



REPUBLIC OF KENYA



**Bwanyange Limited v Alibhai & another (Civil Suit E016 of 2023)
[2023] KEHC 24308 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E016 OF 2023
DKN MAGARE, J
OCTOBER 24, 2023**

BETWEEN

BWANYANGE LIMITED PLAINTIFF

AND

YUSUF ALIBHAI 1ST DEFENDANT

NCBA BANK KENYA PLC 2ND DEFENDANT

RULING

1. The 1st Defendant's/Applicant's Application Notice of Motion Application dated 17th March 2023 brought under Order 8 Rule 3 Order 2 Rule 3 and Order 51 of the *Civil Procedure Rules* 2010 and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following Orders: -
 - a. That this Honourable Court be pleased to Order for the consolidation of the following suits:
 - i. MSA HCCC NO.13 of 2023; Bwanyange Limited versus Yusuf Alibhai & Family Bank (K) Limited,
 - ii. MSA HCCC NO.14 of 2023; Bwanyange Limited versus Yusuf Alibhai Zainab Abdul Kader Diwani & Eco Bank (K) Limited,
 - iii. MSA HCCC NO.15 of 2023; Bwanyange Limited versus Yusuf Alibhai & Equity Bank (K) Limited,
 - iv. MSA HCCC NO.16 of 2023; Bwanyange Limited versus Yusuf Alibhai & NCBA Bank Kenya PLC,
 - v. MSA HCCC NO.19 of 2023; Bwanyange Limited versus Yusuf Alibhai & Absa Bank Kenya PLC,



- b. That this suit, MSA HCCC NO.13 of 2023; *Bwanyange Limited versus Yusuf Alibhai & Family Bank (K) Limited* be the lead file.
 - c. That the Plaintiff's be directed to amend its Complaint filed herein accordingly within 14 days of the grant of the Order of Consolidation.
2. The application was supported and opposed in equal measure. The plaintiff opposed the Application. They relied on the case the replying affidavit of Robert Wangira Wandera and a preliminary objection.
 3. In support of their opposition, they filed submissions. In the said submissions they relied on the case of *Law Society of Kenya v Centre for Human Rights & Democracy & 12 others* [2014] eKLR, where the supreme court Stated as hereunder: -

“(39) 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.

(45) 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.

4. The Plaintiff relied on the case of *Municipal Council of Mombasa Vs - Municipal Council of Mombasa* [2004] eKLR, there justice D.K. Maraga, as then he was stated as doth; -

“There are however situations where consolidation is undesirable like where in two actions a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer than take long and the purpose of saving time will be defeated.

In these cases, the plaintiff is the same in both as the defendant is. Admittedly the causes of action arise from the same agreement. There is no doubt that the court has, under Order 11 Rule 1 a discretion to order consolidation on application or suo moto. Order 11 does not state when the application should be made. Ideally it should be made as soon as possible at any rate before any of the suits is heard. In this case P.W.1 has not completed his evidence in chief. Objection was raised when he was being led on evidence relating to HCCC No. 198/94.”



5. I had directed all the other parties in the related suits file their documents hence they took the title interested parties. The replies were comprehensive and succinct. If I do not cover them, it is not that they were wanting in any particular respect but due to the economy of space.
6. The 2nd Defendant, filed an affidavit of Joan Gachomba dated 26/4/2023, who stated that the 5 suits raise similar issues. They pray that the matters be consolidated.
7. Equity bank filed a response through Samuel Wamaitha. They opposed the application for consolidation due to the aspect of confidentiality and the multiplicity of parties and their advocates. They concede that the plaintiff and 1st defendant, are the same in all suits, the transactions took place at different times.
8. Eco bank Ltd opposed the consolidation and stated that there is strict confidentiality to be maintained. They state that the 5 cases arose from different transactions.
9. ABSA Bank Plc did not participate in the applications due to pendency of another suit in Nairobi
10. The first Defendant, who was the applicant filed humongous submissions to urge me to allow consolidation. They oppose the Plaintiff's preliminary objection and state it must be pure point of law. The preliminary objection does not raise, according to them any point of law.
11. He relied on the case of *Selecta Kenya GmbH & Co. KG v Chase Bank Kenya Limited & 2 others* [2015] eKLR. It was his case that he has identified common issues. They stated that these issues run through all the cases.
12. He also relied on the case of *John Gakure & 148 others v Dawa Pharmaceutical Co. Ltd. & 7 others* [2010] eKLR, where the court of Appeal, stated as follows: -

“The construction of those provisions has since been made in several decisions of this Court; for example, in *City Chemist (NBI) & Another vs. Oriental Commercial Bank Ltd.*, Civil Application No. NAI 302/2008 (UR) where the Court stated: -

“The overriding objective thus confers on the court considerable latitude in the interpretation of the law and rules made thereunder, and in the exercise of its discretion always with a view to achieving any or all the attributes of the overriding objective. One view taken by this Court, differently constituted, is that:

“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective..... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases.”

See *Karuturi Networks Ltd & Anor. Vs. Daly & Figgis Advocates*, Civil Appl. NAI. 293/09.

We think that view is a fair interpretation of the thinking of Parliament in enacting the legislative amendment which was largely borrowed from similar provisions in England. In



that country, the concept of “overriding objective” has now been in use since 1999 when the “Civil Procedure Rules” were promulgated to replace the “Rules of the Supreme Court.” It was tailored to enabling the court to deal with cases justly which includes as far as practicable:

- i. ensuring that the parties are on an equal footing;
- ii. saving expenses;
- iii. dealing with the case in ways which are proportionate-
 - i. to the amount of money involved;
 - ii. to the importance of the case;
 - iii. to the complexity of the issues; and
 - iv. to the financial position of each party
 - v. ensuring that it is dealt with expeditiously and fairly; and
 - vi. allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

13. Finally, they also relied on the case of *Nyati security guards & services Ltd - Municipal Council of Mombasa* [2004] eKLR, where the court, D.K. Maraga, stated as doth: -

“The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where: -

1. some common question of law or fact arises in both or all of them; or
2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. for some other reason it is desirable to make an order for consolidating them.”

Analysis

14. To be able to deal weather the suits should be consolidated, I must ask myself a simple question, had these matters been filed as one suit, could there have been embarrassment to fair trial. I am aware that no all defendants ought to be involved in all the issues.
15. However, a reading of all these complaints, one issue arises, that is, whether the Applicant herein was entitled to operate the accounts in each of the plaintiff’s accounts in the 5 named banks. Except for family bank where there is said to be a freeze on the accounts, the rest relate to money which is already spent. The monies were all indicated to be from one or similar source.
16. The court will have to determine the role played by the 1st Defendant in the imbroglio. The banks find themselves either passively or active involved in the ensuing confusion and conundrum. Without saying much, it is fair just and expedient that the questions be dealt once and for all.
17. Under order 1, rule 3, parties may be joined as defendants if the cause of action arises in the same series of transactions. It provides as doth: -

“Who may be joined as defendants



All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

18. In this matter, though there are several tractions, common questions of fact still remain. This is the power of the 1st Defendant to tract on behalf of the Plaintiff. There are other auxiliary issues which also run though the themes of these cases. In the case of *Chesinende Farmers Cooperative Society Limited v Joel K. Bett (being sued on his own behalf and on behalf of Chesinende Rurl Craft) & 25 others* & *another* [2018] eKLR, Justice J. M Onyango, stated as doth: -

“ 36. From the foregoing, it is my finding that there are common questions of fact and law arising in the two suits and the reliefs claimed arise out of the same transaction. A strong case has therefore been made out for consolidation of the two suits. In arriving at this conclusion I am guided by the case of Joseph Okoyo V Edwin Dickson Wassuna (2014) eKLR where Nyamweya J faced with a situation where the issue of ownership of the suit property was common to the two suits though the parties were seeking different remedies, held that the suits be consolidated.

37. Similarly, in Benson G Mutathi V Raphael Gichovi Munene Kabutu & 4 others (2014) eKLR the court consolidated a suit commenced by way of Plaint and one filed by Originating Summons where one of the suits was part heard. In arriving at the decision to consolidate the suits, the court relied on Law Society of Kenya V the Centre for Human Rights Supreme Court Petition No. 14 of 2013, where the Supreme Court held as follows:

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it”

38. Additionally, the court observed in the case of Korean United Church of Kenya & 3 Others V Seng Ha Sang (2014) eKLR; “Consolidation of suits is done for the purposes of achieving the overriding objective of the *Civil Procedure Act*, that is, for expeditious and proportionate disposal of civil disputes. 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.”

19. Further in a case referred by the parties herein, that is , *Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others* [2018] eKLR, justice G.L.Nzioka stated as doth: -

“ 46. As aforesaid and based on the authorities cited above, the Court has a broad discretion to order for consolidation of suits even on its own motion and can consolidate to tie more than one action together for separate individual actions into one and get a single judgment, where the issues and witnesses are the same



and the rights of the parties can be determined in one suit. (See *Tommie vs La Chance* 412 SO 2nd 439 (Fla 4th DCA 1982).

47. To support this position the Court held in the case of; *Korean United Church of Kenya & 3 Others vs Seng Ha Sang* (2014) eKLR that:

“consolidation of suits is done for purposes of achieving the overriding objective of the *Civil Procedure Act*, that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”

20. Justice A. Mabeya, FCI Arb, in *Arnold Kipkirui Langat v Atticon Limited & 7 others* [2021] eKLR was of the considered view that: -

“38. I would reiterate the foregoing here and add that, there would be no prejudice to be suffered by any of the parties herein if the consolidation sought is granted. The submission that Okwany J has already expressed herself in one of the suits on an interlocutory application cannot be a bar to consolidation. This is so because, it is not necessarily the Judge who considers an interlocutory application in a matter who has to conduct the trial. The decision referred to was in respect of an injunction application which was dismissed. That was on a preliminary basis and the merits of the suit had not been delved into.

39. In view of what I have stated above, it is my view that rather than tire 3 courts with the 3 suits which raise similar and common questions of law and fact, Article 159, which dictates that justice should be dispensed without undue delay as well as the overriding objective of the *Civil Procedure Act*, calls for the consolidation of these suits.”

21. I have said enough and avoided making conclusions of fact in the matter. They may embarrass a fair hearing. Though suit No E 019 of 2023, raises similar issues, there are allegations of pendency of another suit. In effect, till the Absa bank sorts issues in the two suits, I am reluctant to consolidate the same as it may embarrass a fair trial of this cases.

22. In the circumstances, I find that the application dated 17/3/2023 is merited and I allow the same except that case no. Mombasa HCCC No. E019 of 2023; Bwanyange Limited versus Yusuf Alibhai & Absa Bank Kenya PLC shall not be consolidated.

23. Before departing from the ruling there was a preliminary objection to the application filed by the plaintiff. They appears to grounds of opposition, than a preliminary objection.

24. To handle a preliminary objection, the court proceeds on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd* [1969] E.A. 696, made this pertinent observation. It said: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising



of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

25. In a Tanzanian case of *Hammers Incorporation Co. Ltd Versus The Board Of Trustees Of The Cashewnut Industry Development Trust Fund*, the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015, regretted that the practice of raising preliminary objection that was frowned upon by the Court of Appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & Others V the Attorney General*, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the Mukisa Biscuit case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate.”

26. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd*(supra): -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

At page701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

27. A Tanzania Court of Appeal sitting in Dar Es Salaam, in *Karata Ernest & Others vs Attorney General* (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A. , Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists of a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All



the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."

28. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of *Oraro vs Mbaja* [2005] eKLR:

"I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point."

29. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to the *constitution*

Determination

30. The upshot of the foregoing is that I make the following orders: -
- a. I find there is merit in the application dated 17/3/2023 and allow the same in the following terms: -
 - i. MSA HCCC NO.13 of 2023; Bwanyange Limited versus Yusuf Alibhai & Family Bank (K) Limited,
 - ii. MSA HCCC NO.14 of 2023; Bwanyange Limited versus Yusuf Alibhai Zainab Abdul Kader Diwani & Eco Bank (K) Limited,
 - iii. MSA HCCC NO.15 of 2023; Bwanyange Limited versus Yusuf Alibhai & Equity Bank (K) Limited,
 - iv. MSA HCCC NO.16 of 2023; Bwanyange Limited versus Yusuf Alibhai & NCBA Bank Kenya PLC, and Be and are hereby consolidated.
 - b. That this suit, MSA HCCC NO.13 of 2023; Bwanyange Limited versus Yusuf Alibhai & Family Bank (K) Limited be the lead file.
 - c. The Plaintiff to amend the plaint to reflect the consolidation within 21 days of this order.
 - d. I decline to consolidate MSA HCCC NO.19 of 2023; Bwanyange Limited versus Yusuf Alibhai & Absa Bank Kenya PLC as there are other pending proceedings. Parties are at liberty to apply should circumstances change.
 - e. Each party to bear their own costs

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE



JUDGE

In the presence of: -

Mr. Makau for the Plaintiff

Miss Natalie Ongego for the 1st Respondent

Kongere for NCBA bank

