



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 259 OF 2010

VIRCHAND VIRPAL & SONS.....1ST PLAINTIFF

HASMUKHLAL VIRCHAND SHAH.....2ND PLAINTIFF

CHANDULAL VIRCHAND SHAH.....3RD PLAINTIFF

SUNIL CHANDULAL SHAH.....4TH PLAINTIFF

ATUL CHANDULAL SHAH.....5TH PLAINTIFF

-VERSUS-

I & M BANK LIMITED.....DEFENDANT

RULING

[1] When this matter came up for hearing on **13 February 2018**, Counsel for the Defendant, **Mr. Karori**, assisted by **Ms. Ogula**, brought it to the attention of the Court that this suit is one in a series of four suits between the same parties and in respect of the same subject matter. He explained the genesis of the dispute to be a financing agreement that the parties entered into to enable the Plaintiffs trade in shares at the **Nairobi Stock Exchange**; and that when the Bank started to dispose of the shares pledged to it pursuant to the agreement, the Plaintiffs moved to court and filed **High Court Civil Case Number 101 of 2010, HCCC No. 102 of 2010, HCCC No. 103 of 2010**, as well as this suit, **HCCC No. 259 of 2010**. According to **Mr. Karori**, all these cases have a common theme, and that is, whether or not the Bank was under obligation to commence the sale of the shares at the trigger point. It was thus his submission that since the hearing of **HCCC No. 1001 of 2010** has commenced and evidence of the 1st Plaintiff taken to conclusion, it would help in furthering the Overriding Objective of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, that **HCCC No. 101 of 2010** be used as a test case, since it is the ripest of all the four cases. He added that this would obviate the likelihood of the different courts handling these suits coming to different conclusions in respect of the same subject matter, and thereby causing needless discomfiture in the administration of justice.

[2] Counsel further made reference to certain interlocutory applications, one of which, he submitted, is the subject of appeal. His postulation was that, if the Court of Appeal were to disallow the appeal, then the issue of injunction would have been overtaken by circumstances; hence the need for this matter to be put on hold pending the result of the appeal.

[3] **Mr. Odera Obar** for the Plaintiffs opposed the application, contending that it is akin to forum shopping. He pointed out that **HCCC No. 101 of 2010** has already been consolidated with **HCCC No. 102 of 2010** and **HCCC No. 103 of 2010** because of the commonality of the issues in contest therein. According to him, this case is markedly different in that the 1st Defendant, (the principal borrower), is a limited liability company; and that the key issue is not so much about the margin of shares that were pledged; but about a borrowing that was secured by a piece of property in Mombasa in respect of which three Charges were created. He therefore urged the Court to proceed with the hearing and determination of this suit, noting that it has been pending for the last 8 years. Regarding the pending appeal, **Mr. Odera Obar** pointed out that what is before the Court of Appeal is an appeal in connection with an action filed by a spouse whose contention was that she had not been served with the Notification of Sale; and that the matter was strictly under the **Land Act, 2012**, and therefore had nothing to do with the subject matter herein.

[4] It is the law, as stipulated in **Section 6** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

[5] The mischief intended to be cured by this provision, as was well articulated by **Mabeya J in Barclays Bank of Kenya Ltd vs Elizabeth Agidza & 2 Others [2012] eKLR**. Here is what the Learned Judge had to say:

"The mischief sought to be avoided by Section 6 of the Civil Procedure Act is a likelihood of two different courts adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions. That will be embarrassing to the judicial process."

[6] Needless to say that the question as to whether the suits are similar or not can only be determined on the basis of the pleadings. Accordingly, having perused the pleadings herein and placed the same side by side with a copy of the Plaintiff that was filed in **HCCC No. 101 of 2010**, which **Mr. Karori** provided the Court with, it is apparent that this suit is, in certain respects analogous to **HCCC No. 101 of 2010**, which, for the purposes of **Section 6** of the **Civil Procedure Act**, is the earlier suit. For instance, it is true that paragraphs 4 to 17 of the Amended Plaintiff filed herein on **7 March 2012** are more or less similar to the corresponding paragraphs in the Plaintiff filed in **HCCC No. 101 of 2010** in terms of the sense in which the cause of action was articulated, namely: that the Defendant offered and the 1st Plaintiff accepted an overdraft facility in respect of which drawings would be permitted of up to a certain specified percentage of the value held as security; and that the Defendant would have clear rights to dispose of the tradable securities if the drawing exceeded that specified percentage. It was further a common thread in the two matters that any realization of the securities held by the Bank on the grounds of default would automatically be triggered when the balance outstanding on the 1st Plaintiff's and Guarantors' names exceeded the percentage aforementioned. It was further pleaded that the Bank was contractually bound to immediately sell the pledged shares when the total exposure hit the agreed trigger point; and that this stipulation was not observed by the Bank, thereby occasioning the Plaintiffs loss and damage.

[7] Nevertheless, it is also manifest that the dates of the transactions in issue, the amounts involved and even the trigger point in each case, as pleaded, is different. At paragraph 4 of the Amended Plaintiff herein, the date of **30 June 2006** is given as the date of the overdraft; while in **HCCC No. 101 of 2010**, the applicable date is **4 April 2006**. The facility in issue in this matter, amounting to **Kshs.8,000,000/=** was, according to Paragraph 5 of the Amended Plaintiff enhanced to **Kshs.80,000,000/=** on **8 October 2008**; while in **HCCC No. 101 of 2010**, the enhancement occurred on **13 December 2007** from **Kshs.38,501,000/=** to **Kshs. 73,501,000/=**. Another notable difference is that whereas the subject facility in **HCCC No. 101 of 2010** was secured by a Credit Agreement, a joint and several Personal Guarantees and Indemnities by the 2nd to 4th Plaintiffs and a lien over the ordinary shares; in this matter, the security included a First Legal Charge over the property known as **LR No. Mombasa/Block XXVI/380 Kizingo**. It is also noteworthy that whereas the Borrower in **HCCC No. 101 of 2010** was the 1st Plaintiff, **Sunil Chandulal Shah**, the Borrower in this matter is a limited liability company, **Virchand Virpal & Sons Limited**, the 1st Plaintiff herein.

[8] As to the prayers sought, whereas the prayers for a permanent injunction and a declaration that all interest, penalties and other charges levied on the 1st Plaintiff's account are illegal, unlawful and irrecoverable, are common to both suits, in **HCCC No. 101 of 2010**, the Plaintiffs asked for special damages as well, in the sum of **Kshs. 26,337,200.56**; while in this matter, the special damage component is for the sum of **Kshs. 17,129,714.56** only. In addition, the Plaintiffs herein have sought for relief in connection with the Charge aforementioned; which is not the case in **HCCC No. 101 of 2010**.

[9] All the aforesaid variances go to show that; whereas there may be a common theme running through the two suits, namely the purpose of the borrowing, the causes of action are so significantly different as to place the two suits outside the ambit of **Section 6** of the **Civil Procedure Rules**. I similarly find no sufficient nexus between this matter and the appeals mentioned by **Mr. Karori** to warrant a stay of these proceedings. The outcome of the Ruling by **Mutava, J.** dated **28 June 2012** that was alluded to by **Mr. Karori** was the dismissal of the Plaintiff's application for temporary injunction. If the Appeal were to be disallowed, that result would, in essence not be incompatible with the hearing and determination of this dispute, which is what was proposed by **Mr. Odera Obar**. In the premises, I would dismiss **Mr. Karori's** application and direct that this matter be proceeded with to hearing and determination on its own merits.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2018

OLGA SEWE

JUDGE