



**Kamau v Njoroge (Civil Appeal 6 of 2023) [2024] KEHC 1953 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1953 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 6 OF 2023  
FN MUCHEMI, J  
FEBRUARY 29, 2024**

**BETWEEN**

**FRANCIS KAMAU ..... APPELLANT**

**AND**

**JOEL KIMOTHO NJOROGE ..... RESPONDENT**

**RULING**

**Brief Facts**

1. The application dated 10<sup>th</sup> July 2023 seeks for orders of consolidation of Thika Civil Appeal No. E307 of 2023 with Thika Civil Appeal No. 6 of 2023. These appeals were transferred from Kiambu following the gazettelement of a High Court in Thika through Gazette Notice of 10<sup>th</sup> August 2023. The Kiambu numbers were Civil Appeals No. E072 of 2023 and E287 of 2022.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 10<sup>th</sup> August 2023.

**Applicant's Case**

3. The applicant states that he filed two appeals in the High Court in Kiambu being Civil Appeal No. E072 of 2023 and E287 of 2022 prior to the transfer of the appeals to this court. He further states that the two appeals arise from two distinct rulings made by the trial court in Thika in respect to SCCCOMM No. E460 of 2022 involving the same parties. Thus in the interests of justice, the applicant seeks to have the two appeals consolidated. The applicant avers that no prejudice shall be suffered by the respondent.

**The Respondent's Case**

4. The respondent opposes the application on the grounds that it is an afterthought, nonstarter, vexatious, an abuse of the court process and a waste of court's precious judicial time. The respondent states that Civil Appeal No. E287 of 2022 Kiambu, was filed out of time with no application for



enlargement of time being made and further that the applicant did not serve him with the said memorandum of appeal. Further, the respondent contends that the current appeal is res judicata and thus requested the Deputy Registrar on 5<sup>th</sup> April 2023 that the two files be brought together before the Principal Judge for directions.

5. The respondent further contends that on 12<sup>th</sup> June 2023, the court raised the issue that the two files arose from the same parties and transactions but the applicant's advocates insisted that the files raised distinct issues and should be handled differently but the court directed that the files come up for hearing together on 27<sup>th</sup> July 2023. The respondent states that the applicant filed the instant application a few days to the scheduled hearing despite being aware that the files were coming up together for hearing which is a clear pointer to the applicant's continued abuse of the court process and waste of judicial time.
6. The respondent contends that the applicant has introduced a new ground of appeal in his application by stating that the judgment in the small claims court was delivered outside the statutory sixty days period. The respondent further contends that the applicant cannot introduce new grounds of appeal at this juncture as his time to amend the memorandum of appeal has already been overtaken by the court's directions on the appeal.
7. The respondent argues that he who seeks equity must come with clean hands and the applicant's actions are stained thus estopping him from benefiting from the principles of equity.
8. The applicant filed a Further Affidavit dated 13<sup>th</sup> September 2023 and stated that the appeals are not res judicata as they relate to two distinct rulings which were dismissed on procedural grounds and not on merit.

### **The Applicant's Submissions**

9. The applicant submits that consolidating the two appeals Civil Appeal No. E287 of 2022 and E072 of 2023 would significantly contribute to the expeditious disposal and dispensation of justice, while saving valuable court time and resources. The applicant relies on Order 11 Rule 3(1)(h) of the Civil Procedure Rules and the case of Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others [2014] eKLR and submits that consolidation of the cases would allow for a comprehensive examination of the common questions of law and fact which would expedite the resolution of related issues. Furthermore, the applicant argues that consolidation would minimize the risk of conflicting judgments, which he is apprehensive will occur if the matters are heard independently.
10. Relying on the case of Law Society of Kenya vs The Centre for Human Rights and Democracy Supreme Court of Kenya Petition No. 14 of 2013 and states that consolidation allows for a holistic consideration of the evidence and arguments, enabling the court to make informed and consistent decisions on the matters at hand.
11. Furthermore, the applicant argues that consolidation will bring about considerable cost and resource savings which shall serve the interests of all parties involved. To support this contention, the applicant relies on the case of Korean United Church of Kenya & 3 Others vs Seng Ha Sang [2014] eKLR. The applicant further argues that consolidation goes beyond mere expediency and cost reduction; it also fosters a comprehensive and coherent resolution of the disputes as the court gains a complete understanding of the issues at hand resulting to the court giving a more informed and balanced decision.
12. The applicant argues that the application is not res judicata as the fact that the cases are to be consolidated does not mean that the issues in each of the two cases were fully litigated and decided



in the previous case. The applicant contends that the judgment in the trial court was not delivered within the timelines stipulated in the *Small Claims Court Act* therefore posing a challenge that would consequently affect the two rulings. Furthermore, the two distinct rulings made by the trial court were not on merit but were dismissed on procedural grounds.

13. The applicant states that consolidation of the appeals does not alter or modify the substantive grounds of each individual appeal. Each appeal maintains its distinct grounds, arguments and issues. Consolidation is merely a procedural mechanism to address related or connected cases efficiently. Thus the applicant argues that there is no new ground that has been formulated in the application that would be a ground of appeal.

### **The Respondent's Submissions**

14. The respondent gives a background of the case and submits that he instituted a commercial claim dated 26<sup>th</sup> June 2022 in the Small Claims Court in Thika being SCCCOMM No. E460 of 2022. The appellant denied the claim and after the matter was heard, the trial magistrate entered judgment on 15<sup>th</sup> September 2022. The applicant then moved the small claims court on 26<sup>th</sup> October 2022 seeking for orders to allow him to pay the decretal sum in installments of Kshs. 30,000/- and Kshs. 15,000/- interchangeably on a monthly basis. The trial court dismissed the application on the basis that the applicant could not convince the court that he was unable to pay the decretal amount in full either voluntarily or by means of execution.
15. The respondent states that he accommodated the applicant and did not proceed with any execution until 14<sup>th</sup> February 2023 when he instructed the firm of Eshikhoni Auctioneers who served the applicant with a proclamation notice on the said date. During this time, the applicant filed an appeal at the High Court in Kiambu being Civil Appeal No. E287 of 2022 and two applications dated 22<sup>nd</sup> & 30<sup>th</sup> November 2022 which the respondent states were never served on him.
16. The respondent states that the applicant moved the High Court in Kiambu on 17<sup>th</sup> February 2023 seeking similar orders as in the application dated 26<sup>th</sup> October 2022 and decided upon by the Thika Small Claims Court on 14<sup>th</sup> November 2022. The high court issued directions that the applicant needed to illustrate that he had exercised his right to seek to pay the decretal amount in installments under Section 36 of the *Small Claims Court Act*. In utter abuse of the judicial process, the applicant moved back to the small claims court through an application back dated 15<sup>th</sup> February 2023 seeking similar orders as the application dated 17<sup>th</sup> February 2023 and 26<sup>th</sup> October 2022.
17. The respondent contends that the applicant then filed the present appeal and a similar application seeking the same orders as in the applications pending in Civil Appeal No. E287 of 2022 and obtained stay of execution orders. The respondent then wrote to the Deputy Registrar on 5<sup>th</sup> April 2023, requesting that the two files be mentioned together before the principal judge for directions and on 12<sup>th</sup> June 2023, the issue of the two files arising from the same parties and transactions was raised before Mulwa J. to which the applicant's advocate insisted that the files raised distinct issues and should be handled differently but the court directed that the files come up for hearing together on 27<sup>th</sup> July 2023. Despite these orders, the applicant brought the instant application seeking consolidation but with the sole aim of introducing a ground of appeal in an application and bring confusion to the bearing of his application.
18. The respondent urges the court to strike out the latter appeal and its attendant applications for being an abuse of the court process and avoid wasting the court's precious time. To support his contentions, the respondent relies on Section 6 of the *Civil Procedure Act* and the case of Joel Kenduiywo vs District Criminal Investigation Officer Nandi & 4 Others (2019) eKLR; ASL Credit Limited vs Abdi Basid



Sheikh Ali & Another (2019) eKLR; Republic vs Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya [2020] eKLR and Stanley Koech & Another vs Charles Gibson Ombasa [2022] eKLR and submits that consolidation of suits should not be prescribed as a cure to abuse of the court process.

## The Law

### Whether the application has merit.

19. The law governing the consolidation of suits is founded under Section 80(h) of the *Civil Procedure Act* and Order 11 Rule 3(1)(h) of the Civil Procedure Rules. In consolidating suits, the Civil Procedure Rules mandate courts to be guided by the following three parameters:-
  - a. Do the same question of law or fact arise in both cases?
  - b. Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions?
  - c. Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?
20. These principles were set out in the case of Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others [2014] eKLR where the Supreme Court of Kenya held:-

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 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 opposing it.
21. In Prem Lala Nahata & Another vs Chandi Prasad Sikaria [2007] 2 Supreme Court Cases 551, the India Supreme Court held:-

It cannot be disputed that the Court has power to consolidate suits in appropriate cases....The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in court and it appears to the court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.
22. It is therefore clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice and expeditious disposal of matters, consequently promoting judicial economy so long as it is not prejudicial to any of the parties.
23. The present appeal was lodged by the applicant on 15<sup>th</sup> March 2023 whereby he was aggrieved with the decision of the small claims court in Thika being SCCOMM No. E460 of 2022 delivered on 9<sup>th</sup> March 2023. The ruling arose from a determination of the application dated 15<sup>th</sup> February 2023 where the applicant was seeking for the orders of paying the decretal amount in installments and stay of the sale of his properties. The trial court dismissed the said application on the grounds that the application was res judicata and an abuse of the court process as the applicant had filed a similar application dated 26<sup>th</sup> October 2022 and the court rendered its decision in respect of that application on 14<sup>th</sup> November 2022. The appeal in Civil Appeal No. E287 of 2022 was similarly lodged by the applicant on 22<sup>nd</sup> November



2022 against the ruling of the small claims court delivered on 14<sup>th</sup> November 2022 in SCCCOMM No. E460 of 2022. In the said application dated 26<sup>th</sup> October 2022, the applicant was seeking for an order to issue for the payment of the decretal sum in installments of alternate figures of Kshs. 30,000/- and Kshs. 15,000/- each month until payment in full. The trial court dismissed the application on the grounds that the applicant failed to avail evidence to support his inability to settle the claim in a lump sum.

24. From the face value, the two appeals are essentially similar. In both appeals, the court shall be called to determine whether the applicant ought to be allowed to pay the decretal sum in installments. Furthermore, from the perusal of the court record, the applicant has filed the application seeking to pay the decretal amount on numerous occasions. The applicant began by filing the first application dated 26<sup>th</sup> October 2022, then he filed a similar application in the small claims court dated 9<sup>th</sup> March 2023 and two other similar applications in the High Court dated 22<sup>nd</sup> November 2022, 30<sup>th</sup> November 2022 and 17<sup>th</sup> February 2023 where the court declined to issue interim orders. It was until the 10<sup>th</sup> March 2023, after the applicant yet again filed a similar application dated 10<sup>th</sup> March 2023 that he was granted interim orders of stay. The applicant filed these subsequent applications despite the small claims court determining that the said application was res judicata. It is clear that the applicant by filing numerous applications on the same subject matter amounts to an abuse of the court process. In *Republic vs Paul Kihara Kariuki, Attorney General & 2 Others ex parte Law Society of Kenya* [2020] eKLR Mativo J (as he then was) observed the following with regards to abuse of the court process:-

Abuse of court process creates a factual scenario where a party is pursuing the same matter by two court process. In other words, a party by the two court process is involved in some gamble; a game of chance to get the best in the judicial process. A litigant has no right to pursue paripassua two processes, which will have the same effect in two courts at the same time with a view of obtaining victory in one of the processes or both. In several decisions of this court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to an abuse of court/legal process.

25. Accordingly, it is my considered view that this entire appeal is an abuse of the court process. As such, it is my view that it ought to be struck out with costs to the respondent.
26. I have considered the foregoing facts and the arguments of the parties in these appeals. The issue of Kiambu HCCA having been filed out of time was overtaken by the act of the court giving directions that the two appeals HCCA No. E287 of 2022 and HCCA No.072 of 2023 be heard together. However, this does not mean that the said flaw is lost because it will still be considered as an issue in hearing the consolidated appeals, should they see the light of the day. It is not denied that one of the appeals, HCCA No.072 of 2023 challenges the issue in the ruling of the Small Claims Court which have been litigated under Section 36 of the *Small Claims Court Act*.

The effect of this is that the issues raised in the appeal are res judicata. I agree with the respondent's sentiments that the applicant has engaged in an exercise whose result is abuse of the court process and wasting precious judicial time. The numerous applications by the respondent are also a waste of time in that the Small Claims Court had done its duty. Bringing the already determined issues to this court on appeal is indeed intended to delay the intended execution of the judgment. However, the applicant has a choice to proceed to prosecute his appeals, if he wishes appreciating the fact that he is likely to incur more and more financial loss in the protracted litigation. Such funds expended in these appeals would have partly settled the decretal amount.



27. In conclusion, I find no merit in the application dated 10<sup>th</sup> July 2023 and it is hereby dismissed with costs to the respondents which costs shall abide in the appeal.
28. It is hereby so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF FEBRUARY 2024.**

**F. MUCHEMI**

**JUDGE**

