



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 292 of 2007**

**BASIL CRITICOS.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED.....DEFENDANT**

**R U L I N G**

**The application is a notice of motion dated 11th December 2007 expressed to be brought under Order XLIV Rule 1 and Order L rule 1 of the Civil Procedure Rules and Sections 3A, 63 (e) and 80 of the Civil Procedure Act. There are three prayers in this application as follows: -**

1. THAT this Honourable Court do order that the present application be heard prior to any other pending application in the consolidated suits.
2. THAT this Honourable Court be pleased to set aside, vary and/or review the order given on 15<sup>th</sup> June 2007 by the Honourable Lady Justice Lesiit consolidating the present suit with High Court Civil Case No. 108 of 2006 and High Court Civil Case No. 270 of 2007 on the purported consent of the parties.
3. THAT the costs of this application be provided for.

The application is based on five grounds cited on the face of the application as follows:

1. That there is an error apparent in the face of the record of HCCC No. 270 of 2007 in so far as it is purported in an order in that suit that the consolidation was made by the consent of the counsel of parties when as a matter of fact, the advocates of the Defendant in HCCC 292 of 2007 were neither present nor aware and that: -
  - (a) No formal or other application for consolidation was made or brought to the attention of the parties in HCCC No. 292 of 2007.
  - (b) The advocate engaged to act for the Defendant in HCCC 292 of 2007 was not present and was not a party to the consent order, and this renders the consent improper and of no binding value.
  - (c) The Defendant herein did not issue any instructions to any party other than its advocates on record in

HCCC No. 292 of 2007 to act for it.

(d) The record does not reflect the nature of the proceedings that resulted to the consent or the party, which consented on behalf of the Defendant to consolidate HCCC No. 292 of 2007 with the other suits.

2. That the suits herein do not involve same parties, do not raise similar questions of law, do not raise similar questions of facts and do not seek similar reliefs and for that reason the Defendant is represented by different Advocates and consolidation will be most inappropriate.

3. That the Defendant will be greatly prejudiced in its defence in HCCC 292 of 2007 if a determination of the issues raised in it is considered alongside matters which are completely irrelevant to it. In particular, the Defendant has raised the issue of *Res judicata* and multiplicity of suits and seeks to have the questions determined independently which defence would be defeated by an order of consolidation.

4. The Defendant is already enjoying orders granted to it by High Court of Kenya and the Court of Appeal which stands to be invalidated by conflicting *ex-parte* orders that have been granted in the other suits sought to be consolidated.

5. That it is in the interest of Justice that the said order be set aside reviewed and/or varied.

The application is also supported by further grounds contained in the affidavits. Two affidavits are by **LEONARD GETHOI KAMWETI** Advocate, the Company Secretary of the Defendant Bank, dated 11<sup>th</sup> December, 2007 and the second dated 15<sup>th</sup> February, 2008. The third affidavit is by **ABUGA SAMUEL MOGUSU** dated 11<sup>th</sup> March, 2008.

The application is opposed. Mr. Keith Howard Osmond, Advocate for the Plaintiff in HCCC No. 292 of 2007 swore an affidavit in opposition to the application dated 29<sup>th</sup> January, 2008. I have considered the content of the said affidavit, which basically restates the events in court on 15<sup>th</sup> June, 2007, when the consent order was made.

The Applicant's contention is that the Advocate on record for the Defendant Bank in the instant suit is Rachuonyo and Rachuonyo Advocates since 20<sup>th</sup> June, 2007 to date. The Applicant complains that the order made by the consent of the parties on the 15<sup>th</sup> June, 2007, consolidating the instant suit with HCCC No. 270 of 2007 and HCCC No. 108 of 2006 was irregular since the firm of Advocates on record for the Defendant/Applicant herein, were unaware that the application to consolidate the three suits was coming up on the said date. Counsel further submitted that since the record indicated that all parties had consented to the order of consolidation, it was an error on the face of the record as the Advocate representing the Bank in HCCC No. 270 of 2007, where the order was made, had not been instructed to represent the Defendant in the instant suit. Counsel relied on the affidavit of **Abuga Samuel Mogusu** filed in HCCC No. 270 of 2007, dated 11<sup>th</sup> March 2008. In the stated affidavit, at paragraph 4, Mogusu deposes that he was in court on 15<sup>th</sup> June 2007 for the mention of HCCC No. 270 of 2007, on behalf of the 3<sup>rd</sup> Defendant, and that he had no instructions from the Defendant Bank at any time, to consolidate HCCC No. 292 of 2007 with HCCC 270 of 2007 and HCCC 108 of 2006.

In response to the submission by **Mr. Rachuonyo, Mr. Nowrojee** for the Respondent urged the court to carefully read the record to see the events of 15<sup>th</sup> June 2007. Counsel drew the court's attention to representation by **Mr. Abuga**. That **Mr. Abuga** did not inform the court that he was not on record for the Bank in HCCC No. 292 of 2007 (the instant case) nor that he was unaware of the case nor that he required to consult his client.

I have read the proceedings of 15<sup>th</sup> June 2007 on HCCC No. 270 of 2007. Indeed the record is quite short and it is recorded as follows: -

“15.6.2007

*Coram: Lesiit, J.*

*Nthale: CC*

*Githinji holding brief Chebii for Plaintiff*

*Osmond for 1<sup>st</sup> and 2<sup>nd</sup> Defendant*

*Abuga for 3<sup>rd</sup> Defendant*

*Court:*

*By consent of parties HCCC No. 108 of 2006 and HCCC No. 292 of 2007 consolidated with instant suit.*

*LESIIT*

*JUDGE”*

The record is quite clear that the disclaimers being made before this court were not made before me in HCCC No. 270 of 2007, when the application to consolidate the three suits, by consent of the parties, was made. In that regard, affidavit dated 11<sup>th</sup> March 2008, at paragraph 4 is not supported by the record of the proceedings of 15<sup>th</sup> June, 2007 and are devoid of truth. I agree with **Mr. Nowrojee** that **Mr. Abuga** has offered no explanation for his conduct in court on 15<sup>th</sup> June, 2007, including his failure to disclaim HCCC No. 270 of 2007, as he is purporting to do in his affidavit under consideration, at the time the consent order was made. His disclaimer before **Azangalala, J.** on 18<sup>th</sup> July 2007, one month later and in his affidavit dated 11<sup>th</sup> March 2008, eight months later, comes rather late in the day.

I am also disturbed, as **Mr. Nowrojee** was, by **Abuga** Advocate's failure to give any explanation why he consented to the consolidation of these suits if indeed he had no instructions to do so from the Defendant Bank. To that extent, the Advocate's affidavit is evasive.

In regard to Rachuonyo and Rachuonyo Advocates not being aware that the case was coming up for mention, **Mr. Nowrojee** urged the court to note that, that could not possibly be true since on 15<sup>th</sup> June 2007, when the consent order in question was made, the said firm of advocates were not on record for the Bank in the instant case.

That position is quite correct as indicated earlier. Rachuonyo & Rachuonyo Advocate filed a notice of appointment in HCCC No. 292 of 2007 on the 20<sup>th</sup> June 2007, five days after the consent order was made.

I have gone further and perused the record of HCCC No. 292 of 2007. The Plaintiff was filed by the Plaintiff in court on the 11<sup>th</sup> June 2007, simultaneously with a chamber summons application of even date in which injunctive prayers are sought. I note from this record that the Defendant/Applicant herein, has not entered any appearance or filed defence since no summons to enter appearance have been taken out by the Plaintiff. Considering this record, it becomes apparent that at the time the consent order of 15<sup>th</sup>

June 2007 was made consolidating this suit with the other two, the Defendant had no advocate on record for it. For that reason, I agree with **Mr. Rachuonyo** that reflecting that the Defendant in HCCC No. 292 of 2007, who is the Applicant herein, was represented in that court, was incorrect and that it constitutes an error or mistake on the face of the record. **Mr. Osmond's** contention in his affidavit dated 29<sup>th</sup> January 2007 that he discussed with **Mr. Abuga** who was representing the applicant Bank in HCCC No. 270 of 2007, does not change this position. The record of the court is very clear that by 1<sup>st</sup> June, 2007 the Applicant herein had not instructed any advocate to represent it in the instant suit.

**Mr. Rachuonyo** has submitted that had the instant case file been placed before me on 15<sup>th</sup> June 2007, I could not have made the order consolidating the files as it may have found the consolidation inappropriate. **Mr. Rachuonyo** also submitted that the consolidation is likely to prejudice the Defendant's defence and that great difficulties are being experienced by the Defendant.

**Mr. Nowrojee** could hear none of these. Counsel submitted that the Defendant Bank was keenly involved in all three cases and that unless the Applicant was able to show that the cases are not same or similar and that even though parties are the same, the issues raised in the case are different, the application should fail. **Mr. Nowrojee** submitted that the Applicant had failed to satisfy the consolidation test as set out on **Order XI rule 1 of Civil Procedure Rules**.

**Order XI Rule 1** provides:

***"1. Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved the court may either, upon the application of one of the parties, or of its own motion, at its discretion, and upon such terms as may seem fit-***

***(a) order a consolidation of such suits, and***

***(b) direct that further proceedings in any of such suits be stayed until further order."***

I would agree with Mr. Nowrojee that all the considerations listed in that order are relevant ones to be had in mind at the time of consolidating suits, and equally in an application for review such as this one. I go further to add that where the application for review is premised on the ground that there was an error on the face of the record necessitating the review, I would think that the similarities of the parties or of the subject matter of the suits or of points of fact or law raised would not be a very important one to consider.

I have explained in this ruling why I agree that there was a mistake or an error apparent on the face of the record at the time the order for consolidation was made. That error is material and of great importance to all the parties. The effect of the error was to deny the Applicant herein opportunity to be represented in the matter. It also means that the Applicant's interest was not taken into account. That observation does not in any way reduce the severity of my observations regarding the conduct of Abuga Advocate and the reprimand expressed towards him in this matter. It was irresponsible that the counsel allowed consolidation in a matter he was clearly not instructed. However, that said and done, it is trite that the mistakes of counsel should not be visited upon his client.

I am satisfied, upon considering this application, that the Applicant has shown sufficient cause why the prayer for review of the courts order should be allowed. I will allow the application by varying the order of 15<sup>th</sup> June, 2007 to the extent that HCCC No. 292/07 be removed from the record of that order. HCCC NO. 292/07 should be heard separately.

Since the error was caused by Counsel representing the Applicant in HCCC No. 270 of 2007 let the Applicant bear the Respondent's costs of this application.

Dated at Nairobi this 18<sup>th</sup> day of April, 2008.

LESIIT, J.

**JUDGE**

***Read, signed and delivered, in the presence of:***

Mr. Koyoko holding brief for Chebii

Mr. Nowrojee for Osmond

Mr. Rachuonyo for Applicant

Rachuonyo for Mr. Abuga

LESIIT, J.

**JUDGE**

**Order:** Interim orders in HCCC No. 270 of 2007 and HCCC No. 108 of 2006 be and are hereby extended pending the hearing and determination of the pending applications in those files.

LESIIT, J.

**JUDGE**