



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU
PETITION NO. 6 OF 2012
MICHAEL JUMA OTIENO
(REPRESENTATIVE FOR CENTRE FOR
PEACE AND DEMOCRACY (CEPAD) BOARD OF
DIRECTORS.....PETITIONER

VERSUS

THE EXECUTIVE DIRECTOR

NON GOVERNMENTAL ORGANIZATIONS
CO-ORDINATION BOARDRESPONDENT

R U L I N G

1. By a Notice of Motion dated 2nd March 2015 brought under Rule 17 of Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedural Rules 2017, the applicant is seeking primarily an order that the petition herein be consolidated with Kisumu HC Constitutional Petitions Nos. 8 and 9 of 2014 and same be heard as one. The applicant has also asked this Court to strike out Kisumu HC Constitutional Petitions Nos. 8 and 9 of 2014 for being an abuse of the Court process. It is confusing and unintelligible what the applicant wants since the second prayer is not expressed to be in the alternative to the main prayer for Consolidation of the petitions.
2. The application is based on the following grounds:
 - a. After filing this petition and while it was pending the petitioner for no good reason but merely to abuse the court process by clogging the system and thus defeating its overriding objectives has filed two other petitions seeking the same remedies and orders.
 - b. No interest of justice stand to be achieved by the plethora of these petitions as one is just but enough, but the dignity of the court will be upheld by discouraging abuse of court process.
3. The application is supported by an affidavit sworn by Patrick J.O Otiemo. In his affidavit the deponent states that this Petitions Nos. 8 and 9 of 2014 are duplications the petition herein and they were filed in this Court between the same parties and seeking the same remedies. It was his deposition that one petition is sufficient to undertake the petitioner's grievances if at all and that multiplication of petitions over one subject matter only served to clog the court system and erect unnecessary backlog.
4. In opposition, the Respondent filed a Replying Affidavit sworn on 25th April 2015. The respondent

deposed that Petition Nos. 8 and 9 of 2014 arose from two different and independent cause of actions thus the respondent's and they should thus not be consolidated. On the issue of striking out, the respondent stated that the applicant has failed to establish grounds for the striking out of the petitions. The respondent went on further to state that saving the court's time should not be the only consideration that the court ought to take into account as justice to the parties must also be considered.

5. Parties filed written submissions. In his submissions, the applicant only dealt with the question of consolidation. It was argued for the applicant that since the prayers sought on petition No. 8 and 9 of 2014 is the same as the prayer sought in the current petition and further that since the facts and the issues that arise in the two petitions are similar to the ones raised in this petition, then there can be no harm if they were all consolidated and heard together.

6. It was further submitted that since none of the petitions has been heard, there is a danger of having the same evidence produced in two different courts leading to another danger and likelihood of the different courts reaching different decisions in the cases. The applicant relied on the case of *Muturi Investments Limited vs. National Bank of Kenya Limited [2006]eKLR* where Justice Kasango stated thus:

"I am of the view that the two actions have a common question of law and of fact in that they relate to the same lending and hence the documents which shall be relied upon shall also require similar interpretation from the Court. It is clear to me that to order the suit to be heard separately will mean that the evidence submitted by the parties will be duplicated in both cases."

7. In response to the applicants submissions, the respondent submitted that whereas petition No. 8 and 9 of 2015 are between the same parties and they raise similar issues of law and fact, the causes of action and or transactions that gave rise to each specific petition are different. He however agreed with the applicant that there would be no harm in consolidating the petitions.

8. The respondent also addressed the issue of striking out the petitions. He argued that striking out of a suit must be done sparingly and in clear and obvious cases, That unless a matter is plain and obvious, a party to a civil litigation should not be deprived of the right to have the suit tried through a proper trial. The respondent relied on the case of **Wangai vs.- Mugambi [2013]2 EA 474**. He concluded by urging the court to strike out the application with costs.

Determination

9. The application herein raises two separate issues, that is, consolidation and striking out. The court has to make a decision to either strike out the petition no. 8 and 9 of 2014, or consolidate the three petitions, or to disallow this application.

10. The court has the discretion to strike out pleadings and suits, however, that discretion should be applied sparingly and in the clearest of cases. The Court of appeal in the case of *The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999* stated in that regard that **"...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact."**

In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000* the court expressed itself thus:

"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved

11. It is the above principles that should guide this court in deciding whether to strike out the petitions or not.

12. In the petition herein, the respondent has prayed that this Court do order the Applicant to furnish him with information on how it procured the legal services of Otieno, Yogo, Ojuro & Co. Advocates. It is the same prayer Sought in the Petition No. 8 and 9 of 2014. The fact the parties in all these petitions are the same is not in dispute. The subject matter in all three subject is the same that is the petitioner's right to access information on the procurement of legal services from the firm of Otieno, Yogo, Ojuro & Co advocates. The question that arises is whether the respondent's Constitutional right to access information from the applicant (a public authority) can be alienated and different petitions filed for each fragment. Can the respondent's right to access the same information from the applicant be subdivided so that a breach of the same right with regards to the same information and the same respondent be declared thrice? Whereas the claims may arise from different transactions, the substance is the same and the declarations to be made are the same and with regards to the same right and the same authority. It is therefore my finding that it is a waste of judicial time to have all the three petitions heard parallel to each other.

13. Whereas the Court is obligated under Article 23(1) to hear and determine applications for redress of denial, infringement or violation of a right under the bill of rights and while as Article 22 guarantees the right of every citizen to bring a claim for denial of a right under the bill of rights, there is no justification to have three petitions over the same right.

14. The Applicant in its submission submitted that since the three petitions are substantially similar they should be heard as one. The respondent also seems to agree that the petitions should be consolidated and heard as one although he does not agree they are similar. He stated in his submissions as follows:

However, the respondent wish to clarify the fact that whereas the petitions number 8 and 9 of 2015 are between the same parties and raises similar issues of law and fact, the causes of action and or transactions that give rise to each specific petition are different and there will be no harm in consolidating the petitions(sic)

15. In light of the above observations I find that all the petitions shall be consolidated and be heard as one under Petition No.6 of 2012. The applicant shall have the costs of this application.

Dated, signed and delivered this 10th day of March 2016

H. K. CHEMITEI

J U D G E