



Teleposta Pension Scheme Registered Trustees v Intercountries Importers and Exporters Limited & 5 others (Civil Appeal 293 of 2016) [2022] KECA 655 (KLR) (8 July 2022) (Ruling)

Neutral citation: [2022] KECA 655 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 293 OF 2016
AK MURGOR, J MOHAMMED & A MBOGHOLI-MSAGHA, JJA
JULY 8, 2022**

BETWEEN

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES APPELLANT

AND

**INTERCOUNTRIES IMPORTERS & EXPORTERS LIMITED 1ST
RESPONDENT**

COMMISSIONER OF LANDS 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUBILEE INSURANCE COMPANY LIMITED 4TH RESPONDENT

PARK AVENUE INVESTMENTS LIMITED 5TH RESPONDENT

TRUST BANK LIMITED (IN LIQUIDATION) 6TH RESPONDENT

(Being an Appeal against the Judgment and Decree of the High Court (Hon. R.E. Ougo, J.) delivered on 27th July 2016 in HCCC No. 1400 of 2004)

RULING

1. The applicant, Intercountries Importers & Exporters Limited who is the 1st respondent in the appeal has brought this Notice of Motion dated 20th January, 2022 under, rules 42 and 103 of this Court's rules seeking orders that;
 - a. That Nairobi Civil Appeal No. E216 of 2021 Intercountries Importers & Exporters Limited - vs- Total Security Limited & 6 Others be consolidated with this appeal and be heard together.
 - b. Total Security Limited and Lemolok Limited (the Tenants) be joined to the proceedings.
 - c. The hearing of this appeal be stayed pending the hearing and determination of this application.



- d. Costs of this application be in the appeal.
2. The motion is brought on eight grounds on its face and is supported by the affidavit of Naushad Abid, sworn on 20th January 2022. The substantive grounds of the application are, that the dispute over the subject matter in this appeal is similar to those in Civil Appeal No. E216 of 2021, Nairobi InterCountries Importers & Exporters Limited vs Total Security Limited & 6 Others as both revolve around ownership of the property known as LR No. 209/13238 (the suit property) situated on Mucai Drive along Ngong Road and the rights attached to such ownership; that the parties in both appeals are similar and have the same interest in the property; that the dispute in Civil Appeal No. E216 of 2021 arises from the creation of controlled tenancies for Total Security Limited and Lemolok Limited (the Tenants) by the appellant, whilst the dispute over ownership was reserved for judgment by the High Court; that given these factors, the consolidation of the two appeals will be worthwhile as it will facilitate their efficient disposal and save on time and resources; that the Tenants who will be joined in the appeal, will not suffer any prejudice should the appeals be consolidated.
 3. The motion was opposed by the appellant through a replying affidavit sworn by Peter K. Rotich on 18th January 2022 wherein it was deponed, inter alia, that Civil Appeal No. 293 of 2016 and Civil Appeal No. E216 of 2021 were different in that, one concerned a dispute over the suit property, whereas the other was with respect to controlled tenancies; that the appeal in respect of the latter suit was on the question of the jurisdiction of the tribunal and had yet to be heard on its merits. It was further deponed that the parties to the appeals were different, and that the issues in dispute in the two suits were independent of each other.
 4. Both the applicant and the appellant/respondent filed written submissions. At the hearing Ms. Kethi Kilonzo learned counsel for the applicant, submitted that following the trial court's decision, the subject of this appeal, the appellant was ordered to vacate the suit property, but, the appellant has continued to remain in possession through the Tenants' controlled tenancies; that the suit between the appellant and the 1st respondent is over ownership of the suit property; that with respect to Civil Appeal No. E216 of 2021, the 1st respondent's complaint is on the legitimacy of the leaseholds created by the appellant while this appeal was pending, owing to the doctrine of les pendens. Counsel submitted that, in consolidating the appeals, the dispute would be resolved once and for all which would save on court's time and costs.

The applicant's application for consolidation was supported Mr Ogutu learned counsel for the 6th respondent.

6. Opposing the application, learned counsel for the appellant/respondent, Mr. Bundotich appearing with Ms. Nyabenge and Ms. Mathenge begun by submitting that the appellant has never been served with the record of appeal with respect to Civil Appeal No. E216 of 2021; that the instant appeal, that is Civil Appeal No. 293 of 2016 was filed way back in 2016; that it has been through case management and parties have exchanged written submissions, and are awaiting hearing. On the other hand, counsel submitted, Civil Appeal No. E216 of 2021 has never been set down for case management, that save for the appellant and the 1st respondent, the other parties are not the same and more importantly, the Tenants were not parties to the High Court proceedings of this appeal.
7. Counsel further submitted that the dispute in the two appeals was different; that the applicant had not demonstrated the commonality of the two suits. It was asserted that the instant appeal emanated from the judgment delivered in HCCC No. 1400 of 2004 which concerns a land ownership dispute over the suit property between the appellant and the 1st respondent, while Civil Appeal No. E216 of 2021 is an appeal from the decision of the Environment and Land Court in ELC Appeal No. 10 of 2016, filed by



the 1st respondent challenging the decision on jurisdiction of the Business Premises Rent Tribunal in BPRT Causes No. 902 of 2016 and 903 of 2016 filed by the Tenants who are in occupation of the suit property. As such, the applicant had not demonstrated to this Court that there are common questions of law or facts between the two appeals.

8. Learned counsel for the 5th respondent Mr. G. Thuita opposed the consolidation, while Mr. Eredi learned counsel for the 2nd and 3rd respondents and Mr. A Leshan for the 4th respondent took the view that consolidation of the appeal would not be prejudicial to the parties.
9. In considering whether or not to consolidate Civil Appeal No. 293 of 2016 with Civil Appeal No. E216 of 2021, we begin by referring to rule 103 of this Court's rules upon which the application is premised which sets out the basis on which such an application may be granted.

Rule 103 stipulates;

“The Court may for sufficient reason order any two or more appeals to be consolidated on such terms as it thinks just or may order them to be heard at the same time or one immediately after the other or may order any of them to be stayed until after the determination of any other of them.”

10. Addressing a similar question of whether or not to consolidate two appeals, the Supreme Court in the case of *Law Society of Kenya vs Centre for Human Rights and Democracy & 12 Others* (2014) eKLR outlined principles on which to grant such order to the effect 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 meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.

In the circumstances, would it serve the interests of justice to consolidate the appeals in which the parties are the same, and the central issue is the same even if worded differently? The irresistible conclusion is in the affirmative. We do not see what good would result from denying the applicant's prayer for consolidation, and allowing each of the appellants to appropriately canvas its cause. The alternative position would result in undesirable delays in concluding a matter of great public interest. It is obvious to us that, in the interests of all parties, the central issue in the appeals ought to be determined expeditiously and conclusively by this Court. Consolidation of the appeals, in our perception, would significantly advance that goal.”

11. In the case of *National Union of Water and Sewerage Employees & 3 others vs Nairobi Water and Sewerage Company Limited* [2018] eKLR this Court observed that, before a matter can be consolidated, the court ought to set out and interrogate the issues in controversy in each of the matters intended to be consolidated, identify their commonality, either in law or on facts and then give reasons as to why in its view a consolidation order is the most ideal in the circumstances.



12. In the case of *Anne Wambui Githuri vs Makfam Investments Limited & 2 others* [2015] eKLR the Court held that;

“The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Delaying or postponing the hearing of one suit to commence after the other when the subject matter in dispute is the same and competing interests are involved in the different suits does not save time. The test is not whether the parties are different; the test is whether the same or similar questions of law or fact are involved in the suits.” (emphasis ours)

13. This Court in *David Ojwang Okebe & 11 others v South Nyanza Sugar Company Limited & 2 others* [2009] eKLR held that;

“The main object of consolidation is to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus, where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so.” (emphasis ours)

14. In other words, the above cited authorities are clear that cases may be consolidated for their expeditious disposal and to enhance access to justice. But before a court can grant such order, it must be satisfied that the cases in question comprise common questions of law or fact that arise from the same transaction or series of transactions or for some other reason, so as to render it desirable that such an order be made.

15. Applying these principles to the application at hand, when the circumstances surrounding Civil Appeal No. 293 of 2016 are considered, what is apparent is that, it arises out of a suit where the appellant and the 1st respondent both claimed to be the legal and rightful owner of the suit property. In determining the dispute in a judgment dated 27th July 2016, the trial judge dismissed the appellant’s suit and allowed the 1st respondent’s counter claim. By so doing, the trial judge declared the 1st respondent to be the lawful owner of the suit property and ordered the appellant, its agents and servants to vacate the suit property within sixty (60) days from the date of judgment.

16. Civil Appeal No. E216 of 2021, on the other hand arises out of a judgment and decree of the Environment and Land Court (Obaga, J.) dated 25th February 2021 in ELC Appeal No. 10 of 2017 where the trial court dismissed the 1st respondent’s appeal challenging the decision of the Business Premises Rent Tribunal (BPRT) dated 10th February 2017. The tribunal had concluded that it had jurisdiction to hear and determine the reference to it filed by the Tenants. According to the appellant, the reference before the tribunal has yet to be heard on its merits, the inference being that the parties, in particular the Tenants, have yet to ventilate their cases before the tribunal. So that essentially, what is for hearing on appeal in this Court is on the question of whether or not the judge rightly dismissed the 1st respondent’s appeal having found that the tribunal had jurisdiction to determine the reference.

17. From an interrogation of the circumstances surrounding the two appeals, it becomes abundantly clear that, not only do they arise from different facts and transactions, the two appeals pertain to two different decisions in respect of different subject matter, the determination of which will address two different questions of law and fact; one being with regard to the legal ownership of the suit property, and the other on the question of whether the Environment and Land Court rightly concluded that the Business Premises Rent Tribunal had jurisdiction to hear and determine the Tenants’ reference. In other words, the commonality of the issues under dispute is brought into question. Much as the



applicant strenuously argued that the appeals should be consolidated, since the parties in both appeals are similar, and that the issues in both appeals revolve around the ownership of the suit property, and the rights attached to such ownership, we are not satisfied that the circumstances surrounding the disputes in the two appeals are of a common nature as to require their consolidation.

18. This is because firstly, Civil Appeal No. 293 of 2016 concerns a dispute over legal ownership of the suit property, while the issue in Civil Appeal No. E216 of 2021 is concerned with the jurisdiction of the tribunal to hear the Tenants' reference; secondly, both appeals arise from different transactions; Civil Appeal No. 293 of 2016 is with respect to who between the appellant and the 1st respondent is the legitimate owner of the suit property, while Civil Appeal No. E216 of 2021, concerns the leasehold interests in respect of the suit property. Thirdly, Civil Appeal No. 293 of 2016 is an old appeal that has been determined in its entirety and on its merits, while Civil Appeal No. E216 of 2021 has yet to be fully determined. What is on appeal is grounded on an interlocutory decision of the tribunal. And fourthly, the parties in Civil Appeal No. 293 of 2016 are not the same as the parties in Civil Appeal No. E216 of 2021. In the latter appeal, the Tenants are seeking protection of the tribunal under their respective leases, and are not claiming ownership of the suit property. It is therefore evident to us that, the parties, the facts and the transactions are clearly inimically one to the other.
19. Given that the appeals concern two disparate disputes and arise from two separate and distinct judgments, delivered by two different judges, we consider that it would neither be prudent nor efficacious to consolidate the two appeals, more particularly because, the earlier appeal has been finalised having been heard on its merits, while the other continues to await the hearing of an appeal on a jurisdictional question, as the merits of the dispute in the BPRT continue to remain outstanding. Our view is that the interest of justice would be better served by the expeditious, but separate hearing and determination of the two appeals, more so because, Civil Appeal No. 293 of 2016 is a very old appeal, and because the longer Civil Appeal No. E216 of 2021 continues to await determination of the appeal by this Court means the longer the parties will have to await the hearing and determination of the dispute in the BPRT on its merits.
20. In sum, we find that the application is not merited, and is dismissed with costs to the appellant/respondent. We order that both appeals be fixed for hearing on a priority basis in the course of the next term.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF JULY, 2022.

A.K. MURGOR

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original



DEPUTY REGISTRAR

