



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

JUDICIAL REVIEW NUMBER 2 OF 2021

IN THE MATTER OF THE CO-OPERATIVE SOCIETIES ACT CHAPTER 490 LAWS OF KENYA

AND

IN THE MATTER OF JUMATATU FARMERS CO-OPERATIVE SOCIETIES LIMITED

AND

REPUBLIC.....APPLICANT

VERSUS

SUB-COUNTY CO-OPERATIVE OFFICER-SUBUKIA.....RESPONDENT

EX-PARTE

JUMATATU FARMERS CO-OPERATIVE SOCIETY LIMITED.....SUBJECT

RULING

1. The Sub-County Co-operative Officer-Subukia the Applicant vide an application dated 12th February 2021, filed on 17th February 2021 against Jumatatu Farmers Co-Operative Society Limited the Respondent, and brought under **Section 1A, 1B and 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules** seeks **the following orders;**

- *THAT this Honorable Court do order the consolidation of this suit with **Judicial Review No. E03 of 2020**, between the same parties herein.*
- *THAT upon such consolidation the Respondent be granted leave to file a response in the interest of justice.*
- *THAT this Honorable court do make such other or further orders as it may deem fit, necessary and expedient in the interest of justice.*
- *THAT cost of this application be provided for.*

2. The Application is premised on the following grounds;

- *THAT there is a similar suit pending before Hon. Lady Justice Rachael Ngetich (HC4) being **Judicial Review No. E03 of 2020**, between the same parties herein.*
- *THAT both suits relate to the same parties and the same subject matter.*
- *THAT JR NO. E03 of 2020, is fixed for mention on the 16th day of January, 2021 and the outcome of the same will have a bearing on this suit.*
- *THAT the Applicant was at the material time of filing the instant Application and at all times under statutory obligation to disclose the pendency of the other matter involving the same parties herein.*

- *THAT the Petitioner has not come to court with clean hands.*
- *THAT the consolidation shall facilitate the efficient and expeditious disposal of the two matters.*
- *THAT it would be in the interest of justice and fair play if the orders sought in this were granted in order to provide a framework for a fair and just disposal of these matters.*

3. The application is supported by an affidavit of XAVIER LUGAGA who is the Cooperative Officer of the respondent herein sworn on 12th January 2021. The deponent herein reiterated the above grounds.

Respondent's Case.

4. The Respondent through its chairman Joseph Macharia Thaara swore an affidavit in opposition of the Application on 18th February 2021.
5. He deponed that Judicial Review matters are “*Sui generis*” with a complete code of procedure and **section 1A, 1B and 3A of the Civil Procedure Act** are inapplicable to Judicial Review matters.
6. He deposed that **Nakuru High Court Judicial Review No. 003 of 2020 (Jumatatu Farmers Co -operative Society Limited vs Sub-County Co-operative Office-Subukia)**, the Applicant herein sought for leave to institute Judicial Review proceedings in the nature of *certiorari* to quash the Respondent's Notice dated 24th November 2020 in which the Respondent had called for a Special General Meeting (SGM) of Jumatatu Farmers' Co-operative Society Limited to be held on 17th December 2020 and the court after considering that application stopped the meeting slated for 17th December 2020. Consequently the Notice dated 24th November 2020 became superfluous and the Applicant herein was necessitated to issue another notice dated 19th December 2020 calling for another SGM of the Jumatatu Farmers' Co-operative Society Limited for 21st January 2021 which Notice prompted the Applicant (Jumatatu Farmers Co Operative Society Limited) to lodge in this court the Application dated 10th January 2021 which court considered and issued ex-parte orders on 19th January 2021.
7. He deponed that the causes are totally different and unrelated in terms of the separate causes of action precipitated by two distinct and totally different Notices (one of 24th November 2020 and another one of 19th December 2020 calling for a Special General Meeting of the Applicant (Jumatatu Farmers' Co-operative Society Limited) and therefore the two matters are incapable of being consolidated into one because each matter is challenging a different notice with a separate cause of action and reliefs claimed in two matters do not arise out of the same transaction even though the parties are the same.
8. The respondent averred that consolidation shall bring forth a misjoinder of causes of action.
9. He prayed that this Application lacks merit and should be dismissed.

SUBMISSIONS

Applicant's Submissions

10. The Applicant's submissions dated 11th March 2021 were filed on 16th March 2021.
11. The Applicant submitted that the main issue for determination is whether JR No. 2 of 2021 and JR No. 003 of 2020 should be consolidated.
12. They argued that **Order 11 Rule 3(1). (h) Of the Civil Procedure Rules** makes reference to consolidation of suits in appropriate cases.
13. They relied on the cases of;

1. **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others** (2014) CKLR, the Supreme Court of Kenya stated as follows;

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it"

2. **Security Guards & Services Ltd vs Municipal Council of Mombasa (2004) eKLR** where the court held as follows: -

"Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:

1. **Some common question of law or fact arises in both or all of them; or**

2. *The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or*

3. *for some other reason it is desirable to make an order for consolidating them.*

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated."

3. Korean United Church of Kenya & 3 others v Seung Ho Song (2014) eKLR that: -

"[...] the law on consolidation is well settled. Consolidation of suits is done under the inherent powers of the Court and for purposes of achieving the overriding objective of the Civil Procedure Act that is for expeditious and proportionate disposal of civil disputes. Therefore, the main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. It is also ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses. However, such consolidation can only be ordered within the known parameters of the law [...] It is therefore imperative that there must be similar facts and issues of law raised for determination to warrant the consolidation of the suits [...]."

14. It was the Applicant's position that from the aforesaid it is settled that that the quintessence of consolidation of suits is to further the expeditious disposal of cases and to ensure proper case management which has the overall effect of saving costs, time and effort and shielding the parties from multiplicity of proceedings, delay and unnecessary expenses.

15. They submitted that the law courts when faced with the question of consolidation should consider the below parameters;

- Whether some common question of law or fact arises in both or all the suits to be consolidated;
- Whether the rights or reliefs claimed arise out of the same or similar cause of action;
- Whether the parties are the same;
- Whether any prejudice would be visited upon any party upon such consolidation, and
- Whether for some other reason, it is desirable to make an order for consolidating the suits.

16. The applicant therefore contended that guided by the law in the matter herein, the circumstances of the two suits, JR No. 2 of 2021, and JR No. E03 of 2020 is a proper case for consolidation.

17. The applicant argued that the above suits arise from the same cause of action since the respondents in the said matters are seeking to quash notices by the Applicant calling for an SGM.

18. They submitted that the suits involve the same parties, same subject matter and same advocates and as such it will be to the convenience and interest of the parties to the suits to have the consolidation effected.

19. It was their position that consolidating the suits would end repetition, multiplicity and delay of proceedings in that there is a pending case in JR NO. EO3 where a member of the respondent moved court to be enjoined as an interested party and issue arose as to the legitimacy of a member seeking to be enjoined as such and the court directed that the legitimacy of the Applicant's officials and member seeking to be enjoined as an interested party be resolved before the next mention date. The applicant averred that these issues are bound to recur in the instant case and it will interfere with and cause delay in the same manner but consolidation of the two cases will ensure there is no repetition of the issues and hence no unnecessary delays.

20. To bolster the above position the Applicant relied on the cases of;

- Farmers' Cooperative Society Limited vs Joel K. Bett (being sued on his own behalf and on behalf of Chesinende Rural Craft) & 25 others) & another where the court noted that:

"It is interesting that counsel for 3rd to 22nd Respondents has submitted that consolidation of the suits would result in repetition. In my considered view, consolidation would actually achieve the opposite effect by avoiding repetition."

- Kivanga Estates Limited vs National Bank of Kenya Limited (2017) EKLR where the court held: -

"We entertain no doubt whatsoever that by engaging nearly all levels of the court system for the last 27years, filing one suit in one court after the other, moving from Embu, Meru, to Nairobi, amounts to gross abuse of the process of the court, The learned Judge properly balanced the two competing interests: the public interest in ensuring that there is finality in litigation (and that a party should not be "stung" twice in the same matter), and the private interest of a party guaranteed by the Constitution to access the courts. He kept in mind the fact that in all the circumstances, the appellant was misusing or abusing the court process by seeking to raise before it the issue which it had raised before in previous suits, some of which may still be pending. The court will look closely at the conduct of the party bringing subsequent

proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to ex debito justitiae prevent it. There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the Constitution and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resources; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties. We believe the learned Judge had this in mind when he warned counsel for the appellant of the risk of an order of costs being made personally against him if he continued to bring more actions on the same dispute.

The Respondent has not demonstrated the Existence of special Circumstances nor has it demonstrated what prejudice it will suffer if the two suits are consolidated

21. The Applicant argued that the issues raised by the Respondent in the instant suit can be capably addressed in the pending case, JR No. E03 of 2020, that the Respondent has neither placed any material before the Honourable Court to demonstrate the existence of any special circumstances to the contrary nor any material to demonstrate the prejudice it will suffer upon the consolidation of the two cases.

Respondent's Submissions

22. The Respondents submissions dated 7th April 2021 were filed on 21st April 2021.

23. The Respondent admitted that the parties are the same in both matters and contended that the subject matter was not the same.

24. They contended that the document that precipitated the filing of the present action was one dated 19th December 2020 calling for a Special General Meeting of the subject society to be held on 21st January 2021 which meeting was collectively stayed by this Honourable Court on 15th January 2021, the respondent pointed out that it noticed a day prior to filing this submissions that the Sub-County Co-operative Officer-Subukia had, vide a notice dated 13th January 2021, cancelled this meeting stayed for 21st January 2021. They attached the said notice in the interest of justice.

25. They argued that the court orders staying this meeting issued on 21st January 2021 and the notice from Sub-County Co-operative Officer-Subukia notice dated 19th December 2020 legally speaking had rendered this action superfluous, moot and futile.

26. Respondent submitted that the applicant's Notice of 13th January 2021 cancelling the meeting of 21st January 2021, the issue herein was settled and there was now nothing left for determination, as there is no notice for quashing. By asking this court to consolidate this suit with Nakuru High Court Judicial Review No.E03 Of 2020, the applicant was inviting this court to engage in an academic exercise, and urged the court to decline that invitation. The respondent urged the court to do the ...?..., as it was now logical thing to save its time by marking this matter as spent and overtaken by events and to order that costs be borne by the Applicant.

The Respondent submitted that in J.R NO.E03 of 2020 they sought leave of the court to commence Judicial Review proceedings with a view of having the Respondent/Applicant's Notice dated 24th November 2020 calling for an SGM to be held on 17th December 2020 quashed and the leave once granted was to operate as stay of, and suspend the said SGM slated for 17th December 2020. That the application was heard on 16th December and allowed. That it was upon the stay of the meeting slated for 17th December 2020 that the respondent applicant now issued the notice subject of this suit. That since leave to commence Judicial Review proceedings was yet to be granted or denied, there was nothing substantive pending hearing in Judicial Review E03 of 2020. The respondent argued that they deserved an award of costs because they had been compelled by the actions of the applicant to file these proceedings, and that the court was persuaded of their merit and had granted the orders sought.

ANALYSIS & DETERMINATION

27. The core issue for determination herein is whether this suit should be consolidated with **JR No. E03** of 2020 pending before High Court No. 4.

28. The parties herein are the same as those in JR E03 of 2020. The suits arise out of notices issued by the respondent seeking to hold an SGM of the ex parte applicant, the prayer sought is for *certiorari* to quash those notices.

29. Does the fact that the notices were issued on different dates create different causes of action? The principles of consolidation of suits are settled. They were best explained in ***Stumberg and Another vs Potgeiter 1970 E.A. 323*** as follows:-

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

30. The Supreme Court Case of India in ***Prem Lala Nahata vs Chandi Prasad Sikaria*** had this to say: -

“...Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the

conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”

31. In **Law Society of Kenya vs The Centre for Human Rights and Democracy**, the Supreme Court of Kenya had this to say about consolidation of suits: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”

32. **Allahabad High Court of India in P.P. Gupta vs East Asiatic Co. Air 1960 All 184**, the Court also adopted the above position in the following terms:-

“The very nature of the principle of consolidation implies that there is a similarity or identity of the matter in issue in different suits between the same parties which should be decided by the court once and for all. The object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”

33. The **Civil Procedure Rules 2010** mandate Courts in consideration of consolidation of suits to be guided by the following;

- i. Do the same question of law or fact arise in both cases?**
- ii. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction?**
- iii. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?**

34. **Black’s Law Dictionary (8th Edition)** defines consolidation as follows:-

“to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment, or sometimes, separate judgments.....”

35. Clearly consolidating the two suits should be the appropriate thing to do for the efficient and expeditious disposal of the dispute.

36. However is there anything to Consolidate?

37. The ex parte applicant (the respondent in the application under discussion) has submitted that the substratum of its application was settled when the respondent (the applicant in the application under discussion) cancelled the impugned meeting vide its Notice of 13th January 2021. The applicant is saying that this matter is settled and there is nothing to be consolidated.

38. Clearly if the party who brought the suit argues that there is no longer anything left to pursue, and asks the court to mark the matter as settled, the court cannot force it to proceed.

39. The application for consolidation would only make sense if there was going to be a hearing to determine the issues herein.

40. I am persuaded by the ex parte applicant that there is nothing pending for determination, hence nothing to consolidate.

41. In the circumstances, this matter is marked as settled.

42. Each party played a role in the outcome of the matter so each party to bear its own costs.

DATED and DELIVERED at NAKURU via EMAIL this 10th day of JUNE, 2021.

Mumbua T Matheka J

CA Edna

K. Mbugua for Ex parte Applicant

County Attorney for respondent