



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 245 OF 2018

AFRO MARKETING SERVICES LIMITED.....PLAINTIFF

- VERSUS -

TRUST BANK LIMITED.....DEFENDANT

RULING

1. Although this case bears the case number of 2018 it was first filed in the year 2009.
2. Before me is the Notice of Motion dated 25th February 2009. That application is filed by the Trust Bank Limited (In Liquidation) hereinafter Trust Bank. The plaintiffs are, Afro Market Services Limited, Minoti Trade Limited, Minto Travels Limited and Samson Keengu Nyamweya. The only payer subsisting in that application is for this case to be consolidated with case HCCC Misc No 966 of 2003.
3. The plaintiffs have filed a Preliminary Objection dated 30th March 2009. The objection raises the following:
 - a) *the Notice of Motion dated 19th March 2008 (the correct date is 25th February 2009) is incompetent for having been filed by an advocate who has not applied for nor been granted leave of court to act for Trust Bank Limited (In Liquidation).*
4. The objection by the plaintiffs should be considered first. The plaintiffs' sole argument in that objection is that Trust Bank was previously represented by the firm of advocates K. Mwaura & Company advocates and there being no order of the court permitting the firm of advocates Waweru Gatonye & Company advocates to act for Trust Bank, the application being considered, filed by Waweru Gatonye & Company advocates should fail.

ANALYSIS OF THE PRELIMINARY OBJECTION

5. It is important to state that although Trust Bank has submitted that leave was granted to the firm of Waweru Gatonye & company Advocates to act for Trust Bank, in HCCC No 966 of 2003, I was unable to see that order of the court in this file.
6. I do however find that since Trust Bank was placed in Receivership by the Central Bank of Kenya, under the provisions of the Banking Act, leave of the court was not required to enable the firm of Waweru Gatonye to act for Trust Bank. That provision is found under section 35 (5) (b). That Section gives the Board, that is the Deposit Protection Fund Board, power to appoint an advocated to assist it in the performance of its duties.
7. The above being my finding it follows that the preliminary objection raised by the plaintiffs' fails. It is dismissed with costs to Trust Bank.

NOTICE OF MOTION APPLICATION DATED 25TH FEBRUARY 2009

8. Trust Bank by that application seeks to consolidate this suit with HCCC 966 of 2003.
9. There is no doubt that the courts have jurisdiction to consolidate suits subject to the appropriate perimeters of consolidation being present. Those conditions for consolidating a suit were discussed in the case **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** thus;

“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”

10. The Supreme Court of Kenya was also quoted in the above case as follows:

In the case of **LAW SOCIETY OF KENYA VS THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY, SUPREME COURT OF KENYA, PETITION NO. 14 of 2013**, the Supreme Court of Kenya had this to say about consolidation of suits:-

“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”.

11. With the above in mind i have considered what is in issue in both this case and HCC 966 of 2003. In HCCC 966 of 2003 an order was made on 25th January 2003 that Trust Bank does apply the sum of Ksh.179,981,992.90 received by Samson Nyamweya and Minto Travels Limited in full and final settlement of their liability to Trust Bank (In Liquidation); Trust Bank do proceed to give a discharge for the said debts; and that Trust Bank were permitted to execute a discharge of the charges offered as security for the facility granted to Samson Nyamweya and Minto Travels Limited. On those orders being granted the plaintiffs filed this present suit by way of Originating Summons seeking the determination of the following question;

(i) Whether the Defendant (in this case Trust Bank) is under an obligation to prepare, execute and release to the plaintiffs instruments of discharge of. Charge for the purpose of facilitating the removal of that encumbrance known as legal charge dated 22nd may 1996 registered against those properties known as LR NO. 9644.

12. The question the plaintiffs seek determination in the Originating Summons relates to the order made on 25th January 2003, in HCCC 966 of 2003. By that order the court granted an order that Trust Bank do proceed to discharge properties in respect to the debt owed to it by Samson Nyamweya and Minto Travels Limited. In my view there is a common question of law and fact in both the cases since Trust Bank is seeking, in HCCC 966 of 2003, to have the order of discharge of charge set aside and in this case the plaintiffs are seeking the properties be discharged. In my view the consolidation as sought by Trust Bank will facilitate expeditious disposal of both the cases and will certainly contribute to proposer use of judicial time.

13. It is for the above reason that i reject the objection raised in opposition to the prayer for consolidation. The prayer is merited and will be granted. The costs of the application however will be in the cause.

14. The following are the **ORDERS** of the Court:

(a) HCCC. NO. 245 of 2018 is hereby consolidated with HCCC Misc. NO.966 of 2003.

(b) The lead file shall be HCC NO. 245 of 2018. The Plaintiffs shall be:

(i) AFRO MARKETING SERVICES LIMITED

(ii) MINTO TRADE LIMITED

(iii) MINTO TRAVEL LIMITED

(iv) SAMSON KEENGU NYAMWEYA.

(c)The defendant shall be:

(i) TRUST BANK LIMITED (IN LIQUIDATION).

(d) The costs of prayer NO. 2 of the Notice of Motion dated 25th January 2009 shall be in the cause.

(e) The Preliminary Objection dated 30th march 2009 is dismissed with costs to Trust Bank Limited (In Liquidation).

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of DECEMBER, 2019.

MARY KASANGO

JUDGE

Ruling read in open court in the presence of

Court Assistant.....Sophie

.....for the Plaintiff

.....for the Defendant