



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO.174 OF 2019

THE REGISTERED TRUSTEES BHAGWANJI RAJA CHARITABLE

FOUNDATION 1ST PLAINTIFF

HAMMOND HOLDINGS LIMITED 2ND PLAINTIFF

VERSUS

COAST COMPUTER BUREAU LIMITED DEFENDANT

RULING

(Application for dismissal of suit; plaintiffs suing for accumulated service charge and vacant possession; there having been a previous suit seeking same prayers; previous suit seeking service charge for a different period from this suit; though each breach would constitute a separate cause of action and separate suits could be filed, best in the interest of the administration of justice that for a suit claiming a continuing breach, one suit be filed and a claim be made covering the entire period of breach; in our instance two suits already filed; best in the interests of justice that the two suits be consolidated and a once and for all decision given on the issues at hand)

1. This suit was commenced by way of a plaint which was filed on 2 October 2019. It is averred that through an agreement dated 25 October 1993 between the 2nd plaintiff and the defendant, the defendant was granted a long term lease, of Office No. 313 and Store No. 312 of the Biashara Bank Building situated in the properties Mombasa/Block/XXI/396 and 397. The lease is for the unexpired residue of the term of 99 years, commencing 1 October 1973, less the last 7 days, with peppercorn rent (if demanded) plus service charge. Through a transfer dated 5 October 2006 and registered on 16 August 2007, the 2nd plaintiff transferred one half share of its interest in the two suit properties thus making the 1st and 2nd plaintiff joint owners. Later, in December 2014, the 2nd plaintiff transferred its remaining half share to the 1st plaintiff, thus making the 1st plaintiff the sole registered proprietor. The plaintiffs aver that vide the agreement of 1993, the defendant was under obligation to pay service charge. The plaintiffs contend that the defendant has failed to pay the service charges that have accrued and which at the time of filing this suit stood at KShs. 3,532,932/=. This is said to be service charge accumulated from January 2014 to December 2018. The plaintiffs aver that it was a term of the agreement that failure to abide by the said covenant, the plaintiffs would be at liberty to re-enter the premises and the term of the lease would cease, and this would be without prejudice to any remedies that will have accrued. The plaintiffs thus contend that their right of re-entry has crystallized. In the suit, the plaintiffs ask for the following orders :-

(a) Payment of the outstanding service charge of KShs. 3, 532, 932/= due from January 2014 to December 2018.

(b) An order of delivery of vacant possession by the defendant on the basis that the plaintiffs' right of re-entry in to the premises known as office No. 312 and store No. 312 (sic) of Biashara Bank Building situated on the leasehold properties known as

Mombasa/Block XXI/396 and 397 has crystallised and that the plaintiff is (sic) entitled to vacant possession of the said premises.

(c) Costs of this suit.

(d) Interest on (a) and (b) above at court rates.

(e) Any further or other relief that the court may deem fit to grant.

2. The defendant filed defence where it is pleaded that there is an already existing suit between the plaintiffs and defendant being *Mombasa HCCC No. 209 of 2008 (Hammond Holdings Limited vs Coast Computer Bureau Ltd)*. The defendant has averred that within that suit, it has filed a counterclaim against the two plaintiffs herein. It is pleaded that the said suit is partly heard. The defendant has pleaded that this suit is therefore *sub judice*. In the alternative, it is pleaded that the defendant withheld payment of service charge after it was denied services and that there has been no audited service charge accounts.

3. Simultaneously with the defence, the defendant filed the subject application, which is dated 31 October 2019. The application seeks the dismissal of this suit mainly on the ground of the said pre-existing suit. The supporting affidavit is sworn by Nitichandra Krishnalal Pandya, a director of the defendant and he has annexed copies of the pleadings in the previous suit.

4. The application is opposed by the plaintiffs and there is a replying affidavit sworn by Ketan Vrajlal Gandhi, the finance manager of the 2nd defendant. He has contended that the relief claimed in the suit *Mombasa HCCC No. 209 of 2008* is different from the claim in this suit. He has averred that in the earlier suit, the claim is for service charge accruing from the year 2006 to the year 2013. He has stated that in this suit, the claim is *inter alia* for service charge from the years 2013 to 2018. He has argued that the causes of action arose at different times.

5. I invited counsel to file written submissions, which they both did. Mr. Muyaa for the applicant, submitted *inter alia* that the earlier suit claims vacant possession and also service charge, which are the same reliefs claimed here. He has argued that if the plaintiff in that suit succeeds in obtaining vacant possession, that would be spent, for the defendant cannot be removed twice. He submitted that nothing prevented the plaintiff in the former suit from seeking payment of rent or service charge up to the date of judgment if the breach was continuing. He submitted that the remedy will be to amend the earlier pleadings and not file a new suit. He submitted that if the plaintiffs filed a suit each year, then to date, there would be more than 10 suits over the same cause of action. He further submitted that the plaintiffs committed perjury by swearing a verifying affidavit which deposed that there is no pending suit. He submitted that the remedy of staying this suit ought not to apply. He submitted that there exists a risk of a conflict of decisions if the two suits are to proceed.

6. For the respondent, Mr. Kibara *inter alia* submitted that the claim in the suit *Mombasa HCCC No. 2009 of 2008* is service charge from 2006 to 2013, whereas in this suit, it is service charge from January 2014 to December 2018. He dwelt at length in submitting that this suit is not statute barred because the breach is continuing. He added that each breach constitutes a separate and fresh cause of action. He submitted against striking out this suit as it would deny his clients from claiming the unpaid service charge. He submitted that if the court finds the matter to be *sub judice* then it should be stayed rather than be struck out.

7. I have considered the matter. The application is brought pursuant to Sections 1A, 1B, 3A and 6 of the Civil Procedure Act, Cap 21, Laws of Kenya. Section 1A, 1B, and 3A are general sections that give court discretionary power and seek the court's adherence to the overriding objectives. I think Section 6 is more to the point and it is drawn as follows :-

6. Stay of suit No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

8. Although the above provision of the law provides for a stay of a latter suit, where there is a previous one existing, I think in appropriate circumstances, the court has discretion to order a dismissal, if it is convinced that the latter suit is an abuse of the court process. The court however needs to be alive to the fact that the dismissal of a suit is a drastic remedy, which should only be issued in the clearest of cases, so that a party is not denied the chance to present its case to the fullest. In all instances, the court needs to ensure that the interests of justice are met and that no party is shut out. I will have the above points in mind while addressing myself over this application.

9. The lease in issue is dated 25 October 1993, and it is one entered into between the 2nd plaintiff and the applicant. At that time, it was only the 2nd plaintiff who was the proprietor of the leasehold title comprised in the suit properties. It was on 16 August 2007 that the 2nd plaintiff

transferred one half share of its interest to the 1st plaintiff. The plaint in the suit *Mombasa HCCC No. 209 of 2008* is dated 31 July 2008 and it was filed solely by the 2nd plaintiff. The claim, as originally pleaded was for payment of outstanding service charge in the sum of KShs. 701,434/= which was said to have accrued as at January 2007, and also for vacant possession of the premises. It does appear that the 2nd plaintiff was suing for service charge that had accrued before the transfer of a half share of the suit premises to the 1st plaintiff. That plaint was amended on 27 June 2019, to now claim the sum of KShs. 3,642,968.12/=, being service charge accumulated from 2006 to 2013. The applicant, within that suit, filed defence disputing the claim, and also filed a counterclaim, dated 18 September 2008. The counterclaim is against both respondents. The counterclaim *inter alia* pleads that the transfer of the ½ share was done without the consent of the applicant and thus null and void. It also sought orders of accounts and set off. A reply to defence and defence to counterclaim was filed and later amended.

10. Now in this suit, the claim is for accumulated rent from January 2014 to December 2018 together with vacant possession.

11. In as much as I agree with Mr. Kibara, that every breach may constitute a separate cause of action, and a person has liberty to file a separate suit for every breach, my view is that this does not augur well for the administration of justice. Instead of being inundated by an avalanche of cases for every breach, it is best, where there is a claim for a breach covering a span of time, or where there is a continuing breach, that one suit be filed because the issues to be addressed are the same. In our instance, the claim for vacant possession within the suit *Mombasa HCCC No. 209 of 2008* and the claim for vacant possession in this suit, arise from a claim of breach that is similar in both suits. If the claim for vacant possession is allowed in the suit *Mombasa HCCC No. 209 of 2008*, it will not need to be revisited in this suit. If that claim is declined, again, it cannot be revisited here because it would be *res judicata*. The only issue that can be addressed in this case is the service charge payable. If it is found that the applicant is liable to pay service charge, within the suit *Mombasa HCCC No. 209 of 2008*, again that would not be an issue to be tried here, save probably just to calculate the quantum of damages payable.

12. Having said that, I need to ensure that the plaintiffs' claim here is not defeated and that the plaintiffs are allowed to pursue their case for what they consider to be service charge accrued from the year 2014, which is not in the earlier suit. An important issue that that we need to be alive to, is the fact that the claim for vacant possession may not now accrue to the plaintiff in the former suit, for it has transferred all its interest to the 1st respondent. We ought therefore to allow the plaintiffs herein to pursue that claim. The issue of rent is continuing and I think it is best that it be decided once and for all for both this suit and the former suit. In fact, if it is the position of the plaintiffs that service charge is still accruing, they are hereby advised that it is best that they seek amendment, so that they can claim service charge up to the date of judgment. That would avoid the filing of a third suit to claim service charge after the year 2018. But that, I leave it to the plaintiffs to decide.

13. Taking the above into consideration, my position is that the best and most justiciable route to take is to consolidate the two suits. Directions can be taken on how to proceed going forward given that the suit *Mombasa HCCC No. 209 of 2008* is part heard. I do not see any prejudice to any party if I order consolidation, for as I have mentioned, directions can be issued to ensure that each party has a fair opportunity to present their case for both suits.

14. From the foregoing, my order is that the two suits be consolidated. I will give further directions on how the two cases are to proceed on a date that I will give after delivery of this ruling.

15. The costs of this application will be costs in the cause.

16. Orders accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JUNE 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA