



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 832 of 2009

GULFSTREAM TOURS & HOTELS LIMITED ::::::::::: PLAINTIFF

VERSUS

DEVELOPMENT FINANCE CO. OF KENYA LTD. :::::::::: DEFENDANT

RULING

1. The **Chamber Summons** before the court is dated **21st April 2009** filed under Order X 1 Rule 1 and 2 and Sections 3A and 18 of the Civil Procedure Rules. The application seeks as the main remaining prayer an order that this suit be consolidated with HCCC No. 1112 of 2002 for hearing and determination together as they relate to the same parties and suit property with same cause of action being successive.
2. The application is premised on the grounds set out therein and is supported by affidavit of **ABOK JAMES ODERA** dated **21st April 2009** with its annexures.
3. The application is opposed. The Respondent filed grounds of opposition on **12th April 2010**.
4. The brief facts of the application are that the Plaintiff borrowed a loan of kshs.6,400,000/= from the Defendant to complete construction of an Hotel on the suit property know as Gulfstream Hotel in Kisumu between 1989 and 1991. The said loan was secured by a First and Further Charge with a Debenture over the assets of the Plaintiff's Hotel in favour of the Defendant. As usually happens, the Plaintiff defaulted in payment and the Defendant appointed a Receiver Manager over the suit property in 1993 and the Plaintiff filed this suit to stop the Defendant's interference with its business and the appointment of the said Receiver Manager. It appears that after his appointment the Receiver Manager proceeded to close the said hotel and put into motion a process to sell the suit property by Private Treaty. Since the Receiver Manager was not a party to this suit and the orders given herein were not binding on him and since the circumstances had changed following the take-over of the Hotel by the Receiver Manager and its subsequent closure, the Plaintiff filed a fresh suit including both the Defendant and the Receiver Manager in HCCC No. 139 of 1997 which upon Transfer to Milimani Commercial Court in 2002 was given a new number being HCCC No. 1112 of 2002.
5. There followed various interlocutory applications with one ending at the Court of Appeal and in which the Court of Appeal held that the attempted sale of the suit property by the Receiver Manager through Private Treaty was illegal, null and void. The matter was referred to the High court for the determination of other issues. On the face of it, there appears to be no substantial difference between the suits sought to be consolidated.
6. The Respondent has raised objections stating that suit number HCCC No. 112 of 2002 was filed by the same Plaintiff with the intention that the two suits should proceed separately, and that in

any event one of the Defendants in HCCC No. 1112 of 2002 (the Receiver Manager) is not a party in this suit, and that issues raised are different. The Respondent has also opposed the consolidation on the ground that the pleadings in Nairobi HCCC No. 112 of 2002 have not been closed and that consolidating this suit with the said suit HCCC No. 112 of 2002 may defeat the Defendant's Defence in this suit.

7. I have considered the application. The only issues for determination are:-
 - i. ***Whether the suits are similar.***
 - ii. ***Whether the said consolidation if allowed would compromise the Defendant's Defence in HCCC No. 112 of 2002.***
8. In every application for the consolidation of suits the court is enjoined to establish if the cause of action in both matters is substantially the same; if they involve the same parties; and if the consolidation will achieve justice for all the parties and at the same time save the judicial time. In this matter, I have established that the cause of action arises from the same transaction although in successive manner. It is not possible to separate the causes of action in these two suits. As regards the parties, the parties to the suit are all the same except that in the second suit the Receiver Manager is also a party. What is to note is that the Receiver Manager is not accountable for his actions. The Receiver Manager always acts on behalf of a principal who is already part of both suits. The fact that the Receiver Manager is not in one of the suit is not a functional disability. Lastly, I also think that justice will be served while at the same time court time will be saved in line with the overriding objections of our Constitution and the Civil Procedure Rules.
9. As for the submission that the consolidation if granted will compromise the Defendant's Defence in suit No. HCCC No. 1112 of 2002, the Defendant is always at liberty to amend its defence at any time of the proceedings.
10. In the upshot, the Chamber Summons application dated 21st April 2009 is allowed with costs in the cause. The Defendant shall be at liberty to make any amendments to its Defence. That application if necessary, shall be made within 21 days from today.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

M/s Chege for Plaintiff

Kiura for Defendant

Teresia – Court Clerk