



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 920 of 2001**

**THE DELPHIS BANK KENYA LTD..... PLAINTIFF**

**VERSUS**

**MOHAMED ASHRAF.....1<sup>ST</sup> DEFENDANT**

**MOHAMED ANWAR.....2<sup>ND</sup> DEFENDANT**

**STELCO PROPERTIES LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

By an application dated 6<sup>th</sup> August 2008 made under the provisions of **Order XI Rules 1 & 2** of the **Civil Procedure Rules**, the defendants sought orders from this court that the present suit be consolidated with Nairobi HCCC No.4082 of 1994 which was filed by Crescent Construction Company Ltd as against the plaintiff. The application is supported by the annexed affidavit of Mohamed Ashraf and the grounds stated of the face of the application. The defendants contends that the matters in issue in this suit are also directly and substantially in issue in the counter suit in HCCC No.4082 of 1994. The defendants state that the two suits are pending determination by this court. They state that the present suit and the other suit deal with the issue of recovery of monies advanced to Crescent Construction Company Ltd which was allegedly guaranteed by the defendants. The defendants urged the court to consolidate the two suits, because in its view, it would save judicial time, eliminate the risk of contradictory decision and reduce the inconvenience of contesting the same issues of fact and law in two separate suits.

The application is opposed. The plaintiff filed grounds in opposition to the application. It states that the application was fatally defective, misconceived, frivolous and an abuse of the court process. The plaintiff states that the parties in HCCC No.4082 of 1994 are different and distinct from the parties in this suit. The plaintiff reiterates that Crescent Construction Company Ltd is not a party to this suit and therefore it cannot be included in this suit by virtue of consolidation. The plaintiff took issue with the fact that the defendants had sought to consolidate the two suits after a period of seven years which in its view was clearly evidence of a case of an afterthought. It states that the questions of law and the prayers sought in the two suits were totally different and if the court were to consolidate the suits, it would result in the clouding of the issues in dispute. The plaintiffs prayed for the application to be dismissed with costs.

At the hearing of the application, I heard the rival submissions made by Mr. Wetangula for the defendant and by Mr. Kariuki for the plaintiff. I have carefully considered the matters in issue in this application. For this court to consolidate any two suits, it must be satisfied that there are some common questions of law or fact arising in both suits, that the rights or reliefs claimed in the two suits arise out of the same transaction or series of transactions that are connected or that for some other reasons it is desirable to make such an order consolidating the suits. In the present application, the parties in the present suit are Oriental Commercial Bank Ltd (successors of Delphis Bank Ltd) and Mohamed Ashraf, Mohamed Anwar and Stelco Properties Ltd who are said to be the guarantors of a loan that was advanced to Crescent Construction Company Ltd by Delphis Bank Ltd. In HCCC No.4082 of 1994 the plaintiff is Crescent Construction Company Ltd whilst the defendant is the predecessor of the plaintiff in such suit.

Upon careful perusal of the two suits, it is evident that while the two suits could have arisen from the same transaction where the plaintiff in this suit is said to have advanced money to Crescent Construction Company Ltd, and which loan was allegedly guaranteed by the defendants in this suit, this court is of the view that the trajectory that the two suits have taken since they were filed precludes this court from making an order for the consolidation of the two suits. In the first instance, there is still pending litigation in respect of HCCC No.4082 of 1994 at the Court of Appeal. If the appeal is allowed, it may have an impact in the conduct of these proceedings if the two suits are awarded consolidated.

Further, it is clear that although the matter in dispute in the two suits may ultimately be whether the defendants herein and Crescent Construction Company Ltd are liable to pay the amount claimed by the bank, the issues for determination by the court in the two suits are different. I am in agreement with the plaintiff that consolidation of the two suits will result in the issues to be determined by the court being confused and clouded. The consolidation of the two suits will not aid this court in the just and expeditious determination of the matters in dispute. I therefore find no merit with the defendants' application. The application is dismissed with costs.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2009**

**L. KIMARU**

**JUDGE**