



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 37 OF 2015

YOUNG TRADERS (TIGONI) LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

JULIUS NJOROGE KAMAU.....1ST DEFENDANT

DANIEL KIMANI CHEGE.....2ND DEFENDANT/RESPONDENT

R U L I N G

Introduction

1. What is before me is the Application by the Plaintiff dated 18th May, 2015 seeking for the following orders:-

(a) THAT this Honourable Court be pleased to order the transfer of the suit Lamu PMCC No. 15 of 2014 from the subordinate court to this court and consolidate it with the suit Malindi ELC No. 37 of 2015 for hearing and determination.

(b) THAT the cost of this Application be awarded to the Plaintiff.

The Plaintiff's/Applicant's case:

2. The Application by the Plaintiff is supported by the Affidavit of the Plaintiff's Director who has deponed that the subject matter of the suit revolves around the same subject matter in Lamu PMCC No. 15 of 2014, to wit parcel of land number Lamu/Hindi/Magogoni/640; that the 1st Defendant herein is also the Defendant in Lamu PMCCC NO. 15 of 2014 and that the end of justice will be met by the transfer and consolidation of the two suits.

1st Defendant's/Respondent's case:

3. The 1st Respondent has deponed that this suit cannot be consolidated with PMCC No. 15 of 2014 because the cause of action in both matters are totally different and the 2nd Defendant is not a party to PMCC No. 15 of 2014; that after an order was made in PMCC No. 15 of 2014 for the opening of a joint interest earning account, the Plaintiff has declined to do so and that the present suit is an afterthought and an abuse of the court process.

The 2nd Defendant's/Respondent's case:

4. In response, the 2nd Defendant deponed that he is not a party in Lamu PMCC No. 15 of 2014; that the court has already ordered in PMCC No. 15 of 2014 that the money paid by the Plaintiff be deposited in an interest earning joint account and that the suit does not involve a claim for land.
5. The 2nd Defendant has further deponed that the suit in Lamu is in respect of a failed contract between the Plaintiff and the 1st Defendant which he is not privy to and that the issues arising in Lamu PMCC No. 15 of 2014 are totally different from the issues herein.

Submissions:

6. The Plaintiff's advocate submitted that from the pleadings, the 2nd Defendant, though not a party in PMCC No. 15 of 2014, reveals his profound knowledge about the intricate details of his case in the subordinate court; that the Defendants have not suggested the prejudice they will suffer if the two suits are consolidated and that the consolidation of the two suits would provide a platform to unearth the Defendants' fraudulent scheme to defeat the Plaintiff's interest in the suit property.
7. According to the Plaintiff's advocate, the consolidation of the two suits will save judicial time and resources and that the claim in the two matters arise out of substantially the same transaction.
8. The Defendants' advocate on the other hand submitted that the two suits are in different stages; that the sum of Kshs.2,000,000 which the 1st Defendant has deposited in court pursuant to a court order covers the Plaintiff's claim and that the Plaintiff is represented by different advocates in both matters.
9. Counsel submitted that the Plaintiff should not be allowed to wake up every now and then and file new suits between the same parties and over the same subject matter.
10. The Plaintiff's counsel submitted that the parties in the two suits are not the same; that the consolidation of the two suits will be prejudicial to the 2nd Defendant and that the causes of action in the two suits are totally different.
11. I have considered the lengthy affidavits, submissions and authorities placed on the record.

Analysis and findings:

12. The Plaintiff is seeking to transfer Lamu PMCC No. 15 of 2014 into this court and have it consolidated with this matter.
13. In Lamu PMCC NO. 15 of 2014, the Plaintiff sued the 1st Defendant herein alone.
14. According to the Plaintiff in Lamu PMCC No. 15 of 2014 and specifically paragraph 9 thereof, the Plaintiff's claim as against the Defendant is framed as follows:

“The Plaintiff avers that as a consequence of breach on the part of the Defendant, the completion of the agreement was frustrated and the agreement has become void by virtue of the provisions of the Land Control Board Act Chapter of the Laws of Kenya AND the Plaintiff's claim against the Defendant is for the sum of Kshs.1,600,000 being monies had and received under the agreement plus interest at the prevailing commercial rates.”

15. Indeed, the Plaintiff's only prayer in Lamu PMCC No. 15 of 2014 is for a refund of Kshs.1,600,000 plus interest. The Plaintiff neither sought for an order of specific performance nor for an order extending the period within which it may obtain the consent of the Land Control Board.
16. In the current suit, the Plaintiff has sued the Defendant in Lamu PMCC No. 15 of 2014 and the 2nd Defendant.
17. In the Plaintiff's claim, the Plaintiff has averred that it is willing to complete its part of the agreement in respect to parcel of land number Lamu/Hindi Magogoni/640 (the suit property).
18. The ultimate prayer in the current suit is for an order extending the period within which it can obtain the consent of the Land Control Board; a declaration that the consent filed in High Court Miscellaneous Application number 35 of 2015 and all its consequential orders are null and void

- and for an order of specific performance directing the 1st Defendant to complete the sale of the suit property.
19. The orders being sought in the current suit are at variance with the orders being sought in Lamu PMCC No. 15 of 2014.
 20. I say so because in Lamu PMCC No. 15 of 2014, the Plaintiff admitted in its pleadings that the agreement it entered into with the 1st Defendant herein in respect of the suit property is void for want of the consent of the Board.
 21. That being the case, the Plaintiff sought for a refund of the monies paid plus interest at the prevailing commercial rates. The Plaintiff did not pray for an order of specific performance either as an independent prayer or in the alternative. Indeed, the Plaintiff has never been amended to date.
 22. Consequently, due to the variance in the Plaintiff's pleadings, the two suits cannot be consolidated.
 23. In fact, until the Plaintiff decides on the cause of action it wants to pursue, it runs the risk of having the suits dismissed because of the different causes of action raised in the two suits.
 24. Other than the reasons I have mentioned above, the two suits cannot be consolidated because the 2nd Defendant herein is not a party in PMCC No. 15 of 2014.
 25. Considering that the claim by the Plaintiff in Lamu PMCC NO. 15 of 2014 is only against the 1st Defendant for breach of contract, the 2nd Defendant will be prejudiced if the two suits are consolidated.
 26. For those reasons, I dismiss the Plaintiff's Application dated 18th May 2015 with costs.

Dated and delivered in Malindi this 19th day of February, 2016.

O. A. Angote

Judge