



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 321 OF 2007

MICHAEL HAMISI MWAYAYA WABUNGO &

ANOTHER.....PLAINTIFFS

- VERSUS -

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

1. By a Notice of Motion dated 14th April 2011 the defendant prays, in the main, that this suit be stayed or in the alternative that it be consolidated with HCCC No 300 of 2000 *Michael Hamisi Wabungo Vs National Bank of Kenya and another*.
2. The principal reasons are that the matters in issue in the two suits are similar, that the earlier suit should be heard first, that the applicant has a counterclaim against the plaintiff in the earlier suit for recovery and that the issues in both suits are so intertwined that separate trials will lead to a failure of justice.
3. Those averments are buttressed by the affidavit of Damaris Gitonga sworn on 14th April 2011. The deponent avers that the plaintiffs in the current suit seek to recover the share certificates only without bringing to trial the other important matters pleaded in HCCC No 300 of 2000 to wit the defendants counterclaim for Kshs. 614,160 wrongly granted to the business of the 2nd plaintiff herein or monies lent by the defendant and secured by those share certificates.
4. The defendant applicant thus submits that the issues in both suits are so closely intertwined that in the interests of justice, the present suit should be stayed pending the hearing of HCCC No 300 of 2000 or in the alternative, that both suits be consolidated.
5. The motion is opposed by way of grounds of opposition dated 20th June 2011. The primary points raised by the plaintiffs are two. First, that the present suit and HCCC No 300 of 2000 are founded on separate causes of action, and, two that in the present suit the 2nd plaintiff is not a party to the HCCC No 300 of 2000 and accordingly this is not a proper case to be stayed or consolidated with the older suit. The plaintiffs thus pray for dismissal of the motion.
6. I have heard the rival arguments. Section 6 of the Civil Procedure Act provides as follows;

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue in a previously instituted suit or proceeding between the same 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 in any other court having jurisdiction in Kenya to grant the relief claimed”

7. Again sections 1A and 1B of the Civil Procedure Act state that one of the overriding objectives of the court is to facilitate the just, expeditious, proportionate and affordable resolution of disputes. Embedded in this is the requirement for efficient use of the available judicial and administrative resources.

8. I am satisfied that this suit and HCCC No 300 of 2000 present common issues in controversy that are so intertwined that justice would not be fully and effectually done if the two are tried separately. I say so because in the latter suit, the plaintiffs who admit receiving loans from the defendant in this suit, claim for an injunction, damages and interest in that other suit. Of interest, the defendants in turn have a counterclaim there in the amended defence and counterclaim for Kshs. 27,616,371.80. In the present suit, the plaintiffs in the main pray for return of shares which in turn, the defendants allege were security for the lending.

9. The mere fact that there is a second plaintiff herein, just like there was a 2nd defendant in the earlier suit, does not preclude, under section 6 of the Civil Procedure Act aforementioned, a stay of the present suit. I am also satisfied that on the face of it, the 2nd plaintiff herein is only mentioned as a nominal plaintiff and only at paragraph 10 of the plaint where it is alleged that “some time in May 2000 the 1st and 2nd plaintiffs approached the Defendant with a view to having their shares released”. There is then a sense in which the 1st and 2nd plaintiffs are “parties under whom they or any of them claim” as provided for at section 6 of the Civil Procedure Act aforementioned.

10. Accordingly, I am of the considered opinion that under sections 1A, 1B and 6 of the Civil Procedure Act as well as the inherent powers of this court, the order that commends itself to me is to allow the Notice of Motion dated 14th April, 2011 in terms of prayer 1 thereof. In the premises, I order that this suit be stayed pending the determination of Nairobi HCCC No 300 of 2000 Michael Hamisi Wambungo Vs National Bank of Kenya Ltd and Another. The costs of this application are awarded to the defendant in any event.

It is so ordered.

DATED and DELIVERED at NAIROBI this 27th Day of October 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
No appearance for the Plaintiffs

Ms Kamau for the Defendant.