



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 40 of 2005

NYANZA FISH PROCESSORS LIMITED.....PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD.....DEFENDANT

RULING

The applicant Barclays Bank of Kenya has combined two prayers which radically involve two different answers in one application. The application is a Notice of Motion dated 14th April, 2008. It is brought under Section 3A of Civil Procedure Act, Order II Rule 1 and 2, Order 25 Rule 6 and Order 50 rule 1 of the Civil Procedure Rules. In the said application the applicant seeks the following orders:

2. Milimani HCCC No. 40 of 2005 Nyanza Fish Processors Limited v Barclays Bank of Kenya Ltd be consolidated with Milimani HCCC No.140 of 2006 Barclays Bank of Kenya Limited v Afromeat Company Limited & 3 others.
3. Milimani HCCC No.140 of 2006 be deemed as the holding file.
4. Upon consolidation, the suits be marked as wholly adjusted or settled in terms of the Agreement or Compromise reached and evidenced by the correspondence exchanged between the parties between 6th November 2006 and 18th March 2008.
5. judgement be entered in favour of Barclays Bank of Kenya Limited in terms of the said Agreement or compromise as follows:
 - a) Judgement be entered jointly and severally in favour of Barclays Bank of Kenya Limited for the all inclusive sum of Kshs.35,000,000.00 as against Nyanza Fish Processors Limited, Afromeat Company Limited and Karim Mohammed Hassanali.
 - b) The sum of Kshs.35,000,000.00 be paid on a reducing balance basis free of interest in 48 equal monthly installments of Kshs.729,166.65 each payable on the last day of every month commencing from 31st March 2008 (now past) and thereafter on the last day of each succeeding month until payment in full.
 - c) In default or any one installment on the due date the balance of the entire decretal sum shall fall due and payable and interest shall accrue at court rates of 14% per annum from the date of default until payment in full and the bank shall be at liberty to exercise its statutory power of sale in respect of the charged property Kisumu Municipality/Block 3/123 and/or execute the decree against the judgement debtors.
 - d) In the event of no default in payment, Barclays Bank Kenya Limited shall forthwith discharge the Charge registered in its favour at the expense of Nyanza Fish Processors Limited upon payment of the decretal sum and the suit shall be marked as settled.
 - e) Each party shall bear its own costs in the consolidated cases.
6. Any further relief that may be deemed necessary in the interest of justice.

7. Costs of the application be awarded to Barclays Bank of Kenya Limited on the higher scale.

The grounds in support of the application are;

- (a) A lawful compromise/agreement has been reached between the parties which effectively settles the consolidated suit.
- (b) The compromise follows a lengthy period of negotiations that culminated in the settlement being reached.
- (c) The application effectively captures the precise terms of the compromise reached and there are no pending issues to go to trial.
- (d) At all material times the suits never proceeded to hearing of any application on account of the on going negotiations that were taking place.

The two prayers which are combined in this application are:

- (1) A prayer for consolidation of this suit with Milimani HCCC No.140 of 2006 and
- (2) That judgement be entered in favour of Barclays Bank for the sum of Kshs.35 million.

The nature of the application is that an order for consolidation be given at the first instance and that upon consolidation, the two suits be marked as wholly adjusted or settled in terms of the agreement or compromise reached and evidenced by the correspondence exchanged between the advocates for the parties.

Having gone through the application in detail and having listened to the rival submissions presented by the advocates in this matter, it is clear that the main target of the applicant is to enforce certain compromise allegedly reached with the plaintiff in this suit and other parties in HCCC No.140 of 2006. The question that arises is whether judgement can be entered before the issue of consolidation is addressed. I have considered the reasons advanced by **Mr. Allen Gichuhi** for the applicant and **Mr. Nagpal** for the plaintiff/respondent and one thing is clear in my mind that the issue of consolidation is central to the determination of the other issues in dispute between the parties. I therefore think that the applicant combined two prayers which are radically different in one application. It is for that reason that I intend to deal with the prayer for consolidation and leave the other prayer in abeyance in a further decision.

Mr. Nagpal learned counsel for the plaintiff was of the view that application for consolidation of the two suits has no merit. And that there is no reason for consolidation. It is true that applicant has not brought or that there is no material concerning the other file in this application. The applicant failed to annex the pleadings in HCCC No.140 of 2006 in the present application under my determination. However, **Mr. Allen Gichuhi** says that this court has powers under Order 13 rule 6 of the Civil Procedure Rules to call for that file. On the other hand **Mr. Nagpal** learned counsel for the respondent says there must be an affidavit evidence to show how the record is material to the present suit. And that a party is required to make a formal application in that respect. I am in agreement with **Mr. Nagpal** that the issue of consolidation is of paramount importance since the other reliefs sought by the applicant are predicated on consolidation.

Order XIII Rule 6(1) of the Civil Procedure states as follows:

“The court may of its own motion, and may in its discretion upon the application of any of the parties to a suit, send for, either from its own records, or from any other court the record of any other suit or proceeding and inspect the same”.

I appreciate that consolidation of suits is a matter which is simple and straightforward. However, the court has to determine whether the two suits intended to be consolidated involve the same or similar questions of law and fact. **Mr. Nagpal** says that there is nothing to show that the two suits involve the same or similar questions.

In the present suit the plaintiff is **Nyanza Fish Processors Limited** and **Barclays Bank of Kenya Ltd** is the defendant. In HCCC No.140 of 2006 the plaintiff is **Barclays Bank of Kenya Limited**, the 1st Defendant is **Afro meat Company Limited**, the 2nd defendant is **Nyanza Fish Processors Limited**, the 3rd defendant is Karim Mohamed Hassanali and the 4th defendant is Mohamed Hassanali who allegedly died some six years ago.

The present suit is concerned with the statutory notice served by the bank on **Nyanza Fish Processors Limited** in a matter involving loan facilities advanced to **Nyanza Fish Processors Limited**. **Mr. Nagpal** submitted that this suit is meant to question the format of the charge which is wrong and that the only issue in this suit is the validity of the charge

instrument. And that is why the plaintiff filed an application for injunction to stop the bank to sell the property over a charge which is invalid.

In HCCC No. 140 of 2006, the issue is guarantees signed by those sued except the 1st defendant who is supposed to be the debtor. Again **Mr. Nagpal** thinks there is absolutely no common point of law and fact involving the two suits and that is why the present applicant has not raised that issue in the application.

Having exercised my powers under Order XIII Rule 6 of the Civil Procedure Rules it is apparent that the two suits involve two sister companies and the primary individuals behind those two companies. I therefore think the issues involved in the two suits can be determined by consolidation. If the two suits are not consolidated there is an apparent danger of multiplicity of suits and remarkable delay in the resolution of the dispute. I also think considerable amount of judicial time would be saved by an order of consolidation. The central issue in the two suits is that the parties in both suits have a common thread. And that upon consideration of the issues, the court would be able to answer all the questions raised by the parties.

In my humble view consolidation of suits would be ordered where there are common questions of law or facts in two separate suits or 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. On the other hand consolidation should not be ordered where there are deep differences between the claims and defences in each action. I do not think there are any significant differences between the claims and the defences of the parties in the two suits subject of this application. As stated the real question in controversy in the two suits is whether the bank advanced monies to the parties involved and whether there is a legitimate reason to show that they are liable.

The question of the validity of the charge is central to the issue in dispute between the parties and the court can address that issue on the same breath with other issues which is whether monies were advanced to the parties and whether they are entitled to repay the same. I therefore think the consideration of the validity of the charge cannot stop this Honourable court from giving an order of consolidation.

The crucial question is whether or not the answer to the issues in one suit would be an answer to the second suit. And in my humble view the common questions of law or fact in HCCC No.40 of 2005 cannot be addressed without the danger of multiplicity and duplication in HCCC No. 140 of 2006. It is therefore, desirable that the whole of the matters in the two suits should be disposed of at the same time so as to save judicial time and ensure that justice is dispensed between the parties without duplication and danger of contradiction by different courts. It is for that reason that I allow the application for consolidation of the two suits to enable the court to address the real issues in dispute between the parties wholesomely. It is not in the interest of justice to determine issues that arise between the same parties over the same subject matter in a piecemeal manner therefore, the order for consolidation serves the interest of justice and that of the parties involved in the two suits.

The other issue is whether the applicant is entitled to the prayer for judgement as sought in this application. I think that prayer is premature and it was wrongly combined with prayer for consolidation in one application. That was not an appropriate procedure and nothing can be done until there is an order for consolidation. I do not think I should address my mind to the merit of that prayer so as not to prejudice the interest of the parties. I direct that that prayer be canvassed by the parties after the order for consolidation has been properly effected.

In the premises I make no finding on the prayer for judgement on compromise as prayed in prayer No.5 in the application dated 14th April, 2008. It does not in any way mean that, that prayer has been determined on merit hence the plea for *res judicata* would not apply. It also does not mean it has been struck out or dealt with in any manner. It is left pending for the decision of the applicant to take the next appropriate step. My determination on that prayer is that it was inappropriately combined with a prayer for consolidation. And it cannot be dealt with before the issue of consolidation has been determined. In conclusion the prayer for consolidation succeeds with no orders as to costs.

Dated, signed and delivered at Nairobi this 12th day of June, 2008.

M. A. WARSAME

JUDGE