



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.331 OF 2018

TEPSHA HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

DAVIES NYAMBU MWALANDI TRADING AS

MR. ZION HOSTELS.....1ST DEFENDANT/RESPONDENT

AFRICAN BANKING CORPORATION LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. Before Court is the Notice of Motion dated **9th November 2018** in which **AFRICAN BANKING CORPORATION** the 2nd Defendant/Applicant seeks the following orders:-

“(1) SPENT

(2) SPENT

(3) THAT this Honourable Court be pleased to order that the instant matter being Nairobi Civil Suit No.331 of 2018 Tepsha Holdings Limited Versus Davies Nyambu Mwalandi T/A, Mt. Zion Hostels & African Banking Corporation Limited be transferred, consolidated and disposed of by the High Court sitting at Mombasa together with Mombasa Civil Suit No. 65 of 2018 Davies Nyambu Mwalandi – Versus – African Banking Corporation Limited and another.

(4) THAT pending the hearing and determination of the consolidated suits, this Honourable Court be pleased to set aside the default judgment entered by this Honourable Court against the 2nd Defendant/Applicant and that the 2nd Defendant/Applicant be granted leave to file its Defence out of time.

(5) THAT costs be in the cause.

The application which was premised upon **Section 3A of the Civil Procedure Act Cap 21 laws of Kenya, Order 10 Rule 11, Order 47 Rule 6(2) and Order 51 of the Civil Procedure Rules 2010** and all other enabling provision of the law, was supported by the Affidavit dated **9th November 2018** and the Supplementary Affidavit dated **13th December 2018** sworn by **SHARON MUKAMI** the Legal officer of the 2nd Defendant/Applicant.

2. The Plaintiff/Respondent **TEPSHA HOLDINGS LIMITED** filed their Grounds of Opposition dated **21st November 2018**, as well as a Replying Affidavit of even date sworn by **PETER N. NJENGA**, a Director of the Plaintiff/Respondent Company.

3. Pursuant to directions given by the Court the application was disposed of by way of written submissions. Both 2nd Defendant/Applicant and the Plaintiff/Respondent filed their written submissions on **14th December 2018**. **Mr. Wakaba** Advocate, who was on record for the 1st Defendant/Respondent, informed the Court that his client held a similar position as that held by the 2nd Defendant/Applicant and would abide

by the decision of the Court. The 1st Defendant/Respondent did not file any written submissions in the matter.

BACKGROUND

4. The Plaintiff filed this suit being **Nairobi HCCC No.331 of 2018** (hereinafter referred to as “**the Nairobi suit**”) seeking judgment against the Defendants in respect of a contractual agreement between the parties whereby the 1st Defendant was to put up a development on all that parcel of land known as **RONGE/NYIKA/2530** (hereinafter referred to as “**the charged property**”). The Plaintiff alleged that it was to receive part of the payment for this development from the 2nd Defendant. The Plaintiff’s suit was premised on the fact that despite having put up the developments as agreed the 1st and 2nd Defendant failed and/or declined to render the payments due leading the Plaintiff to take legal action to recover the debt.

5. This Nairobi suit was filed on **15th August 2018**. On the very same date roughly 500Km away at the Mombasa High Court the 1st Defendant/Respondent filed **Mombasa HCCC NO.65 of 2015** (hereinafter referred to as “**the Mombasa Suit**”). In that suit the Plaintiff (the 1st Defendant herein) sought to prevent the exercise by the 1st Defendant (the 2nd Defendant/Respondent herein) of its statutory power of sale following the alleged default by the Plaintiff in clearing a loan facility for some **Kshs.43,200,000/=**. The common denominator in the two suits is the loan facility advanced by the 2nd Defendant/Applicant to the 1st Defendant/Respondent which loan facility was thereafter utilized to put up the developments on the charged property. These developments were the subject of the contractual agreement between the Plaintiff/Respondent herein and the 1st Defendant. Moreover the orders sought in both suits are in respect of the same property being the charged property. It is for this reason that the 2nd Defendant/Applicant seeks to have the Nairobi suit transferred to Mombasa for consolidation with the Mombasa suit.

6. Counsel for the Applicant submits that if the two suits are heard and determined separately, there exists a real risk of rival orders emanating from two courts of concurrent jurisdiction. The Applicant further posits that since the charged property as well as the development thereon are located in Taita/Taveta area within the local jurisdiction of Mombasa High Court, it would save judicial time and resources to have both suits heard together.

7. The 2nd Defendant/Applicant further prays that pending the hearing and determination of the consolidated suits the Interlocutory judgment entered in the Nairobi case in default of filing a defence be set aside. The Applicant avers that it was surprised to learn that the suit was slated for formal proof on **5th December 2018**. They submit that the hearing notice was erroneously served upon **M/s Karami Kanae Advocates** whereas the 2nd Defendant had appointed the firm of **Messrs. Bowyer Mahihu & Co. Advocates**, to act for them which firm had filed their Notice of Appointment on **25th September 2018** and had duly served the same upon the Plaintiff/ Respondent with the same. That Notice of Appointment was served upon the Plaintiff/Respondent on **26th September 2018** and barely two days thereafter the Plaintiff requested interlocutory judgement.

8. The 2nd Defendant states that they did not file their defence within the specified time because having learnt of the existence of the Mombasa suit they decided to file an application for transfer and consolidation of the two suits, in which case they intended to file a combined Statement of Defence. The 2nd Defendant contends that the Draft Statement of Defence which they have annexed raises triable issues which ought to be heard and determined on merit.

9. In opposing this application the Plaintiff/Respondent submit that the two suits do not meet the legal criteria for consolidation as there exists no commonality in the prayers sought in each suit. That the Mombasa suit seeks a permanent injunction whilst the Nairobi suit prays for a conditional injunction. Further the Mombasa suit revolves around a chargor/chargee dispute whereas the Nairobi suit is concerned with purely contractual issues where the Plaintiff is seeking to recover moneys due to it from the Defendants. Given these circumstances the Respondents contend that a consolidation of the two suits would only serve complicate issues and would defeat the overriding objectives of just expeditious and affordable disposal of suits. As a consequence there would be no need to have this Nairobi suit transferred to Mombasa.

10. The Plaintiff/Respondent further opposes the setting aside of the default judgment on the grounds that the entry of the same was regular and that in any event the Draft defence does not raise any triable issues. It is further contended that the Applicant has not advanced any reason for its failure to file a defence and that setting aside the default judgment would prejudice the Plaintiff who have already made great strides in prosecuting their case. Finally the Respondent submits that it would not serve the interest of justice to set aside the default judgment. They pray that this application be dismissed in its entirety with costs.

ANALYSIS AND DETERMINATION

11. I have carefully perused the rival submissions in this matter. I have also considered the statute law as well as the relevant case law. Three issues arise for determination in this application as follows:-

- i. Is the Application incompetent for lack of Authority to swear?
- ii. Should the Nairobi suit be transferred to Mombasa High Court and consolidated with the Mombasa suit for hearing and determination?
- iii. Should the Default judgment entered on **16th October 2019** be set aside and the Draft Statement of Defence be admitted by the court?

I will now proceed to deal with each issue individually.

i. Competency of the Application

12. In their Grounds of Opposition filed on **22nd November 2018** the Plaintiff/ Respondent argues that the Application as filed was incompetent as the deponent of the Supporting Affidavit lacked requisite authority to swear the affidavit on behalf of the 2nd Defendant/Applicant. Though this issue was not canvassed by the Respondents in their written submissions filed on **14th December 2018**, I deem it essential to settle it if only for completeness of the record. The Supporting Affidavit in question was deponed by one **Sharon Mukami** who described herself as **“a legal officer of the 2nd Defendant/Applicant, well versed in the facts of this case and duly authorized to swear this Affidavit.”**

13. **Order 4 Rule 1(4)** and (5) of the Civil Procedure Rules 2010 provides thus:-

(4) Where the Plaintiff is a corporation the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company.

(5) The provisions of sub rule (3) and (4) shall apply mutatis mutandis to counterclaims.”

The deponent of the Supporting Affidavit dated **9th November 2018** is the legal officer of the 2nd Defendant/Applicant. The only situation in which the law requires that an authority to swear be attached to a Verifying Affidavit is where a suit is filed by a Corporation or where a Corporation has filed a counter-claim. Neither is the case here. Accordingly there exists no statutory requirement for the Deponent of the Supporting Affidavit to annex an authority to swear. I find no merit in this ground of opposition and the same is hereby dismissed. I find that the present application is competent.

14. Transfer and consolidation of the two suits.

Order 11 rule 3(1)(h) Civil Procedure Rules provides for the consolidation of suits. In support of their prayer to have the Nairobi suit transferred to Mombasa and consolidated with the Mombasa suit for hearing and determination, the Applicant cites the fact that the charged property is in issue in both suits. The Applicant further contends that the loan facility granted by the 2nd Defendant to the 1st Defendant which is the subject matter of the Mombasa suit, forms the basis of the contractual obligation between the Plaintiff/ Respondent and the Applicant in the Nairobi suit. For this reason it is submitted that that the two suits are inter-independent and therefore ought to be heard together.

15. On their part the Plaintiff/Respondent submits that the two suits are distinct from each other and do not meet the pre-conditions for consolidation. That there exists no commonality between the prayers being sought in the two suits. The purpose for consolidation of two or more suits is to save on judicial time and resources and to aid in the expeditious and cost effect disposal of suits. In **KOREAN UNITED CHURCH OF KENYA 63 OTHERS –VS- SENG HA SANG 2014 eKLR** it was held:-

“Consolidation of suits is done for the purpose 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.”

16. The principles guiding the consolidation of suits was set out in the case of **CHESINENDE FARMERS CO-OPERATIVE SOCIETY LIMITED –VS- JOEL K. BETT & Another HCCC NO.25 OF 2017**, in which the Court citing **NYATI SECURITY GUARDS** held as follows:-

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

- a. Some common questions 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.**

17. In the Indian case of **PREMLALA NAHATA & ANOTHER –VS – CHANDI PRASAD SIKARIA [2007] 2 SUPREME COURT CASES 551** at Para 18, the Supreme Court of India held as follows:-

“....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 suits or that the 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 for consolidating the suits.” [own emphasis].

Do these preconditions exist in the instant matters? Do the two suits arise from the same transaction and are the prayers sought in the two suits similar in nature? There can certainly be no doubt that the charged property being **RONGE/NYIKA/2530** is common to both suits. However the mere fact that the charged property is mentioned in both suits does not make the two cases similar in nature.

18. A close look at the Nairobi and Mombasa suit specifically at the prayers sought in each reveals some distinction. The Nairobi suit is

premised upon a contractual agreement between the Plaintiff/ Respondent and the 1st and 2nd Defendant. The Plaintiff in this Nairobi suit seeks to be paid the debt allegedly owed to it by the Defendants and seeks a conditional injunction on the suit property if said debt is not honoured. On the other hand the Mombasa suit is premised on a chargor-chargee relationship in which the security offered was the charged property. In the Mombasa suit the prayer sought is for a permanent injunction to restrain the bank (the 2nd Defendant) from selling or disposing of the charged property. It is also pertinent to note that the parties in the two suits are not entirely the same. The Plaintiff in the Nairobi suit **is not** a party to the Mombasa suit. It would be unfair to compel the Plaintiff in the Nairobi suit to move all the way to Mombasa to prosecute his claim yet the same was filed in Nairobi. It is my finding that given these distinctions the two suits cannot be said to merit consolidation as there exists no commonality in the prayers being sought in each. The mere mention of the same property in both suits does not render them the same. Each suit is based on different claims in law, different prayers and the parties are not the same. For these reason, I find no merit in the prayer for consolidation of the Nairobi and Mombasa suits and decline to order the same.

19. On the question of transfer of the Nairobi suit to Mombasa for hearing and determination, although the charged property is located in the Coast area, the court will be guided by **Section 15 (c) of the Civil Procedure Act, Cap 21, laws of Kenya** which provides:-

“Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction.

(c) The cause of action, wholly or in part arises.”

This Nairobi suit as has been stated earlier is premised upon a contractual agreement. The alleged contract was entered into in Nairobi and the funds in question were to be paid into the Plaintiff/Respondents bank account in Nairobi. The Plaintiff in the Nairobi suit resides and works for gain in Nairobi, and the Applicants Head Office is situated in Nairobi. On the basis of the foregoing, I find that the suit was properly filed in Nairobi and there is no need or reason to have the same transferred to Mombasa.

Accordingly, I do decline the prayer for transfer of this suit, to the High Court in Mombasa.

20. (iii) Setting aside of the Default Judgment

Order 10 Rule 11 of the **Civil Procedure Rules 2010** provides as follows:-

“Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or Order upon such terms as are just.”

Judgment in default of defence was entered in this matter on **16th October 2018**, and the Hon Deputy Registrar then fixed the matter for hearing for formal proof on **5th December 2018**. Before that date on **9th November 2018** the 2nd Defendant/Applicant filed this present application in which one of the prayers sought to have the default judgment set aside. Inasmuch as this court has declined the Order seeking consolidation of the two suits, I do not agree with the Respondents submissions that the prayer to set aside the default judgment must also fail for having been hinged on the prayer for consolidation. The two were separate and distinct prayers and this court will consider each prayer on its merits.

21. In cases where a regular judgment in default of defence has been entered, the Court has the discretion to set aside that judgment. The principles which a court ought to consider in deciding whether or not to set aside a default judgment were stated in the case of **ABDALLA MOHAMED & Another –VS – MBARAKA SHOKA Civil Appeal No.163 of 1989** as follows:-

“.....the tests for the correct approach in an application to set aside a default judgment are, firstly whether there was any defence on merits, secondly whether there would be any prejudice; and thirdly what is the explanation for any delay.”

22. The Applicant has denied laxity or negligence as the reasons behind its failure to file as defence on time. It is averred that the delay in filing defence was the anticipation that the Nairobi suit would be consolidated with the Mombasa suit and therefore the Applicant intended to file only one combined defence. I am not persuaded by this logic. The Applicant had no way of knowing which way the court would decide on the question of consolidation and transfer. As such they were obliged out of an abundance of caution to file their defence to the Nairobi suit within the stipulated time. Their failure to do so is in my view inexcusable.

23. Nevertheless the above finding does not preclude the court from the exercising its discretion in favour of setting aside the default judgment as this discretion is unfettered and unlimited. In **EXPRESS KENYA LTD –VS- MANJU PATEL [2000] 1 E.A 54** the court held that:-

“Absence of explanation alone must however not divest the court of its discretion to set aside a default judgment and ensure that the ends of justice are met. The court’s discretion to set aside judgment is not to be conditioned on the explanations advanced for the delay or default.” [own emphasis]

24. The main factor a court must consider is whether the defence raises triable issues.

In **PATEL –VS- E.A CARGO HANDLING SERVICES LTD [1974] E.A. 75**, it was held:-

“.....where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits does not mean, in my view, a defence that must succeed, it means.....

“a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

In **KENYA TRADE COMBINE LTD –VS- SHAH Civil Appeal No.193 of 1991** the Court defined the term **“triable issue”** as follows:-

“...all a Defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We would hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The Defendant is at liberty to show, by whatever means he chooses, whether by defence, oral evidence, affidavits or otherwise that his defence raises bona fide triable issues.”

25. I have perused the Draft Defence annexed to the 2nd Defendant’s Supporting Affidavit dated **9th November 2018**. I am persuaded that it raised triable issues which deserve a hearing on merit. For this reason I do set aside the default judgment entered on **16th October 2018** against the 2nd Defendant/Applicant and grant the Applicant leave to file its defence out of time. The same to be filed and served within 14 days hereof.

26. Finally, I do allow the present application in terms of prayer (a) and direct that costs be met by the 2nd Defendant/Applicant.

27. I further direct that the 2nd Defendant/Applicant shall pay to the Plaintiff/Respondent throw away costs of **Kshs.30,000/=** (Thirty Thousand Only).

28. Finally in order to expedite the matter, I direct that parties appear before the Hon Deputy Registrar for Case Management on **13th May 2019**. It is so ordered.

Dated in Nairobi this 11TH day of April, 2018.

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Justice Maureen A. Odero