



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**

**ELC SUIT NO. 505 OF 2011**

**KOBIL PETROLEUM LIMITED.....PLAINTIFF**

**VERSUS**

**ALFAWAYS LIMITED.....1<sup>ST</sup> DEFENDANT**

**FAMILY BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**NEEM PHARMACY LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Background:**

By an indenture of lease dated 7<sup>th</sup> July, 2000 between Posta Investment Co-operative Society Limited (hereinafter referred to only as “Posta”) and the plaintiff, Posta leased to the plaintiff a portion of all that parcel of land known as Land Reference Number 1/933, Nairobi (original number 1/480/5) that was marked “A” in the sketch plan that was attached to the said indenture of lease (hereinafter referred to only as “the suit property”) for a term of thirteen (13) years with effect from 1<sup>st</sup> July, 2000 with an option to renew for a further one term of ten (10) years on the terms and conditions that were set out in the said indenture of lease.

It was a term of the said lease that if at any time during the term of the lease, Posta would wish to sell or dispose of the suit property or any part thereof, Posta would give to the plaintiff a notice of such desire stating the price and the terms on which it would sell the suit property or any part thereof and if the plaintiff would not agree to purchase the suit property or any part thereof as the case may be on the said terms within sixty (60) days of receipt of such notice, Posta would be at liberty to sell the suit property to a third party. It was also a term of the said indenture of lease that Posta would not at any time accept any offer for the purchase of the suit property made by any third party without first offering to sell the property to the plaintiff in accordance with the aforesaid clause of the indenture of lease.

By a conveyance dated 15<sup>th</sup> July, 2010, between Posta and the 1<sup>st</sup> defendant, Posta granted and conveyed to the 1<sup>st</sup> defendant Land Reference Number 1/933 (Original Number 1/480/5) (hereinafter referred to as “the entire parcel”) of which the suit property formed part at a consideration of Kshs.200,000,000/=. The plaintiff was aggrieved by the said transaction between Posta and the 1<sup>st</sup> defendant and filed a suit on or about 13<sup>th</sup> September, 2010 in the High Court at Nairobi namely, Milimani Commercial Court Civil Suit No. 652 of 2010 against Posta and the 1<sup>st</sup> defendant (hereinafter referred to as “the plaintiff’s first suit”) seeking among others the following reliefs:

1. A declaration that by reason of the restriction that was imposed upon Posta with regard to its right to dispose of the entire parcel under the Indenture of Lease dated 7<sup>th</sup> July, 2000 between the plaintiff and Posta, the conveyance dated 15<sup>th</sup> July, 2010 between Posta and the 1<sup>st</sup> defendant was null and void for want of consent of the plaintiff.
2. A declaration that the plaintiff’s right to purchase the entire parcel at Kshs.200,000,000/= accrued on or about 15<sup>th</sup> July, 2010.
3. An order for specific performance by Posta of its contract to sell and convey to the plaintiff the entire parcel.
4. A permanent injunction to restrain Posta and the 1<sup>st</sup> defendant from interfering with the plaintiff’s right of possession and quiet enjoyment of the entire parcel.

By an instrument of lease dated 16<sup>th</sup> November, 2010, the 1<sup>st</sup> defendant as proprietor of the entire parcel, leased to the 2<sup>nd</sup> defendant a portion of the entire parcel measuring approximately 6000 square feet which was marked “A” in the sketch plan that was attached to the said instrument of lease (hereinafter referred to as “the 2<sup>nd</sup> defendant’s premises”) for a term of 6 years with effect from 1<sup>st</sup> September, 2010.

By another instrument of lease dated 10<sup>th</sup> March, 2011, the 1<sup>st</sup> defendant as the proprietor of the entire parcel leased to the 3<sup>rd</sup> defendant a portion of the entire parcel measuring approximately 914 square feet which was marked "B" in the sketch plan that was attached to the said lease (hereinafter referred to as "the 3<sup>rd</sup> defendant's premises") for a term of 5 years and 1 month with effect from 1<sup>st</sup> May, 2011.

The 2<sup>nd</sup> and 3<sup>rd</sup> defendants were not made parties to the plaintiff's first suit even after the suit was amended on 13<sup>th</sup> June, 2011. On 16<sup>th</sup> November, 2010, the plaintiff purported to terminate a licence agreement dated 20<sup>th</sup> December, 2007 that it had entered into with the 2<sup>nd</sup> defendant in respect of the 2<sup>nd</sup> defendant's premises before the premises were acquired by the 1<sup>st</sup> defendant and demanded that the 2<sup>nd</sup> defendant vacates the premises failure to which it would lock the premises and deny the 2<sup>nd</sup> defendant access to the same. Following that demand, the 2<sup>nd</sup> defendant filed a suit against the plaintiff in the High Court at Nairobi namely, Milimani Commercial and Tax Division Civil Case No. 897 of 2010 (hereinafter referred to as "the 2<sup>nd</sup> defendant's suit") seeking the following reliefs.

1. A declaration that the plaintiff had no right over the 2<sup>nd</sup> defendant's premises and that its interference with the 2<sup>nd</sup> defendant's possession and quiet enjoyment of the said premises was illegal, null and void.
2. A permanent injunction restraining the plaintiff from interfering with the 2<sup>nd</sup> defendant's possession and quiet enjoyment of the 2<sup>nd</sup> defendant's premises.

While the plaintiff's first suit and the 2<sup>nd</sup> defendant's suit were pending hearing and determination, the plaintiff brought this suit against the defendants seeking the following reliefs:

1. Possession of the suit property.
2. Mesne profits at the rate of Kshs.660,000/= with effect from 1<sup>st</sup> September, 2010 and at the rate of Kshs.792,000/= from 1<sup>st</sup> September, 2013 to August, 2017 as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
3. Mesne profits at the rate of Kshs.110,000/= from 1<sup>st</sup> May, 2011 to 30<sup>th</sup> April, 2013 and at the rate of Kshs.121,000/= from 1<sup>st</sup> May, 2013 to 30<sup>th</sup> April, 2015 as against the 1<sup>st</sup> and 3<sup>rd</sup> defendants.

The defendants entered appearance in this suit and filed separate statements of defence. In its statement of defence dated 25<sup>th</sup> October, 2011, the 2<sup>nd</sup> defendant averred among others that it had filed a suit against the plaintiff ("the 2<sup>nd</sup> defendant's suit") in respect of the same subject matter which suit the plaintiff failed to disclose to the court. The 2<sup>nd</sup> defendant averred that this suit was filed in contravention of the provisions of sections 6 and 7 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

#### The application before the court:

What is before me now is the 2<sup>nd</sup> defendant's application brought by way of Notice of Motion dated 15<sup>th</sup> January, 2014 seeking the following orders:

1. That this Honourable court be pleased to strike out the plaintiff's plaint dated 21<sup>st</sup> September, 2011 for non-compliance with sections 7 and 8 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
2. That in the alternative, this Honourable court be pleased to stay further proceedings and consequential orders herein until further order of the court and/or until the determination of the High Court Case No. 897 of 2010, Family Bank Ltd. v Kobil Petroleum Ltd.
3. That the costs of the application be provided for.

The 2<sup>nd</sup> defendant's application which was brought under sections 3A, 6, 7 and 8 of the Civil Procedure Act was premised on the following main grounds. The 2<sup>nd</sup> defendant averred that on 24<sup>th</sup> December, 2010, it filed a suit against the plaintiff ("the 2<sup>nd</sup> defendant's suit") in which it sought a declaration that the plaintiff had no right over the entire parcel and also sought a permanent injunction restraining the plaintiff from interfering with its quiet enjoyment of the 2<sup>nd</sup> defendant's premises. The 2<sup>nd</sup> defendant averred that before its suit against the plaintiff was determined by the court, the plaintiff amended a suit it had brought earlier against Posta and added the 1<sup>st</sup> defendant as a party thereto ("the plaintiff's first suit"). The 2<sup>nd</sup> defendant averred that while the two (2) suits mentioned above were pending, the plaintiff brought the present suit against among others the 2<sup>nd</sup> defendant over the same subject matter. The 2<sup>nd</sup> defendant contended that the issues of fact and law arising from the 2<sup>nd</sup> defendant's suit are the same issues which have been raised in this suit as between the plaintiff and the 2<sup>nd</sup> defendant.

The 2<sup>nd</sup> defendant contended that there is real danger of the courts which will be dealing with the two (2) cases reaching different and conflicting decisions on the same and/or similar points of law and fact in the event that the cases are allowed to proceed to hearing separately. The 2<sup>nd</sup> defendant averred that the plaintiff's suit is bad in law and incurably defective as it offends the provisions of section 7 and 8 of the Civil Procedure Act, Chapter 21 Laws of Kenya.

The 2<sup>nd</sup> defendant's application was opposed by the plaintiff through grounds of opposition dated 23<sup>rd</sup> July, 2014 filed in court on the same day and replying affidavit sworn by David Ohana on 3<sup>rd</sup> January, 2018. The plaintiff contended that since the issues raised in its first suit and the present suit are common a fact which was admitted by the 2<sup>nd</sup> defendant, the remedy to the problem raised by the 2<sup>nd</sup> defendant is to

have both cases heard and determined at the same time rather than striking out the suit.

The 2<sup>nd</sup> defendant's application was argued by way of written submissions. The 2<sup>nd</sup> defendant/applicant filed its submissions on 19<sup>th</sup> September, 2014 while the plaintiff/respondent filed its submissions on 4<sup>th</sup> January, 2018. The 3<sup>rd</sup> defendant supported the application through a replying affidavit sworn on 5<sup>th</sup> March, 2018 by Magdi Riad Neematallah and submissions of the same date which were both filed on 6<sup>th</sup> March, 2018.

I have considered the 2<sup>nd</sup> defendant's application together with the affidavits which were filed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in support thereof. I have also considered the grounds of opposition and the replying affidavit filed by the plaintiff in opposition to the application. Finally, I have considered the submissions on record filed in support of and in opposition to the application. The only issue which I have been called upon to determine is whether this suit offends the provisions of sections 6, 7 and 8 of the Civil Procedure Act and if so, the appropriate remedy in the circumstances.

I have at the beginning of this ruling set out in detail the genesis of the dispute between the parties herein. From the affidavits and submissions by the parties, there is a consensus that the dispute between the parties revolves around the ownership of all that parcel of land known as Land Reference Number 1/933 (Original Number 1/480/5) ("the entire parcel") and occupation of various portions thereof – namely the 2<sup>nd</sup> defendant's premises and the 3<sup>rd</sup> defendants premises. The parties are also in agreement that so far, a total of four (4) suits (including the present suit) have been filed over the dispute of which cases three (3) have been filed by the plaintiff and one (1) by the 2<sup>nd</sup> defendant. The four (4) cases are the following:-

1. Nairobi HCCC No. 652 of 2010 Kobil Petroleum Ltd. v Posta Investment Co-operative Society Ltd. and Alfaways Ltd.
2. Nairobi HCCC No. 897 of 2010, Family Bank Ltd. v Kobil Petroleum Ltd.
3. ELC Suit No. 505 of 2011, Kobil Petroleum Ltd. v Alfaways Ltd, Family Bank Ltd. and Neem Pharmacy Ltd. (the present suit).
4. HCCC No. 826 of 2013 Kobil Petroleum Ltd. v Alfaways Limited.

After reviewing some of the pleadings in the above cases, I have formed the view that the plaintiff herein has chosen for reasons which are not clear to litigate its grievances arising from the sale of the entire parcel by Posta to the 1<sup>st</sup> defendant and subsequent alienation of the property by the 1<sup>st</sup> defendant in installments or in bits and pieces. From the material before the court, it appears that the 1<sup>st</sup> defendant acquired the entire parcel from Posta on or about 15<sup>th</sup> July, 2010 while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants acquired their premises from the 1<sup>st</sup> defendant on 12<sup>th</sup> November, 2010 and 17<sup>th</sup> May, 2011 respectively following the registration of the leases aforesaid in their favour. The certificate of postal search annexed to the affidavit of Magdi Riad Neematallah sworn on 5<sup>th</sup> March, 2018 shows that this information was available at the Land Registry as at 1<sup>st</sup> July, 2011. It follows therefore that the plaintiff would have joined all the defendants herein in HCCC No. 652 of 2010 if it wished to do so more particularly when it amended the plaint in that suit. This would have enabled the court to determine the dispute as between all the parties conclusively once and for all.

When the plaintiff threatened the 2<sup>nd</sup> defendant with eviction from the 2<sup>nd</sup> defendant's premises, the 2<sup>nd</sup> defendant brought HCCC No. 897 of 2010 to restrain the plaintiff from carrying out the said threat. Again, the plaintiff had the opportunity to file a counter-claim against the 2<sup>nd</sup> defendant in that suit in the event that it had a claim against the 2<sup>nd</sup> defendant in respect of the said premises. The plaintiff could also have added the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant in the same counter-claim.

I am in agreement with the 2<sup>nd</sup> defendant that the plaintiff violated section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya in bringing the present suit while HCCC No. 897 of 2010 was pending hearing and determination before the court. Section 6 of the Civil Procedure Act, Provides that:

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

After perusing the pleadings in the present suit and in HCCC No. 897 of 2010, I am persuaded that the issues raised in the two cases are substantially the same and that as concerns the plaintiff and the 2<sup>nd</sup> defendant, the two suits are between the same parties. This court is precluded by section 6 of the Civil Procedure Act from hearing this suit as it relates to the plaintiff and the 2<sup>nd</sup> defendant while HCCC No. 897 of 2010 is pending.

The 2<sup>nd</sup> defendant had urged the court to strike out this suit as *res judicata* and in the alternative to stay the suit pending the hearing and determination of HCCC No. 897 of 2010. Since HCCC No. 897 of 2010 has not been heard and determined, this suit cannot be said to be *res judicata*. The suit is however barred pursuant to section 6 of the Civil Procedure Act aforesaid which empowers this court to stay this suit. That in my view is the best cause of action for the court to take in the circumstances.

The plaintiff had on the other hand urged the court to consider having the two cases heard one after the other. As I have said earlier, the filing of this suit was not justified. Public policy frowns against multiplicity of suits. I would be encouraging the filing of multiple suits if I was to consolidate this suit with HCCC No. 897 of 2010 or direct that the two cases be heard together side by side.

In conclusion, I find merit in the 2<sup>nd</sup> defendant's Notice of Motion application dated 15<sup>th</sup> January, 2014. This suit is hereby stayed pending the hearing and final determination of Nairobi HCCC No. 897 of 2010, Family Bank Limited v Kobil Petroleum Limited or further orders by the court. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants shall have the costs of the application. It is so ordered.

**Delivered and Dated at Nairobi this 6<sup>th</sup> day of December 2018**

**S. OKONG'O**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. Kotonya for the Plaintiff

N/A for the 1<sup>st</sup> Defendant

Ms. Muyai h/b for Ms. Ouko for the 2<sup>nd</sup> Defendant

Mr. Njau h/b for Ms. Ngonjo for the 3<sup>rd</sup> Defendant

Catherine-Court Assistant