

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E320 OF 2023

FARMERS
LIMITED.....PLAINTIFF/RESPONDENT

CHOICE

-VERSUS-

BIGCOLD KENYA LIMITED.....DEFENDANT/RESPONDENT

CLIMATIC LINK TECHNOLOGIES

LIMITED.....THIRD PARTY/APPLICANT

RULING

1. The third party filed a Notice of Motion application dated 10th June 2025 under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 11 Rule 3 and Order 51 of the Civil Procedure Rules, and all other enabling provisions of the law seeking an order for consolidation of this suit with **MCCC No. E2500 of 2023 - Modern Reliance Industries Limited v Big Cold Kenya Limited**, **MCCOMMSU No. E734 of 2023 - Big Cold Kenya Limited v Climatic Link Technologies Limited** and **Civil Suit No. E4351 of 2023 Envirosafe Limited v Big Cold Kenya Limited** and for the said suits to be heard together.
2. The application is premised on the grounds on the face of the Motion and it is supported by an affidavit sworn on the same day by Mr. Arif Sameja, a Director and shareholder of the third party company. Mr. Sameja averred that consolidation of this suit with **Modern Reliance Industries Limited v Big Cold Kenya Limited**, **Big Cold Kenya Limited v Climatic Link Technologies Limited** and **Envirosafe Limited v Big Cold Kenya Limited** is on the basis that they involve substantially the same parties, arise from the same fire incident at the defendant's warehouse, and raise similar questions

of fact and law. He explained that all the claims stem from a fire that allegedly occurred at the defendant's warehouse, causing loss to the plaintiffs, who attribute the damage to the defendant's negligence, and that in those suits the defendant successfully sought to join the applicant as a third party.

3. Mr. Sameja stated that the core issues across the suits include whether the fire occurred, whether loss was suffered, and whether liability lies with the defendant and/or the third party for the acts of their servants or agents. He asserted that consolidation is necessary to avoid duplication, ensure consistency of judgments, save judicial time, and prevent injustice. Mr. Sameja deposed that no prejudice will be suffered by the plaintiff and the defendant, whose claims will still be determined on their merits in accordance with Order 11 Rule 3 of the Civil Procedure Rules, 2010.
4. In opposition to the application herein, the plaintiff filed a replying affidavit sworn on 28th July 2025 by Ms Grace Masaki, the plaintiff's Head of Legal and Administration. Ms Masaki averred that the instant application does not meet the legal threshold for consolidation of suits. She deposed that the suits sought to be consolidated involve different parties, noting that the plaintiff is not a party to any of the other suits. She further averred that the said matters also raise distinct issues and seek different reliefs, with one being a subrogation claim by an insurer, the other one being a claim by Big Cold Kenya Limited against Climatic Link Technologies Limited for losses arising from the fire of 16th March 2022, and the third being a purely contractual claim for unpaid waste disposal or incineration services unrelated to the fire.
5. Ms Masaki stated that although two of the suits arise from the same fire incident, their legal relationships, issues, and remedies are materially different, and the contractual suit raises no overlapping issues at all. She

contended that consolidation would only complicate and delay the proceedings, particularly, since the other suits fall within the pecuniary jurisdiction of the Magistrate's Court. She further stated that if at all any overlap exists, the proper course would be to stay the related suits pending determination of liability in the instant suit.

6. The defendant in response to the instant application filed a replying affidavit sworn in July 2025 by Mr. Peter Juma Echulet, the defendant's Director of Operations. Mr. Echulet averred that the application for consolidation is misconceived because the three other suits are pending before the lower Court, while this suit is before the High Court. He deposed that consolidation of all four matters cannot be ordered unless the lower Court suits are first transferred to the High Court for hearing and determination. Mr. Echulet urged this Court either to dismiss the instant application or in the alternative, issue appropriate directions to facilitate the transfer of the other suits so that all matters may then be properly managed together.
7. In a rejoinder, the third party filed a supplementary affidavit sworn on 30th August 2025 by Mr. Arif Sameja, a Director and shareholder of the third party company. Mr. Sameja deposed that all the suits sought to be consolidated involve similar parties, in that Big Cold Kenya Limited is the defendant in each case and Climatic Link Technologies Limited has been joined as a third party. He asserted that the genesis of all the claims is the fire that broke out at the defendant's warehouse, giving rise to a common question of liability between the defendant and the third party, which falls within the scope of Order 11 Rule 3 of the Civil Procedure Rules, 2010.
8. He contended that the plaintiff has itself acknowledged that there is a common question of liability arising from the fire of 16th March 2022, and that even the Environsafe Limited suit is anchored on liability from the fire, as evidenced by the defendant's application to join the applicant as a third

party for purposes of indemnity or contribution. He stated that Environsafe's claim for waste disposal and incineration services also flows from the fire incident, making determination of liability central to all the suits.

9. While concurring that a stay of the related suits pending determination of liability in this suit may be appropriate, Mr. Sameja reiterated that consolidation is aimed at resolving the common question of liability efficiently, expediting the disposal of disputes, avoiding inconsistent outcomes, and serving the interest of justice.
10. The application herein was canvassed by way of written submissions. The third party's submissions were filed by the law firm of Pooja Patel & Company Advocates LLP on 1st September 2025, the defendant's submissions were filed on 10th September 2025 by the law firm of Kamotho Njomo & Company Advocates and the plaintiff's submissions were filed on 17th September 2025 by the law firm of Walker Kontos Advocates.
11. Mr. Mingo, learned Counsel for the third party cited the case of **Kamau v Njoroge** [2024] KEHC 1953 (KLR) and submitted that under Order 11 Rule 3 of the Civil Procedure Rules, 2010, the Court has the power to consolidate suits raising common questions of law and fact. He argued that all the suits sought to be consolidated stem from the same fire that occurred at the defendant's warehouse on 16th March 2022, and that the central and common issue in all of them is liability for that fire, a fact acknowledged by the plaintiff in its replying affidavit.
12. Counsel relied on the Supreme Court case of **Law Society of Kenya v Centre for Human Rights and Democracy & 12 others** [2014] KESC 29 (KLR) and maintained that consolidation would enable the Court to determine the question of liability more efficiently, avoid duplication of proceedings and the risk of conflicting judgments, and

promote judicial economy without occasioning any prejudice to the plaintiff and the defendant, who have not demonstrated any such prejudice.

13. Mr. Mingo asserted that the third party has discharged its burden by showing the nexus between the suits and the common questions of law and fact. He urged this Court, in the interest of justice, judicial consistency, and public confidence in the administration of justice, to allow the application for consolidation as prayed.
14. Mr. Ogunde, learned Counsel for the plaintiff relied on the Supreme Court case of **Law Society of Kenya v Centre for Human Rights and Democracy & 12 others** (supra) and the case of **Family Bank Limited v Cheruiyot (As the Administratrix of the Estate of Philip Chelule Cheruiyot)** [2022] KEELC 13827 (KLR), and submitted that the four suits sought to be consolidated involve different parties, distinct causes of action, and diverse reliefs, with only two of them arising from the same fire incident, and even then in materially different legal contexts, while the Environsafe suit is founded purely on contractual obligations for waste disposal services and does not directly concern liability for the fire.
15. He contended that consolidation would unnecessarily complicate and prolong the proceedings, especially since the other suits fall within the jurisdiction of the Magistrate's Court, whereas the instant suit has already been certified ready for hearing and scheduled for trial, such that consolidation at this stage would occasion undue delay and prejudice.
16. Mr. Ogunde cited the case of **Nyati Security Guards & Services Limited v Municipal Council of Mombasa** [2004] eKLR, and emphasized that consolidation is undesirable where it would not save time or costs or would introduce unrelated issues and parties, such as is the case herein. He asserted that the more appropriate course, to the extent that there are

overlapping issues on liability in two of the suits, is to stay those matters pending determination of liability in this suit.

17. Mr. Kamotho, learned Counsel for the defendant submitted that the application herein is fatally defective because the third party failed to invoke the Court's jurisdiction to transfer the other suits to this Court before seeking consolidation, yet a Court cannot grant orders that have not been pleaded and parties are bound by their pleadings. He relied on the case of **Mbogo v NCBA Bank Kenya & 2 others** [2025] KEHC 6065 (KLR) and argued that the Court cannot issue orders on matters not properly placed before it.

18. Counsel contended that without a prayer for transfer of the other suits which are filed in the Magistrate's Court and without disclosure of the stages of the other suits, the Court lacks the necessary factual and jurisdictional basis to determine whether consolidation is appropriate. Mr. Kamotho further submitted that before ordering suits to be heard together, the Court must be satisfied that they are at similar stages of prosecution, which information has not been provided, thus the instant application is procedurally defective and ought to be dismissed.

ANALYSIS AND DETERMINATION.

19. I have considered the application herein, the grounds on the face of the Motion, the affidavits filed in support thereof, the replying affidavit by the plaintiff and the defendant, and the written submissions by Counsel for the parties. The issue that arises for determination is whether an order for consolidation of suits should issue.

20. The Supreme Court in the case of **Law Society of Kenya v Centre for Human Rights and Democracy & 12 others** (supra), addressed the issue of consolidation of suits and held that -

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 intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.

21. An order for consolidation of suits can only be made in instances where the suits sought to be consolidated raise common questions of law or fact, or where the rights or reliefs claimed arise out of the same transaction or series of transactions. In the case of **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa** [2000] eKLR, the Court in dealing with an application for consolidation of suits held that -

The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where

- a) Some common questions of law or fact arises in both or all of them;*
- b) The rights or reliefs claimed in them are in respect of the same transactions;*
- c) For some other reasons, it is desirable to make an order for consolidating them.*

22. In this case, the third party contended that all the suits sought to be consolidated arise from the same fire incident that occurred at the defendant's warehouse on 16th March 2022 and as such, they raise a common question of liability between the defendant and the third party. The plaintiff and the defendant asserted that the said suits involve different parties, distinct causes of action and they are pending before different

Courts, therefore consolidation would complicate rather than expedite the proceedings.

23. Upon perusal of the material placed before me, it is evident that **MCCC No. E2500 of 2023** and **MCCOMMSU No. E734 of 2023** arise from the fire incident of 16th March 2022. The two suits are however brought by different parties, on different legal basis and seek different reliefs. It is further noted that one of the suits is a subrogation claim by an insurer, while the other is a claim by Big Cold Kenya Limited against Climatic Link Technologies Limited for indemnity and damages. Although the said suits arise from the same factual event as is this case, the legal relationships and remedies are materially distinct.

24. In regard Civil Suit No. E4351 of 2023, the claim is founded on an alleged breach of contract for waste disposal and incineration services and the reliefs sought are for unpaid contractual sums. It is manifest that while the third party asserts that the contract arose following the fire incident, the cause of action in that suit is contractual, not tortious or delictual liability for the fire. The determination of who was responsible for the fire is therefore not a central or necessary issue in that suit. The Court is therefore persuaded that consolidation in the circumstances of this case, would introduce multiple parties, distinct causes of action and different legal issues into a single proceeding, thereby making the trial unnecessarily complex and protracted, contrary to the principle of the overriding objective as provided for under Sections 1A and 1B of the Civil Procedure Act.

25. It is also not disputed that the third party did not disclose the stages of the proceedings in the other suits, thus this Court is unable to determine whether they are at comparable stages, a factor that would be relevant in deciding whether consolidation of the suits would serve the overriding objective of expeditious and efficient disposal of disputes. In the

circumstances, this Court is of the considered view that issuing an order for consolidation of suits would risk delaying a suit that is already properly before this Court.

26. In addition to the foregoing, it is not disputed that the three suits sought to be consolidated are pending before the Magistrates' Court, whereas the instant suit is before this Court. As correctly stated by the defendant, the third party did not seek in the instant application, any orders for transfer of the suits filed in the Magistrate's Court to this Court as provided for under Sections 17 & 18 of the Civil Procedure Act. In the circumstances, this Court lacks the procedural basis to bring the said suits before it for purposes of consolidation, noting that a Court cannot grant orders not expressly sought.

27. The foregoing notwithstanding, this Court notes that there may be overlapping issues of liability arising from the fire incident of 16th March 2022 in **MCCC No. E2500 of 2023** and **MCCOMMSU No. E734 of 2023**. For this reason, I am of the considered view that the more appropriate procedural course as suggested by the plaintiff and indeed conceded to by the third party, is to stay those suits pending the determination of liability in this suit, rather than to order consolidation of all the matters. However, such an order cannot be made by this Court as it can only be made by a Court seized of the hearing of those matters.

28. In view of the foregoing, this Court finds that the third party has not made a case to warrant the issuance of an order for consolidation of suits, since the suits sought to be consolidated involve different parties, distinct causes of action, are pending before different Courts, hence their consolidation would not facilitate, but rather hinder, the efficient and expeditious disposal of the disputes.

29. In the premise, this Court finds that the Notice of Motion application dated 10th June 2025 is devoid of merits. It is hereby dismissed. Costs of the application shall be borne by the third party.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 23rd day of January 2026. Ruling delivered through Microsoft Teams Online Platform.

**NJOKI MWANGI
JUDGE**

In the presence of:

Mr. Mingo for the third party/applicant

Ms Mutonyi h/b for Mr. Ogunde for the plaintiff/respondent

Ms Sigei for the defendant/respondent

Ms B. Wokabi – Court Assistant.