



Faza Properties Limited v Mohamed & another; Mwea Rice Mills Limited & another (Interested Parties) (Environment & Land Case E014 of 2022) [2023] KEELC 792 (KLR) (14 February 2023) (Ruling)

Neutral citation: [2023] KEELC 792 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E014 OF 2022
JA MOGENI, J
FEBRUARY 14, 2023**

BETWEEN

FAZA PROPERTIES LIMITED PLAINTIFF

AND

ABDIRAHMAN SHEIKH MOHAMED 1ST DEFENDANT

HASSAN HUSSEIN MOHAMMED 2ND DEFENDANT

AND

MWEA RICE MILLS LIMITED INTERESTED PARTY

MURAGE ESTATE AGENTS LIMITED INTERESTED PARTY

RULING

1. By a Notice of Motion Application dated 29/06/2022, brought pursuant to Order 11 and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#), Sections 1A, 1B, 3A, 18 (1) (b) of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and any other enabling provisions of the Law, the Applicant seeks the following orders:
 - i. That the Court be pleased to order that the Milimani CMCC No E1174 of 2021 – Abdirahman Sheikh Mohammed v Murage Real Estate Limited & Mwea Rice Mills Limited be and is hereby transferred to the Environment and Land Court at Nairobi and consolidated with the Nairobi Environment & Land Court Case No E014 of 2022 – Faza Properties Limited versus Hassan Hussein Mohammed, Abdirahman Sheikh Mohammed, Mwea Rice Mills Limited and Murage Estate Agents Limited for hearing and determination.



- ii. The costs of the application be provided for.
2. The application is supported by grounds on the face of the application and the affidavit of CS Kennedy Ochieng in which he states that the instant suit and CMCC No E1174 of 2021, arise from a cross-claim by alleged tenants on the same subject matter being LR No 209/590.
3. The 1st respondent/defendant filed Grounds of Opposition opposing the Notice of Motion dated June 29, 2022 on the following grounds that the application is misconceived, bad in law and an abuse of the court process. In his grounds of opposition, he states that the application is not supported by any evidence to warrant the orders prayed for. That the application does not meet the requirements upon which it is alleged to be brought. That the entire application is fatally defective and an abuse of the court process.
4. Parties agreed to canvass the application through written submissions and both parties filed their submissions.
5. The Applicant submitted that the claimants in the two suits are the same and that the transactions that gave rise to the two claims arose from similar circumstances. He also submits that counsels are the same or they are likely to be the same including witnesses.
6. He submits at paragraph 14 of his submissions that as much as the transactions are different they relate to the same subject matter.
7. The Applicant further submitted that the motive of the intended transfer is to expedite proceedings in the two matters pursuant to Section 18 of the *Civil Procedure Act*, as the two matters are so closely related that it is in the interest of justice that they are consolidated and heard as one.
8. It is submitted that the witnesses in the matter are likely to be the same as two parties are litigating over the same issues of law and fact and same subject matter. Therefore, hearing the suit as one would minimize costs for the parties.
9. The Application was opposed by the plaintiff who filed a replying affidavit dated 1/09/2023 and the 1st defendant who filed Grounds of Opposition dated September 16, 2022 and a replying affidavit dated November 14, 2022. The 1st Defendant/Respondent submitted that the application is incompetent, misconceived and an abuse of the court process. Further that that the application herein lacks merit.
10. The Plaintiff submits that it is not true that the two suits are similar and neither did the transactions that gave rise to the two claims arise from the similar circumstances. Further that the parties are to the suit are not entirely the same in the two suits. He submits that the plaintiff in the instant suit seeks for compensation for trespass by the defendant on the suit property and therefore he wants a permanent injunction to issue against the defendant for trespassing on LR 209/590.
11. However, the plaintiff submits that in CMCC E1174/2021, the 1st defendant alleges that there is a breach of contract and therefore he seeking a refund of the funds paid to the interest parties.
12. It is submitted for the Plaintiff/Respondent that the application does not meet the threshold for consolidation as provided by law. That the cause of action in each suit is different and that the prayers sought in each claim are different.
13. The Plaintiff/Respondent submitted that consolidation will prejudice both Claimants rights to fair hearing. It is the Plaintiff's submission that the application be dismissed.



14. This court has considered the application and the submissions therein. The principles for consolidation of suits are set out in the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2004] eKLR where the court held as follows:

“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 question of law or fact arises in both or all of them;
- b. The rights or reliefs claimed in them are in respect of or arise out of the same transaction;
- c. For some other reason, it is desirable to make an order for consolidating them;

15. This court has compared the two suits sought to be consolidated namely CMCC No E1174 of 2021 and ELC E014 of 2022 to determine whether the same involve common questions of law or fact, whether the reliefs sought arise out of the same transaction and whether it would be convenient and efficient to consider the same in a consolidated suit. I find that some parties are the same, in that the 2nd Respondent in the instant suit is the Plaintiff in CMCC No E1174 of 2021. The 1st Interested Party is the 2nd Defendant in CMCC No E1174, the 2nd Interested Party is the 1st Defendant in CMCC No E1174. However, the 1st Respondent in the instant suit is not a party in CMCC No E1174 and neither is the Plaintiff a party in CMCC No E1174.

16. This means that not all the parties are the same, the subject matter seems to be the same but the reliefs sought are not the same. The cause of action in both suits arise seem to involve the same subject matter, namely; the impugned transfer LR No 209/590.

17. Despite the suit property being the same due to the facts pointed out here above, I find that this application is frivolous and an abuse of the court process. The suits are the same and not similar.

18. Section 18 of the *Civil Procedure Act*, provides as follows:

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

- a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;”

19. The principles of consolidation of suits was re-stated in *Stumberg & another v Potgeiter* [1970] EA 323 as follows: -

“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”

20. In the Indian case of *BRIJ Kisbore v Bir Singh & others* at the High Court of Punjab and Harana (LR 5922 of 2013) Justice Paramjeat Singh quotes the following from the Supreme Court Case of *Prem*



Lala Nabata & another v Chandi Prasad Sikaria, (2007) 2, Supreme Court Cases 551 at paragraph 18:-

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose 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 the 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 to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions; or that for some other reason it is desirable to make an order consolidating the suits”.

21. The two suits present different claimants for different causes of action therefore the suits sought to be consolidated are different and distinct and the cause of action arose out of separate agreements. That the parties are the same, is not sufficient reason to transfer and/or consolidate the two suits.
22. The Claimant in the instant suit Faza Properties Limited is not a party in the CMCC No E1174 of 2021 and neither is Hassan Hussein Mohammed the 2nd defendant, this means that they will not have an opportunity to participate in the suit in the Chief Magistrate’s Court. If this application were to be allowed at this juncture, the two parties will have been condemned unheard.
23. In conclusion the court returns that no prejudice will be occasioned to the Applicant herein if the two suits are heard and determined separately in the respective courts where they have been filed. For this reason, I dismiss the application dated June 29, 2022 with no orders as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF FEBRUARY 2023.

MOGENI J

JUDGE

Ruling read in virtual court in the presence of:

Mr Ochieng for 2nd Interested Party/ Applicant

Mr Okoth holding brief for Mr Juma for Interested Party

Mr Were holding brief for Mr Khayemba for Plaintiff

Ms.Cheunda holding brief for Mr.Osundwa for the 1st Defendant

No appearance for 2nd Defendant

Ms. Caroline Sagina: Court Assistant.

