



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NUMBER 25 OF 2020

MONICA WANGUI NJENGA.....PLAINTIFF

VERSUS

DAVIS KINYANJUI NJENGA.....1ST DEFENDANT

NJEMONI LTD.....2ND DEFENDANT

CONSOLIDATED BANK OF KENYA.....3RD DEFENDANT

RULING

1. The Application before the Court is dated 11/08/2020. It contains two prayers in the following terms:

1) That this suit be consolidated with HCCC Case No. 27 of 2020 between Davis Kinyanjui Njenga & Anor Vs Monica Wangui Njenga and HCCC Case No. 4 of 2020 Davis Kinyanjui Vs Monica Wangui and directions be taken on the mode of disposal of the issues therein

2) That costs of this Application to abide the outcome of the suit.

2. The Applicant is David Kinyanjui Njenga (hereinafter “Applicant”) who is the 1st Defendant in this suit. The Applicant in the suit is Monica Wangui Njenga (hereafter “Monica”). The 2nd and 3rd Defendants respectively are Njemoni Limited (hereinafter, “Njemoni Limited”) and Consolidated Bank Ltd (hereinafter, “Consolidated Bank”).

3. In the instant suit, Monica has sued the three defendants for certain reliefs related to a parcel of land known as LR No. 451/2055 (hereinafter, “the Suit Property”). The Suit Property is registered in the name of Njemoni Limited. Monica is one of two undisputed shareholders in Njemoni Limited. The other undisputed shareholder is the Applicant. I say “undisputed” because, as elaborated above, one of the disputes in the related tangle of suits is whether the two are the only shareholders or whether other individuals have effectively become shareholders of Njemoni Limited.

4. In any event, Monica alleges that the Applicant unlawfully and unprocedurally took out a third party charge over the Suit Property. Consolidated Bank is the lender and chargee while the borrower is Dandora Millers Ltd. Dandora Millers Ltd is a company related to Njemoni Limited as will soon become clear. The only two shareholders of Dandora Millers Ltd are Monica and the Applicant.

5. Monica’s case against the defendants is as follows. She alleges that the Applicant took advantage of Monica’s advanced age and health to make unilateral decisions regarding the Suit Property and in particular to charge it without a resolution of Njemoni Limited. Additionally, she alleges that the Applicant opened a bank account for Dandora Millers Ltd without authorization or company resolution and also sublet part of the Suit Property to third parties without a resolution of the company. Monica alleges that the Applicant forged her signatures in order to carry out some of these allegedly illegal acts. Monica also claims that the Applicant is attempting to unilaterally increase his shares in Njemoni Limited with the intention of getting the full control of the Company, and hence its assets.

6. Monica’s claim against Consolidated Bank is that it accepted the allegedly forged documents without conducting due diligence; and further that it opened a company bank account for Dandora Millers Ltd without a valid company resolution or conducting due diligence to

confirm the identity and consent of Monica as the only other shareholder of the Company.

7. On the other hand, the Applicant has instituted **Civil Case No. 27 of 2020** on his own behalf and on behalf of Njemoni Limited as a derivative lawsuit. The Defendants in that suit are: Monica as the 1st Defendant; Frecia Wanjiku Gathogo (“Frecia”); David Kinyanjui Mathu (“David”); Joyce Nyambura Njenga (“Joyce”); and the Registrar of Companies as the 2nd to 5th Defendants.

8. The Applicant’s central claim in that suit is that Monica acted in concert with the 2nd – 4th Defendants to illegally increase her shareholding in Njemoni Limited; and then using her allegedly illegally-enhanced shareholding powers proceeded to make certain decisions alienating the Company’s property to another company (PolyAfric Industries Limited) in which she is the sole shareholder. The Applicant claims that to achieve this goal, Monica has conspired with officials of the Registrar of Companies who have illegally accepted the changes in the structure of shareholding. The impugned changes in shareholding was that Monica sold and transferred shares in Njemoni Limited to the 2nd – 4th Defendants. The changes in structure of shareholding is illegal, the Applicant alleges in that suit, because by the Special General Meeting which allegedly approved it was not called procedurally; and in any event did not meet the quorum requirements since only Monica attended. In any event, the Applicant insists in that suit that many provisions of the Articles and Memorandum of Association of Njemoni Limited and the Companies Act were breached.

9. In **Civil Case No. 27 of 2020**, the Applicant primarily seeks prayers to revoke the allegedly illegal sale and transfer of shares by Monica to Frecia, David and Joyce and an injunction restraining the Defendants from selling, transferring, allocating or in any way interfering with the structure of the shareholding and management in Njemoni Limited.

10. **Civil Suit No. 4 of 2020** is also filed by the Applicant where he is the 1st Plaintiff. The other Plaintiffs are Njemoni Limited and Dandora Millers Ltd. The Applicant has filed on behalf of the other Plaintiffs. The Defendant in that matter is Monica.

11. The central claim in that suit is that Monica had wrongfully written to officials of Consolidated Bank denouncing executing documents which were used to open a bank account for Dandora Millers Ltd and for the advancement of a loan to Njemoni Limited. The suit also claims that Monica went to the factory owned by Njemoni Limited and threatened, without any colour of right or authority, to close the entire factory. The reliefs prayed for in the suit are declarations that the conduct of Monica in writing letters to the Consolidated Bank and in interfering with the trading activities of Njemoni Limited and Dandora Millers Ltd without due authority of the shareholders or directors **vide company resolutions were unlawful and a permanent injunction restraining her from the allegedly offending conduct.**

12. These are the three suits which have been filed related to these matters. To understand the level of emotions involved in the copious volumes of court filings produced by the parties as well as the multiplicity of the suits (there are other suits filed in the Environmental and Land Court as well as a Judicial Review matter now completed in which the same actors are parties), one needs to merely note the relationship between the actors. The Applicant, David and Joyce are the children of Monica and her late husband. Frecia is Monica’s granddaughter of Monica. Monica and her husband, the Applicant’s father, started both Njemoni Limited and Dandora Millers Ltd together. It would appear that the original shareholder was equal between Monica and her husband. Monica’s husband is now deceased. Before his death, he had gifted and transferred his shares in both Njemoni Limited and Dandora Millers Ltd to the Applicant. So, it is safe to assume, *prima facie*, that at some point the Applicant and Monica were co-equal shareholders and directors of the two companies.

13. It would also seem, however, that at some point both the Applicant and Monica decided to change the structure of shareholding of Njemoni Limited. The Applicant insists that Njemoni Limited increased the share capital and number of shares and he became the majority shareholder. Monica, on the other hand, claims the opposite: that the share capital and number of shares were increased and she acquired the majority of shares and sold some shares to Frecia; David and Joyce – hence making the three shareholders as well. It appears to be an intensely contested issue which one, if either between the Applicant and Monica, succeeded in lawfully changing the structure of shareholding. It is tautological to say that the outcome of the three suits the Court is being urged to consolidate depends on the findings by the Court whether either the Applicant or Monica succeeded in lawfully changing the structure of shareholding in Njemoni Limited. If the Applicant succeeded, he would likely succeed in both **Civil Suit No. 27 of 2020** and **Civil Suit No. 4 of 2020**. On the other hand, if Monica succeeded in lawfully changing the structure of the shareholding of Njemoni Limited, she will likely succeed in **Civil Suit No. 4 of 2020**.

14. It follows that the Applicant and Monica are the prime actors in this saga. All the other litigants’ cases depend on whether either of these two succeed in their claims. The Consolidated Bank’s interests will likely be prejudiced if Monica succeeds in her central claim that she is the majority shareholder in Njemoni Limited and did not authorize the transactions in question. The Registrar of Companies will, of course, have no legs to stand on if, in fact, the changes in shareholding registered in his office were un-procedurally accomplished and therefore illegal. Frecia, David and Joyce’s interests directly derive from Monica’s central claim that she lawfully succeeded in changing the shareholding structure of Njemoni Limited.

15. I have rehashed and restated the disputes in the three cases this simply because such a restatement helps resolve the singular issue for determination: should the three suits be consolidated?

16. The different parties have, as I pointed out above, filed copious material for or against the motion for consolidation. Monica filed Grounds of Opposition dated 07/09/2020. The grounds are as follows:

- 1) *That the said Application is incurably defective, incompetent, misconceived, has no merit whatsoever and is an abuse of the Court Process.*
- 2) *That the Application does not disclose any reasonable grounds to warrant the prayers sought as it is based on misrepresentation of facts.*
- 3) *That three suits which the Applicant seeks to consolidate do not meet the principles that should be met to allow for consolidation as they do not present a common question of law and fact.*
- 4) *That the rights ad reliefs, claimed are very distinct and therefore consolidating the cases will not only amount to a misjoinder but also an abuse of the Court's process and time.*
- 5) *That even though the dispute revolves around the issue of management and shareholding, the cause of action giving rise to HCCC Case No. 27 of 2020 and HCCC Case No. 4 arose from different transactions compared to those of this case.*
- 6) *That the question of facts in all of the three matters are different. HCCC Case No. 4 is based on the issue of transfer of shares under which the Registrar of Companies, among others, it a party while this case is only concerned with charge of land belonging to the 2nd Defendant herein is an issue that should be determined independently.*
- 7) *That the issue before Court under this suit is about a charge that was fraudulently registered and unilateral actions of subletting on all that piece of land LR 451/2055. IR 33556. These are not issues that can be determined with the issue of transfer of shares in Njemoni as they are issues that have arisen from completely different transactions.*
- 8) *That the other cases also involve other parties who are not parties in this suit and consolidation of the files will only cause confusion of issues before Court which will be prejudicial to the parties.*
- 9) *That the issues raised by the parties in the three suits are not issues that can be disposed off at the same time and furthermore, the Plaintiff herein has raised an issue of locus standi in HCCC Case 27 of 2020 and HCCC Case No. 4 which the respective Courts should first determine.*
- 10) *That the Application is unmerited, misconceived and the same should be dismissed*

17. The Consolidated Bank has filed Grounds of Opposition dated 22/10/2020. It raises the following grounds:

- a) *The 1st Defendant and the Plaintiff have filed a multiplicity of suits and failed to raise a legitimate cause of action against the 3rd Defendant Bank that merits a joinder of issues.*
- b) *The 3rd Defendant Bank is neither a party nor associated with the internal management and shareholder disputes arising in the following suits:-*
 - (i) *Nakuru High Court Civil Case No. 4 of 2020 Davis Kinyanjui, Njemoni Limited and Dandora Millers Limited Vs Monicah Wangui Njenga: and*
 - (ii) *Nakuru High Court Civil Case No. 27 of 2020 Davis Kinyajui Njenga and Njemoni Limited Vs Monica Wangui Njenga. Frecia Wanjiku Gathogo David Kinyajui Mathu, Joyce Nyambura Njenga and the Registrar of Companies.*
- c) *The 3rd Defendant Bank would serve no probative value in the determination of issues in Nakuru HCCC No. 4 of 2020 and Nakuru HCCC No. 27 of 2020 as it cannot offer any valuable contribution, evidence or testimony in the determination of the lawful or unlawful running of Njemoni Limited and/or Dandora Millers Limited.*
- d) *Enjoining the 3rd Defendant Bank in Nakuru HCCC No. 4 of 2020 and Nakuru HCCC No. 27 of 2020 will reduce the said Bank to a mere spectator in the proceedings yet its issues can be easily and quickly resolved in the present suit and in the absence of consolidation.*
- e) *The 3rd Defendant Bank's relationship with the 2nd Defendant emanates from a voluntary agreement pursued by the Plaintiff and 1st Defendant to secure a loan facility in favour of Dandora Millers Limited in which both act as directors.*
- f) *The 3rd Defendant Bank lawfully carried due diligence, perfected and registered a legal charge over LR. No. Nakuru Municipality 451/2055, IR 33556 ("the security") registered in the name of the 2nd Defendant as security for the loan disbursement.*
- g) *The 3rd Defendant Bank's right over the security is protected by law and cannot be defeated on claims or assertions of capacity as the 3rd Defendant is by law*

- (i) Not bound to enquire as to any limitation on the powers of the directors to bind a company or to authorize to do so
- (ii) Presumed to have acted in good faith unless the contrary is proved; and
- (iii) Not to be regarded as having acted in bad faith only because a particular act is beyond the powers of the directors under the constitution of the company.

h) Dandora Millers Limited had defaulted on its loan obligation and a grant of the orders sought in the 1st Defendant's Application shall adversely affect and prejudice the 3rd Defendant Bank's legal right to realize its security.

i) That any delay in the realization of the security by the 3rd Defendant Bank due to consolidation of the suit will occasion the risk of the loan account running into further arrears and the said debt outstripping the value of the 3rd Defendant's Bank's security.

j) That the 1st Defendant's Application irregular, should be struck out as it is sworn by the 1st Defendant's Advocate alleging facts that can only be proven or asserted by the 1st Defendant which subsequently flies against the provisions of Order 19 Rule 3 of the Civil Procedure Rules, 2020.

18. Frecia, David and Joyce also opposed the Application. They filed joint Grounds of Opposition dated 08/10/2020. They are as follows:

- 1) *The Application is incompetent, bad in law, misconceived and therefore an abuse of Court process.*
- 2) *That Application is supported by an incompetent affidavit the same having been sworn by an advocate and on contested issues of facts.*
- 3) *That Application does not meet the threshold of consolidation of suits for the following reasons:-*
 - a. *The proposed defendants are not parties in the instant case or in NAKURU HCCC NO. 4 OF 2020*
 - b. *The causes of action in NAKURU HCCC NO. 25 Of 2020, NAKURU HCCC NO. 27 OF 2020 and NAKURU HCCC NO. 4 OF 2020 do not arise from the same transaction.*
 - c. *The question of law and fact in the three cases are not the same.*
 - d. *The Reliefs sought in the three suits proposed to be consolidated are not the same and do not arise out of the same transaction.*
- 4) *That NAKURU HCCC No. 27 OF 2020 has an Application pending for leave of Court to continue the suit as a derivative claim. The Application is opposed by the Proposed Defendants and the Court is yet to make a determination on the issue.*

19. The Honourable Attorney General, acting on behalf of the Registrar of Companies, filed Grounds of Opposition dated 09/12/2020 and raised five grounds as follows:

- a. *That the office of the Registrar of Companies is not a party to HCCC Case NO. 4 of 2020 between David Kinyanjui & Others v Monica Wangui.*
- b. *That there is no cause of action against the Registrar of Companies in HCCC No. 27 of 2020 and the issues raised in this suit (sic) and the orders sought are substantially and the issues raised and orders sought in HCCC Case No. 27 of 2020 (sic).*
- c. *That there is no privity of contract between the Registrar of Companies and the parties in HCCC No. 25 of 2020.*
- d. *That this Application does not meet the threshold required to grant sought orders.*
- e. *That this Application is frivolous, lacks merit and is an abuse of Court process.*

20. All the parties also filed written submissions and lists of authorities. I have read those submissions and cases cited. I do not propose to cite or rehash all of them. The singular issue for determination is whether the three suits referenced above should be consolidated and heard together.

21. The parties have, thankfully, largely cited the same set of cases. The leading one, which, by the doctrine of stare decisis I am obliged to begin my analysis with, is the two-judge decision in the Supreme Court in **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR**. In that case, the judges enunciated the general principle to be applied when considering consolidation thus:

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.

22. The practical principles which the Courts use in the consideration were stated and applied by Maraga, J. (as he then was) in ***Municipal Council Of Mombasa Vs - Municipal Council Of Mombasa[2004] eKLR*** thus:

Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. 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.

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.*

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.

23. While the Applicant has submitted at length that the cases are a good candidate for consolidation on all the three principles suggested by Maraga J. (which, he submits, should be read disjunctively and not conjunctively), all the other parties insist that none of the three grounds is satisfied in the instant case.

24. I began this ruling by rendering the disputes engendered in the three cases as I understand them. The rehashing makes it clear that the shareholding structure of Njemoni Limited and Dandora Millers Ltd is the central issue in all the three cases. None of the three cases can be determined without resolution of the question of shareholding. This, at an elementary level, means at least three things:

a. *First*, there is a definitional confluence of facts in the three cases to the extent that the central factual issue of what the extant shareholding structure of the two companies are will be the critical factor in determining whether the competing claims by the Applicant on the one hand, and Monica on the other hand prevail.

b. *Second*, there is a real threat that if each of the three cases is determined separately each Court might come up with conflicting findings on the central question of shareholding structure leading to possible judicial embarrassment.

c. *Third*, while not all the parties - particularly the Consolidated Bank and the Registrar of Companies – might not be interested in all the issues in the three cases, it is true that their interests in the cases are contingent on the central issue about the structure of shareholding. It, therefore, follows that it is imperative, for all the issues to be substantively determined expeditiously, that the three matters be consolidated. Indeed, the interlocutory applications on file in the three cases are clear indication that this is the correct course. There are extant interim orders in ***HCCC No. 27 of 2020*** directing that status quo be maintained. The other parties in the other cases have now approached the Court with an Application claiming that the extant orders are affecting the orderly running of the business of the two Companies.

25. The upshot is that the Court finds that there is a confluence of facts in the three cases which militate, for both equitable and expeditious resolution, for the three cases to be consolidated.

26. Accordingly, the orders emanating from this ruling are that:

a. **This suit is hereby consolidated with *HCCC Case No. 27 of 2020: Davis Kinyanjui Njenga & Anor Vs Monica Wangui Njenga* and *HCCC Case No. 4 of 2020: Davis Kinyanjui Vs***

Monica Wangui with this suit being the lead file.

b. **Costs of this Application will be in the cause.**

27. Orders accordingly.

DATED NAKURU THIS 22ND DAY OF APRIL, 2021.

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JOEL NGUGI

JUDGE

NOTE: This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.