



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 547 OF 2013

SELECTA KENYA GmbH & Co. KGPLAINTIFF/RESPONDENT

VERSUS

CHASE BANK KENYA LIMITED.....1ST DEFENDANT/RESPONDENT

MOHAMED ESMAIL2ND DEFENDANT/APPLICANT

PETER WANDERI3RD DEFENDANT/APPLICANT

RULING

1. This Ruling relates to a Notice of Motion Application dated 28th November, 2016 brought under the provisions of Order 8 Rule 3, Order 11 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules, 2010 & Sections 1A, 1B and 3A of the Civil Procedure Act (Chapter 21) of the Laws of Kenya and all other enabling provisions of the Law. The Application is premised on the grounds on the face of it and an Affidavit dated 28th November 2016 sworn by both Applicant.

2. The applicant are seeking for orders that:

a) An order do issue consolidating the instant suit with Nairobi HCC No. 548 of 2013 Selecta Kenya GmbH & Co. KG vs Mohamed Esmail & Peter Wanderi;

b) Upon consolidation, the Defendants/Applicants be granted subsequent leave to amend their Statements of Defence in the respective suits both dated 16th April 2014 in terms of the Amended Statements of Defence annexed herewith;

c) The Honourable Court do make such other and further orders as it may deem fit, necessary and expedient in the interest of justice;

d) That cost of this Application be provided for.

3. The Applicants aver that the Plaintiff (herein “the Respondent”) sued them vide a Plaint dated 16th December 2013, jointly with Chase Bank Kenya Limited for allegedly conspiring to defraud it of Kenya Shillings Thirty Three Million, One Hundred and Eighty Eight Thousand, Seven Hundred and Twelve (Kshs. 33,188,712.00) which was allegedly lost as a result of the fraudulent dealings via an alleged illegal account maintained with Chase Bank Kenya Limited.

4. Similarly, the Respondent has sued them vide a Plaint dated 16th December 2013, filed the suit in the High Court Civil Case No. 548 of 2013 Selecta Kenya GmbH & Co. KG vs Mohamed Esmail & Peter Wanderi, the Respondent has sued the Applicants for allegedly conspiring to defraud it of Kenya Shillings One Hundred and Seventy Five Million, Eight Hundred and Seventy Five Thousand, Five Hundred and One, Eighty Four Cents (Kshs.175,875,501.84) through a series of illegal transactions, unauthorized and irregular transfer of funds to personal accounts held with Chase Bank Kenya Limited.

5. That the Applicants duly responded to these claims through joint Statements of Defences dated 16th April 2014. The Applicants argue that the subject matter in these two cases arises out of the same act or transaction or series of acts or transaction as whether jointly or severally as against the Applicants herein and Chase Bank Kenya Limited. That the documents provided in support of the Respondent claim are generally similar. Further, the suits raise similar questions of law and facts namely: alleged conspiracy by the Applicants and Chase Bank Kenya Limited to defraud the Respondent of huge sums of money.

6. Therefore the suits should be consolidated with a view to disposing of them expeditiously and proportionately and in the best interest of justice, time and costs saving. The Applicant further state that pursuant to the Ruling of the Court delivered on 15th December 2015; they inspected documents that were in the sole possession of the Respondent and upon the analysis of the same, they have established that there is a need for the amendment of the Statements of Defence to enable the Court to effectively and completely determine all the issues in dispute and to ensure that the Respondent does not unjustly enrich itself by recovering amounts which were lost by fraud of its own fault. That the amendment will not cause any prejudice to the Respondent.

7. However, the Application was opposed by the Respondent through grounds of opposition dated 11th April, 2017, arguing that the two suits are incapable of being consolidated because:

(a) The causes of action in the two matters do not arise from the same transaction. That the transactions giving rise to the cause of action in HCCC No. 547 of 2013 are different from the transactions giving rise to the cause of action in HCCC No. 548 of 2013.

(b) That the questions of facts in the two matters are not the same. The questions of facts in HCCC No. 547 of 2013 are different from the questions of facts in HCCC No. 548 of 2017;

(c) That the questions of law in HCCC No. 547 of 2013 are different from the questions of law in HCCC No. 548 of 2013

8. The Respondent further opposed the consolidation of the two matters arguing that it will cause it prejudice and confer undue advantage to the Applicants in that:

(a) The number of transactions giving rise to the action in HCCC No. 548 of 2013 is very high, and the same applies to HCCC No. 547 of 2013. If the suits are combined the case will be crowded and difficult to conduct;

(b) The evidentiary documents filed in support of each of the cases are many and if combined they will cause confusion in the conduct of the case;

(c) The questions of facts in the two cases are quite numerous and combining them will result in confusion;

(d) Due to the numerous transactions, questions of fact and evidentiary documents, consolidation will impose a disproportionate burden on the Plaintiff to establish a clear case

9. The Respondent argued that the consolidation of the suits will result in a significant change of their nature and substance, which will be in violation of the Respondent's right to a fair hearing which entails the right to determine the nature and substance of the case to file against a Defendant.

10. Further that the Application is misconceived and incompetent as the Applicants seek to consolidate suits when they seek to amend their defences in the two matters, after consolidation (if it is allowed). That the Application also is unfounded, frivolous and made in bad faith. There has been undue delay in filing the same, as the Applicants entered appearance in the year 2013, filed their Defences and have participated at various stages of these proceedings without objection and if consolidation is allowed the Parties will be forced to file amended Pleadings and that which will delay the case and unduly disadvantage the Respondent.

11. The Respondent averred that although the Applicants allege that they got new information from documents they inspected, the proposed changes do not concern any new information as it relates to their work procedures which were already known to them at the time of filing their Defences because they had practiced them for 8 years. It was argued that even then the Application for Amendment is irregular and misconceived because the Applicants are seeking to amend of a Defence filed in a different suit being HCCC No. 547 of 2013.

12. In response to the Plaintiff's grounds of opposition the Applicants filed further submissions dated 23rd August 2017, in which they reiterated that, the matters in HCCC No. 547 of 2013 and HCCC No. 548 of 2013 are prime for consolidation, as they arise from the same series of transactions relating to alleged loss of money by fraudulent dealings action by them (the 2nd and 3rd Defendants) and further irregular transfers of those amounts to Chase Bank Limited. That the issues of both fact and law arising are so essentially intertwined as to render separate hearings unnecessary and the evidentiary documents filed in support of the two suits are similar and if combined will eliminate any form of duplicity and ease the Court's determination of the apparent issues.

13. It was argued that the request for amendment of the respective defences in HCCC No. 547 of 2013 and HCCC No. 548 of 2013 is well in order as the amendments proposed are indeed necessary for the just determination of the controversy between the parties. That in any event, both matters recommended for consolidation and amendment have not progressed to any advanced stage to occasion the Plaintiff any prejudice as alleged or at all and no prejudice will be occasioned upon the Plaintiff.

14. The Parties agreed to dispose of the Application by filing submissions. The Applicants submitted that the term '*Consolidation*' has invariably been defined, however for the purposes of this case, the Applicants elect to limit the choice of definitions to that provided for in the Black's Law Dictionary (8th Edition) which states as follows;-

“to combine, through court order, two or more actions involving the same parties or issues into a single action ending in a single judgment, or sometimes, separate judgments.....” (emphasis ours)

15. It was submitted that the power of the Courts to make orders for consolidation as sought stem from the provisions of Order 11 Rule 3(1)(h) which mandate the Honourable Court to consider consolidation of suits with a view of furthering expeditious disposal. That the principles to consider were amply set out in the case of; **Nairobi ELC Suit No. 1000 of 2012 Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR**, which cited with approval the case in **Mombasa HCCC No. 992 of 1994 Nyati Security Guards and Services vs Municipal Council of Mombasa** wherein the factors were enumerated 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 question of law or fact arises in both or all of them; or

(b) The rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or

(c) For some other reason it is desirable to make an order for consolidating them.”

16. That the same parameters were considered in the case of; **Kerugoya HC ELC 258 of 2013 Benson G.**

Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others (2014) eKLR which cited with approval a rendition of the Indian case of; **Brij Kishore vs Bir Singh & Others Harana L.R. 5922 of 2013** wherein Justice Paramjeat Singh quoted the following from the Indian Supreme Court case of; **Prem Lala Nahata & Another vs Chandi Prasad Sikaria, (2007) 2**, Supreme Court Cases 551 at paragraph 18 and stated as follows:-

“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 cause 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.”

17. That similarly in the **Petition No. 14 of 2013 Law Society of Kenya vs Center for Human Rights and Democracy and 12 Others (2014) eKLR**, Supreme Court observed follows:-

“the essence of consolidation of suits 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.”

18. It was argued that it therefore follows the Court should exercise its discretion by comparing the suits sought to be consolidated to determine;

(a) *Whether the same involves common questions of law or fact;*

(b) *Whether the reliefs claimed arise out of the same transaction;*

(c) *Whether it is convenient and efficient to pursue the same in a consolidated suit in fulfilling the overriding objections;*

(d) *Whether consolidation will cause the Plaintiff and undue advantage/prejudice*

19. The Applicants further submitted that the core principle of consolidation where there are two cases in the same court involving a common issue arising out of similar points of law or facts were stated in the case of; **Stumberg and Another vs Potgeiter 1970 E.A. 323** where the Court stated:-

“where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”

20. Finally, in the case of; **Allahabad High Court of India in P.P. Gupta vs East Asiatic Co., Air 1960 All 184**, the Court also adopted the above position in the following terms:-

“The very nature of the principle of consolidation implies that there is a similarity or identity of the matter in issue in different suits between the same parties which should be decided by the court once and for all. The object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”

21. It was argued the fact remains that even where the cause of action is worded differently, for so long as the cases presented for consolidation revolve around the same subject matter, (in this case, alleged fraudulent and illegal transfer of funds), and therefore raise substantially common issues of law and fact, the Court is bound to exercise its discretion in favour of an order for consolidation as held by the

Supreme Court of Kenya in the case of; **Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others (2014) eKLR** that:-

“...in the circumstances, would it serve the interests of justice to consolidate the appeals in which the parties are the same, and the central issue is the same even if worded differently? The irresistible conclusion is in the affirmative.....”

22. The Applicants further argued that the Court should at all times be mindful of upholding the overriding objectives of ensuring the just, expeditious, proportionate and affordable resolution of the civil disputes as enshrined under Sections 1A and 1B in the Civil Procedure Act, (Chapter 21) Laws of Kenya. The overriding objective is meant for the attainment of justice and as well propounded by Waki, JA in the case of; **Court of Appeal Civil Application No. 299 John Gakure & 148 Others vs Dawa Pharmaceuticals Company Limited & 7 Others Civil Application No. 299 of 2007**, where the Court expressed itself as follows:

“jurisdiction of the Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principle aims. In the Court’s view, dealing with a case justly includes inter-alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective calls for a new thinking and innovation and actively including the granting of appropriate interim relief in deserving cases.”

23. That the same rationale was affirmed by the High Court in Nairobi **ELC Suit No. 1000 of 2012 Joseph Okoyo vs Edwin Dickson Wasunna (2014) eKLR** in which the Court cited with approval the case in **Korean United Church of Kenya & 3 Others vs Seng Ha Sang (2014) eKLR**, and observed:

“Consolidation of suits is done for the purpose of achieving the overriding objection of the Civil Procedure Act, that is, for the expeditious 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.”

24. The Applicants also submitted that as propounded through the entire course of their submissions, the issues of both fact and law arising from the two suits are so inextricably intertwined. The dividing line is tenuous at best and relates to two aspects namely the alleged collusion with the 1st Defendant in the fraudulent dealings as alleged in HCCC No. 547 of 2013 and use of embezzled funds for unjust enrichment as alleged in HCCC No. 548 of 2013

25. Finally the Applicant submitted that the request for consolidation was made to the Honourable Court during Case Management as prescribed under Order 11 Rule 3(1) and by then, none of the suits had progressed to the hearing stage to occasion the Plaintiff any disadvantage.

26. It was submitted that the request for amendment of pleadings sought does go beyond the sham that the Plaintiff has painted it to be. It inevitably falls in tandem with the request to consolidate to better enable this Court narrow the issues before it and in any event, the orders sought neither require the Plaintiff to amend their pleadings to come up with one Plaintiff nor abandon one in place of another. The issue of amendment of the Applicants’ defence can be addressed by directions from the Court.

27. However, the Plaintiff/Respondent reiterated the factual matters stating that the Plaintiff filed this suit against the Defendants to seek damages for loss occasioned by the conspiracy between the 1st Defendant on one hand and the 1st and 2nd Defendants on the other, to open a bank account in the name of the Plaintiff and to use it to siphon money directly from the Plaintiff’s actual account held with the Middle East Bank Kenya Limited and further the transfer of the money brought in to the account opened at the 1st Defendant bank to another account opened in the same bank in the joint names of the 2nd and 3rd Defendants for their own personal use.

28. In HCCC No. 548 of 2013, the Plaintiff has sued the 2nd and 3rd Defendants only, seeking for damages for losses occasioned by false accounting activities carried out by the said Defendants, on their own, to defraud the Plaintiff of its funds. These activities include false petty cash entries, illegal use of credit cards and issuance of false and illegal payment instructions, in order to embezzle money from the Plaintiff. That these activities are numerous given that they were incorporated in the daily activities carried out by the said Defendants in their capacities as Finance and Administration Manager and Accountant.

29. The Respondent submitted that the case of; **Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others (2014) eKLR** and re-stated in **Stumberg and Another Vs Potgeiter 1970 E.A. 323** laid down principles that guide consolidation of suits as follows:-

“where there are common questions of law or facts in actions having sufficient importance in proportion of the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered”

30. Similarly in the case of; **Brij Kishore vs Bir Singh & Others** at the **High Court of Punjab and Harana (L.R. 5922 of 2013)** Justice Paramjeat Singh quoting from the Court case of; **Prem Lala Nahata & Another vs Chandī Prasad Sikaria, (2007) 2, Supreme Court Cases 551** at paragraph 18 stated as follows:-

“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 of relief claimed in the suits are in respect 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 suit”

31. The Applicant further referred to the case of; **Law Society Of Kenya Vs The Centre for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 Of 2013,** where the Supreme Court of Kenya had this to say about consolidation of suit:-

“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 intended to occasion any disadvantage towards the party that opposes it”

32. It was argued that the Civil Procedure Rules mandate the Courts to consider consolidation of suits and in so doing, to be guided by the following factors:-

(i) Does the same question of law or fact arise in both cases?

(ii) Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transaction

(iii) Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party

33. The Respondent reiterated that these two matters are not appropriate for consolidation for the reasons, firstly that the two cases do not arise from the same transaction in that in this case the Plaintiff has sued the Defendants based on their conspiracy to transfer money from the Plaintiff’s account held with the Middle East Bank Kenya Limited, into an unauthorized and illegal account opened in the Plaintiff’s name at the 1st Defendant’s Bank. It is completely different from HCCC No. 548 of 2013, where the Plaintiff is

suing only the 2nd and 3rd Defendants based on their falsification of petty cash entries, illegal use of credit cards and falsification of payment instructions/ or demands.

34. Secondly, the two cases arise from different questions of facts and law, for instance, in the case herein, the Honourable court is called upon to determine whether indeed such an account was opened, whether it was opened with authority or not, whether it was opened with the collusion of the three Defendants, whether such an account was used to transfer money from the Plaintiff's actual account, whether the transfers were unauthorized and such like questions. Whereas in HCCC No. 548 of 2013. the Honourable Court, will be called upon to determine whether the various petty cash entries were false, whether the petty cash entries made were made by or on collusion of the 2nd and 3rd Defendants, whether money was taken from the Plaintiff on account of the petty cash entries, whether the 2nd and 3rd Defendants used the Plaintiff's credit cards on unauthorized expenditure, whether the 2nd and 3rd Defendants falsified payment instructions or demands, whether money was taken from the Plaintiff on account of these false demands and such like questions. Similarly, the questions of law arising from these cases are different and distinct, and there is no chance of the Court making conflicting determinations.

35. Thirdly, Consolidation of the two cases will prejudice the Plaintiff's case as most of the transactions were undertaken by the 2nd and 3rd Defendants daily in their ordinary cause of business and they are spread over a span of about eight (8) years, as the 2nd and 3rd Defendants were employees of the Plaintiff between the years 2005 and 2012 and there are bulky bundle of documents in HCCC No. 548 of 2013 and it is for this reason the suits were filed separately. If they are merged, they will become too complex and almost confusing to the parties and most likely to the Honourable court. This will result in a case marred with difficulties all of which will prejudice the Plaintiff's cases and will play to the advantage of the Defendant denying of the Plaintiff's right to a fair hearing and right to access justice, guaranteed under Articles 50 and 48, respectively, of the Constitution of Kenya.

36. The Applicant in final response stated the discretion of the Court to issue orders for consolidation is uncontested and contrary to the Plaintiff's contentions, consolidation as presently sought shall in no way alter or prejudice the Plaintiff's rights and that the Defendants are only seeking for an expeditious disposal of the suit.

37. That Respondent's adamant objection at consolidation and persistent advocacy for duplication of proceedings, particularly where the underlying issue are common in both suits falls nothing short of an oxymoron to the overriding objective of the Court as enumerated in **Nairobi ELC Suit No. 275 of 2009 Kenya Anti-Corruption Commission vs Wilson Gacanja & 2 Others (2014) eKLR** in which the Court cited in its own decision in **HC ELC No. 347 of 2012 and ELC No. 223 of 2011 (unreported)** and stated:

“ I am satisfied that the issue for determination in the various suits is common and in my opinion it would be expedient and time saving to try all the 5 cases together to obviate the necessity of having to hear the same evidence time and again in every suit and further to prevent the prospect of having conflicting decisions on the same subject matter.....”

38. The Applicant further submitted that delay should not be a basis of striking out this Application. It is only a hindrance when it is intentional, which the Plaintiff has miserably failed to illustrate. In the case of; **Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others Kerugoya HC ELC 258 of 2013 (2014) eKLR** the Court observed that:

“that explanation sounds plausible and in any event, delay alone, if reasonably explained, cannot be a bar to the consolidation of suits in appropriate cases and especially when there is no evidence to suggest that any party will suffer prejudice.”

39. In the same vein with respect to the issue of the inspection of documents, it is incumbent upon the Defendants/Applicants to exercise due diligence should they expect to succeed at trial and it is therefore malicious of the Plaintiff/Respondent to insinuate that a party's right during the trial process is frivolous and ill intended especially considering that the Plaintiff/Respondent has made no plausible attempt at

justifying their allegation.

40. The Applicants submitted that there is no timelines in bringing an Application for consolidation and relied on the case of; **Benson G. Mutahi vs Raphael Gichove Munene Kabutu & 4 Others (2014) eKLR** in which the Court analyzed the rationale in the Appellate decision in **Ngumbao vs Mwatate & 2 Others (1988) KLR 549** and citing the same with approval, ultimately held that consolidation can be done at any point in trial stating that:

*“it is also clear from a reading of the Court of Appeal’s decision in **NGUMBAO VS MWATATE & 2 OTHERS (1988) K.L.R. 549** that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore, the submissions of Mr. Muyodi that this case cannot be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition.”*

41. At the close of the arguments/submissions by the parties, I have considered the prayers in the Application and the submissions by the respective parties and I find that the issue to determine is whether the Applicants have met the threshold for consolidations of suits.

42. The law applicable is found under Order 11 Rule3 (I) (h) of the Civil Procedure Rules which states as follows:-

3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall

—

(a)-----

(h) Consider consolidation of suits;

43. Similarly, the case law on consolidation of suits as evidenced by the authorities cited above is now settled and the principles that arise there from are that;

(i) that the suits should have common questions of law and facts;

(ii) the reliefs sought in both cases in respect of or arise from the same transactions or a series of transactions; and

(iii) any other reason desirable to make the order.

44. It is therefore clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice, and expeditious disposal of matters, consequently promote judicial economy, so long as it is not to prejudice any of the Parties.

45. I have considered the averments in each Plaintiff filed in the subject suits and I note as follows on the mentioned issues:-

(a) Parties:

(i) The Plaintiff is the same in both suits;

(ii) Save for the 1st Defendant namely Chase Bank Limited in HCCC 547 of 2013, the 2nd and 3rd Defendants/Applicants are the same in both cases.

(b) Legal representation

(i) The Plaintiff in both suits is represented by the Law Firm of Rachier & Omollo Advocates;

(ii) The 2nd and 3rd Defendants in both suits are represented by the Firm of Kemboy & Company Advocates;

(iii) Save for the Firm of Robson Harrison & Company Advocates who represents the 1st Defendant.

(c) The pleadings

(i) The averments under paragraphs 1, 3, 4, 5 and 7 of the Plaintiff in HCCC 547 of 2013 is the same in all respect with the averments under paragraphs 1, 2, 3, 4, and 5 of the Plaintiff in HCCC 548 of 2013.

(ii) Prayers (i), (iv), (v), (vi) and (vii) sought for in the Plaintiff of HCCC 547 of 2013 are the same as prayers (ii), (iii), (iv), (v), and (viii) in HCCC 548 of 2013.

(iii) The particulars provided for under paragraph 8 of the Plaintiff in HCCC 547 of 2013 relates to conspiracy to defraud whereas the particulars provided for under paragraph 6 of the Plaintiff in HCCC 548 of 2013 relates to fraud.

(iv) It is however notable that at the end of each Plaintiff, prayers sought for as hereunder below stated are similar:

?General damages;

?An order of injunction;

?An order of tracing;

?An order directing the transfer of all the properties and assets to the Plaintiff;

?Judgment for the stated sum of money;

?Costs of the suit;

?Interest at Court rates; and

?Any other relief.

**?Both Plaintiffs are verified by an Affidavit sworn by one and the same person;
Henderikus Eikens**

(d) The witnesses

The Plaintiff's witness is Henderikus Eikens in both cases

(e) Plaintiff's List of Documents

The following documents are similar in both Plaintiffs;

(i) certificate of change of name;

(ii) employment contract for 2nd and 3rd Defendants;

(iii) bundle of documents indicating fraudulent of documents;

45. In a nutshell, what comes out clearly from the pleadings in both Plaints is that the 2nd and 3rd Defendants were employees of the Plaintiff in the capacity stated herein. It is alleged that they abused these positions to conspire with the 1st Defendant to defraud the Plaintiff of its money. The money was channeled through unauthorized transactions including but not limited to purchase of real property, motor vehicles, payments to purported Plaintiff suppliers and/or merely transferring funds to third Parties.

46. As aforesaid and based on the authorities cited above, the Court has a broad discretion to order for consolidation of suits even on its own motion and can consolidate to tie more than one action together for separate individual actions into one and get a single judgment, where the issues and witnesses are the same and the rights of the parties can be determined in one suit. (See *Tommie vs La Chance 412 SO 2nd 439 (Fla 4th DCA 1982)*).

47. To support this position the Court held in the case of; *Korean United Church of Kenya & 3 Others vs Seng Ha Sang (2014) eKLR* that:

“consolidation of suits is done for purposes 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.”

48. However, the Court observed in the case of; *Nyati Security Guards & Services Lrd vs Municipal Council of Mombasa (2004) eKLR* where the Court held that:-

“there was however situations where consolidation is undesirable....The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such a situation, the hearing will be longer the purpose of saving time will be defeated.”

49. In regard to this matter, the Respondents opposed consolidation and argued that matter No. HCCC 547 of 2013 relates to conspiracy in opening of an account whereas matter No. HCCC 548 of 2013 relates inter alia to falsification of petty cash entries, illegal use of credit cards. That the bundle of documents in HCCC No. 547 of 2013 is smaller compared to the bundle in HCCC No. 548 of 2013. In addition, many of the transactions undertaken by the Applicants are spread over a span of about eight (8) years. Finally if the two cases are merged they will become too complex, confusing even to the court, and/or the nature and substance of the cases will change. With due respect to these arguments, these issues cannot override the provisions of section 1A and 1B of the Civil Procedure Act (Cap 21) of the Laws of Kenya as stated above. The concerns raised by the Plaintiffs in terms of the management of the documentation and the complexity of the transactions can be dealt with during the pretrial directions and/or case management conference.

50. In conclusion I find that in view of the fact that the parties herein are basically the same and the transactions that gave rise to the two claims herein arose from the same circumstances, in that they relate to the Plaintiff and the 2nd and 3rd Defendants as employer and employee respectively and that the alleged fraudulent transactions occurred in the ordinary course of the 2nd and 3rd Defendants work, that the Counsels representing the parties and the witnesses are the same or likely to be, it is in the interest of justice and to achieve the rationale for consolidation of cases, that is the expeditious disposal of the case, in the cost effective manner, that I allow and hereby do allow the Application as prayed and order that these suits be consolidated.

51. As regards the prayer seeking for amendment of the Defence upon consolidation, I hereby grant leave to either of the parties to be at liberty to amend their pleadings within 14 days of this order, if need arises. In the same vein the parties are at liberty to file any other documents and/or statements to enable this matter to be heard expeditiously .

52. However, I find that it is in the interest of justice, that no costs are awarded at this stage, the same shall abide the outcome of this suit.

53. Those then are the orders of the Court.

Dated, delivered and signed in open Court this 20th day of March, 2018

G.L.NZIOKA

JUDGE

In the presence of;

Mr. Anam for Ms Fundi for the Plaintiff/Respondent

Mr. Akelo for Mr. Otieno for the 1st Defendant

Ms. Ogonjo for the 2nd and 3rd Defendants

Lang'atCourt Assistant