



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL CASE NO. 7 OF 2013**

**NIXON KAMAU GICHUHI (Suing as the Legal Representative/Administrator of the Estate of  
KENNEDY NJUGUNA GICHUHI - DCD) .....PLAINTIFF/RESPONDENT**

**VERSUS**

**PATRICK WAWERU KARUKWA.....1ST DEFENDANT**

**NOAH NGARA..... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

In their application dated 13th May, 2014 the defendants/applicants seek for the following orders:-

1. The Honourable Court be pleased to order and direct that this suit be tried as a test case on liability in relation to EMBU CMCC NO. 182 of 2013, EMBU CMCC NO. 202 of 2013, EMBU CMCC NO. 217 of 2013, EMBU CMCC No. 281 of 2013, EMBU CMCC NO. 282 of 2013, EMBU CMCC NO. 283 of 2013, EMBU CMCC 284 of 2013, EMBU CMCC 279 of 2013 and EMBU CMCC NO. 280 of 2013 and any other suit filed against the Defendants arising from the accident involving Motor Vehicle Registration Number KAA 274D and KAW 972Q on 27th December 2012, the subject matter of this suit.
2. The Honourable Court be pleased to order and direct that there be a stay of proceedings and all steps in relation to EMBU CMCC NO. 182 of 2013, EMBU CMCC NO. 202 of 2013, EMBU CMCC NO. 217 of 2013, EMBU CMCC No. 281 of 2013, EMBU CMCC NO. 282 of 2013, EMBU CMCC NO. 283 of 2013, EMBU CMCC 284 of 2013, EMBU CMCC 279 of 2013 and EMBU CMCC NO. 280 of 2013 until the trial of this suit shall have been determined, or shall have failed to be a real trial of the issues in the stated matters and any other suit filed against the Defendants arising from the accident involving Motor Vehicle Registration Number KAA 274D and KAW 972Q on 27th December 2012, the subject matter of this suit.

The grounds supporting the application are contained in the supporting affidavit of John Gitibi Rukioyah the applicants counsel and on the face of the application. The facts are that the applicants being owner and driver of the vehicle registration No. KAA 274D have been sued by the plaintiff in this case and the plaintiffs in the cases filed before the Chief Magistrate court for damages for death and injuries sustained in the accident which occurred on 27/12/2012. The claims in this case and the other nine cases in the Magistrate's court are based on the same cause of action.

It is for this reason that the applicants want the High Court suit No. 7 of 2013 to be tried as a test suit while the suits in the Magistrate's Court are stayed pending the determination of the test suit. The applicants hold the view that since the issues arising from all the suits regarding liability are similar, it would be appropriate to have one tried as a test suit.

The application was not opposed by the plaintiff represented by Mr. Njeru of Njeru Ithiga and Co. Advocates.

However, one Mr. Valerio Mwathi Njue the advocate for the plaintiffs in CMCC Nos. 279 & 280 both of 2013 filed a replying affidavit to this application in which he vehemently opposed the prayers sought by the applicants. He depones that although the cases arise from the same accident, each plaintiff has a right to give an account of his own case to the court for fair and just determination of the issues. He opines that treating this High Court case as a test suit and applying its judgment to all the other cases will disadvantage the other plaintiffs who will have been denied the right to be heard. Such a move would also offend the principles of natural justice.

Mr. Njue also argued that there are many other advocates representing other parties in the cases filed in the Chief Magistrate's court and who were not served with this application, a fact which was admitted by Mr. Rukioyah for the defendant. Mr. Njue also expressed the fear that if the application is granted, the parties in this suit may record a consent on liability which is likely to disadvantage the plaintiffs in the other suits. Mr. Njue on behalf of the plaintiffs in CMCC No. 279 & 280 both of 2013 urged the court to take the option of consolidation which would ensure that all parties participate in the hearing of their respective suits.

It is important to look at the law relating to test suits. **Order 38 of the Civil Procedure Rules** provides that

***“upon the court satisfying itself that the issues in each of the suits are precisely similar, it may make an order directing that one of the suits be tried as a test case, thereby staying all the other suits”.***

In the case of ***Fredrick Otieno Vs Pamela Awino [2013] eKLR*** explained the gist of consolidation of suits and selecting a test suit. The court observed that in consolidation of suits, all cases with common questions of law or facts are disposed off together at the same time. In a test case, all other steps in each of the matters with similar issues are stayed until the test suit is determined or shall have failed to be a real trial of issues.

Order 38 requires that before an order for selection of a test suit is made, all interested parties must be notified. The purpose of this requirement is to ensure that all interested parties are informed and give their input in the matter. In the application before, some of the advocates representing some parties in the magistrate's court were not served with this application. The purpose of Order 38(1) is that all the relevant parties must be notified. Any order that this court may make in respect of the prayers sought is likely to affect the parties who may have no knowledge of this application. This would result in violating the rules of natural justice.

The law applicable to consolidation of suits was provided for in Order XI of the repealed Civil Procedure Rules. Order XI(i) provided:-

1. ***where two or more suits are pending in the same court which the same or similar questions of law or fact are involved, the court may either, upon application of one of the parties, or in its own motion, at the discretion, and upon such terms as may seem fit -***
  - (a) ***Order a consolidation of suits; and***
  - (b) ***Direct that further proceedings in such suits be stayed until further orders.***

These provisions were excluded in the Civil Procedure Rules, 2010. It was held in the case of ***RMG VS NG Interested Party SP Limited & MD Limited 2013 eKLR***, that the fact that the provisions of Order XI of the repealed Civil Procedure Rules are not in the current rules, does not mean that the principle stated in the case of ***Stumberg & Another Vs Potgieter [1970] EA 323*** are no longer good law so long as consolidation and stay of suits is concerned. The principle in that case was that where there are common

questions of law or fact 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.

In the case of *Motokov Vs Auto Garage Ltd & others [1970] EA 249* the court held that the purpose of granting stay of suits was to avoid a situation where tribunals seized of the suits are likely to reach conflicting conclusions. The importance of these narratives is to make a statement that despite the exclusion of the provisions of Order XI of the old Civil Procedure Rules, courts can still grant orders of consolidation of suits and stay orders.

The plaints in the suits before the Chief Magistrate have been annexed to this application. On perusal of the claims therein, I have reason to believe that any award of damages in the said suits will not exceed the pecuniary jurisdiction of the Chief Magistrate which goes up to Shs.7,000,000/=.

Mr. Njue for the interested parties argument that some of the plaintiffs may be disadvantaged by not being given a chance to be heard should the orders herein are granted makes a lot of sense. Every party has a right to be heard and denial of this right is against the rules of natural justice. The parties in this suit were not opposed to the issues raised in Mr. Njue's affidavit. I say this because there were no replying affidavits filed in court to this effect. The parties decided to go slow in opposing the issues raised for reasons best known to them.

For the foregoing reasons and in the interest of justice, I decline to grant the orders sought in this application. Under the powers conferred to this court under Section 18 of the Civil Procedure Act, I hereby order transfer of this suit to the Chief Magistrate for purposes of consolidation with the other suit captioned in this application. I also order stay of any further steps in this suit and in all the related suits until the magistrate's court makes further orders regarding all the suits.

Costs in the cause.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 11TH DAY OF NOVEMBER, 2014.**

**F. MUCHEMI**

**JUDGE**

**In the presence of:-**

**Mr. Ithiga for Respondent and holding brief for Mr. Rukioya for the applicant.**

**F.M. MUCHEMI**

**JUDGE**