



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 74 OF 2008

BAIKUNYUA ENTERPRISES LIMITED.....PLAINTIFF

VERSUS

THE STANDARD LIMITED.....1ST DEFENDANT

KENYA COMMERCIAL BANK.....2ND DEFENDANT/APPLICANT

RULING

The 2nd defendant moved this court by a notice of motion dated 12.2.2019 supported by an affidavit sworn by its advocate Denis Onyimbo Onyinkwa. The applicant sought for the following reliefs:

- i. That there be a stay of proceedings and / or further proceedings herein pending the hearing and determination of this application.
- ii That this court be pleased to set aside and / or vary and / or review the orders made on 23.11.2018 consolidating the matter herein with Eldoret HCC.No.47 of 2009 between Baikunyua Enterprises Limited vs The Standard Limited and Moses Ochola.
- ii. That costs be provided for.

2. The deponent averred that an order was made in Eldoret HCC.No.47 of 2009 consolidating the two suits, Yet the cases involved different parties and causes of action. The 2nd defendant is not a party in Eldoret HCC.No.47 of 2009, he did not participate in the consolidation of the suit and that the issues in controversy are not the same.

3. In his supporting affidavit he deponed that an order was served on 23.11.2018 for consolidation yet this instant suit had a hearing date for 27.11.2018, the pleadings in Eldoret HCC.No.47 of 2009 indicate the parties as Baikunyua Enterprises vs Standard Limited and Moses Chololo who is not a party in this instant suit which is a claim on contract whereas the claim in the other is on tort. Also there was no claim against Kenya Commercial Bank in Eldoret HCC.No.47 of 2009.

4. The Deponent further urged that the consolidation was not necessary and having different causes of actions, the court cannot give inconsistent verdicts. Consolidation of the suits would amount to dragging the 2nd defendant into a matter in which there is no cause of action or claim against it. He urged the court to allow the application.

Responses

5. The director to the plaintiff filed a replying affidavit dated 26th February 2019 stating that this instant application ought to have been made in the suit where the consolidation orders was made, the applicant filed the application two and half months later without explaining reasons for the delay. Further parties shall rely on the same documentary evidence since the issues are the same.

6. In addition, in regard to Order 1 rule 5 of the Civil Procedure Rules a defendant need not be interested in all the reliefs sought by the plaintiff. The reliefs sought arise from the same issue of indebtedness. The court was urged to dismiss the application.

Submissions

7. The 1st respondent did not participate in this application.

8. In submissions, Miss Wesonga counsel for the applicant urged that the consolidation was not necessary since the questions of fact and law are different, in this instant case the plaintiff is seeking declaratory orders arising from a defamation case. The reliefs therefore are different.

9. The application was made in due time as opposed to the plaintiff's contention.

10. Mr. Wambua Counsel for the plaintiff urged that he relied on the affidavit filed and section 80 of the Civil Procedure Act, where one need not be a party in a suit, and also Order 1 rule 5 of the Civil Procedure Rules. He further stated that this court lacked jurisdiction to review an order made in a different file and that two and half months is inordinate delay to seek for review.

11. In response counsel for the applicant urged that the court had ordered on 27th November 2018 that they be served by the plaintiff with the pleadings in file No. 47/2009, the plaintiff never served them despite many requests and reminders. There was no law barring filing of the application in either file and lastly the court had jurisdiction to grant the relief sought.

Analysis

12. The applicant has been sued by the plaintiff as the 2nd defendant. In its defence they averred that it had guaranteed Ksh 3,500,000/= to the 1st defendant at the request of the plaintiff. The plaintiff in its claim averred that it had been carrying on business with the 1st defendant till 17.4.2008, when they received a letter from 1st defendant purporting to recall a guarantee of Ksh 3,500,000/= which is alleged the plaintiff had with the 2nd defendant, a fact which is strongly opposed. This is in regard to the suit no.74 of 2008.

13. The plaintiff had also sued the 1st defendant herein and Moses Ochola in Eldoret HCC No. 47 of 2009, the 2nd defendant/applicant is not a party in the suit. It is for that reason they moved the court by this application since the plaintiff/respondent had filed an application for consolidation in Eldoret HCC no.47 of 2009 which was allowed by the court on 23.11.2018 and served it upon them on the same day. The applicant moved the court under Article 159 of the Constitution, section 1A,1B,3,3A, Order 45 Rule 1,2, and 3 and Order 51. Order 45 rule 1 provides as follows:

1(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

14. Order 45 rule 1(b) sets the conditions when one should apply for review. The applicant has to demonstrate the above rules before the court grants or declines the review. The applicant urged that the parties in the two suits are different and the cause of action is different and therefore the court may end up giving contradicting judgment.

15. The principals involved when a court is to consider consolidation of suits were amply set out in the case of **Nyati Security Guards & Services Ltd vs - Municipal Council of Mombasa [2004] eKLR** 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:-

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 plaintiff/respondent urged that parties would refer to the same documentary evidence since the issues were the same and that both cases were based on indebtedness. The plaintiff declined that the court did not order for the service of the pleadings in Eldoret HCC no.47/2009 which is untrue. On 27.11.2018 Mr. Mugambi for the plaintiff indicated to this court he was not able to serve pleadings as ordered due to the short notice. The applicant could have referred to the pleadings and made a decision on whether to proceed with the suit as they had been consolidated or not. The applicant could not tell whether the question of facts or law are the same or not.

16. In addition to the above the plaintiff on 4.7.2018 attended court and indicated that he would be calling 2 witnesses, come 24.10.2018 counsel was not ready to proceed, the plaintiff's counsel did not indicate to the court or 2nd defendant/ applicant that there was another suit. Though this court had issued a consolidation order, the plaintiff had moved the court with unclean hands. The applicant herein is not a party to Eldoret HCC no. 47/2009. The objective of the court as provided by section 3A (1) is to facilitate the just, expedition, proportionate and affordable resolution of disputes. This court therefore is conferred with jurisdiction to hear and determine the application for review. The court is in agreement with the decision in - **Korean United Church of Kenya & 3 others v. Seng Ha Sang** (2014) eKLR where the court observed that:

“Consolidation of suits is done for 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 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.”

The consolidated cases involved different parties and causes of action, and cannot therefore conveniently be treated as one. On the grounds, I find the application merited and is allowed. Costs be in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF JULY 2019

In the presence of:

Mr. Mugambi for the Plaintiff

Firm of Z. K. Yego are for the 1st Defendant (Absent)

Mrs Werunga for the 2nd Defendant (Absent)

Ms Sarah - court Clerk

S. M GITHINJI

JUDGE