMOND TRUST BANK (K) LTD.....5TH DEFENDANT**

**R U L I N G**

The 2nd Defendant filed a Chamber Summons dated 22nd March 2002 based on Order VI rules 13 and 16 of the Civil Procedure Rules. The 3rd and 5th Defendants also filed a Chamber Summons dated 12th March 2003 under order VI rules 13(1) a, b and 16 of the Civil Procedure rules. Both applications have similarities namely:-

Firstly, they were all listed for hearing on the same day i.e. 14/5/2002.

Secondly, both applications seek to have the plaint struck out or dismissed basically on the ground that the plaint is bad by virtue of the provisions of the law limitation of Actions Act Cap. 22 laws of Kenya.

Thirdly that the applications have all been served on the parties save for the State Counsel who sought to be excused from participating at this stage. Fourthly, that when the applications were called out for hearing the advocates for the 2nd defendant and that of the 3rd and 5th Defendants orally sought to have the two applications consolidated. This later point leads to the purpose of this ruling. The gist of the 2nd, 3rd and 5th Defendant's oral application is to have the two applications consolidated to save time and expense on the part of the court and the parties concerned.

The plaintiff's Counsel put up a spirited opposition to this application the ground that it is not provided for under the Civil Procedure Act. The plaintiff's Counsel further alluded to the fact that Section 3A of the Civil Procedure Act could be used but a party must make a formal application as opposed to an oral application. It was also the plaintiff's submission that this court has no jurisdiction to make an order to consolidate applications in the absence of a formal notice of motion as envisaged under Order L rule 1 of the Civil Procedure Rules. The other issue which the plaintiff's counsel contented was that the

applications were supported by distinct and separate affidavits hence it would prejudice the plaintiff's case and that he would be mixed up when it comes to responding to their application

From the submissions of the three learned Counsels, it is admitted by all that there is no provision for the consolidation of applications under the Civil Procedure Act and the rules there under. Order XI of the civil procedure Rules provides for the consolidation of suits. Order XI reads:-

***“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 consolidation of such suits, and***

***(b) Direct that further proceedings in any of such suits be stayed until further order.”***

Under the same order it is also provided that such an application may be made orally or by a chamber summons. Of course the Civil Procedure Act does not purport to be exhaustive, save on the matters specifically dealt with by it. Section 3 of the Act provides that in the absence of any specific provision to the contrary nothing in the Act shall be deemed to limit or otherwise affect any special jurisdiction or power conferred or any special procedure prescribed by or under any other law for the time being in force. Therefore the absence of any provisions on any particular matter does not mean that the court has no power to act in regard to the matter. In this instant circumstance, I am of the view that parties will have to resort to the assistance of section 3A of the Civil Procedure Act which reads:

***“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”***

It is therefore clear that an application can be made to the court by invoking the exercise of its inherent powers under S.3A if no other remedy is available. It also means that even where there are specific provisions in the Rules to be applied to a particular case, the inherent jurisdiction of a court is not thereby fettered. Therefore the plaintiff's arguments that attempts to restrict the inherent powers of the court cannot stand this test. I would say that this court has jurisdiction to consolidate applications but not without conditions. There are certain vital conditions though not exhaustive which must be established before allowing an application for consolidation.

First, the issues raised by the applications should be precisely or nearly similar.

Secondly that the applications sought to be consolidated must be of the same format i.e. both the applications should either be Chamber Summons, Notice of Motion or any other format provided for by law so long as they fall in the same class.

Thirdly, the applications should be brought under the same provisions of the law or are seeking similar prayers.

The other issue which needs to be decided is the procedure which parties should adopt when making an application for consolidation. In my view, the matter should be left open to the parties to choose to make a formal application by way of a Notice Motion or make oral representations in court. Under Order XI rule 2 of the Civil Procedure rules, an application to consolidate suits could be made either orally or by chamber summons.

However, when allowing an application to consolidate applications the court granting, the court should make certain directions on how the parties should proceed when prosecuting the application to avoid confusion.

In the circumstances therefore I will allow the application to consolidate the applications dated 22nd

March 2002 and that of 12th March 2003. I will also direct that the 2nd applicant should be the first open arguments since it was the 2nd Defendant who first in time to file its application and the 3rd and 5th Defendants to follow in that order. Costs of this application to abide the out come of the application in consolidation.

**Dated at Mombasa this 15th day of May, 2003.**

**J.K. SERGON**

**JUDGE**