



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 199 of 2005

MUTURI INVESTMENTS LIMITEDPLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT

RULING

An application is made by the Defendant brought under Order XI Rule 1 and 2 of the Civil Procedure Rules. The plaintiff seeks the following order:

“That this suit be consolidated with Nairobi (Milimani) HCCC No.624 of 2005, between Nairobi Mamba Village Limited –VS- National Bank of Kenya Limited, being a suit which is also pending before the Honourable Court”.

In support of that application it is deponed on behalf of the defendant that the two cases being the subject of the application arise from the same subject matter namely banking facilities advanced by National Bank of Kenya Limited to Nairobi Mamba Village Limited the principal debtor herein. That Principal debtor is the Plaintiff in HCCC No.624 of 2005. The facilities granted to the said Mamba Village Limited were secured by charges over LR. No.13525/3 Lang’ata road which property is registered in the name of Muturi Investments Limited. The said Muturi Investments Limited also executed a Deed of Corporate Guarantee. In HCCC No.624 of 2005 which are hereafter be referred as Mamba has prayed for a declaration that National Bank of Kenya is not entitled to claim any monies from the principal debtor because of an alleged breach of contract of lending. In this present suit which shall hereafter be called Muturi the guarantor has sought a declaration that all guarantees and securities given by itself to National Bank of Kenya Limited are illegal and enforceable because of alleged said breach. The guarantor in Muturi has also sought order for injunction to restrain the bank from realizing the suit property. In both these suits the Defendant herein has denied all the claims that are leveled against it. The deponent of the affidavit in support of the application concluded that in view of the foregoing that it is clear and obvious that the two cases are similar in substance and that they arise out of the same transaction. That the cases raise similar questions of law and fact and that it is in all probabilities that the same documents shall be produced in evidence at the trial of both suits. That accordingly it is in the interest of justice that the two cases be consolidated. That such consolidation will enable the court to make a final determination of the issues thereby and consequently will save the court’s time and also will avoid duplication of proceedings.

That application was opposed and in affidavit in reply sworn by the managing director of the Plaintiff stated that he is competent to swear the affidavit and he was of the view that the affidavit in support of defendant’s application was shallow, hollow and has not disclosed or established sufficient facts or material to enable the court exercise its discretion in favour of the prayers for consolidation. The Plaintiff

was of the view that this case would have proceeded to full hearing had it not been for this present application brought by the Defendant. He therefore concluded that the present application is an afterthought. He stated that the Defendant's affidavit is correct to the extent that Mamba case arises from banking facilities granted to Nairobi Mamba Village limited. He however stated that the Plaintiff in Muturi case and the principal borrower are separate and different legal entities. He stated that the Defendant is also correct that all the securities were signed by the Plaintiffs in this case in favour of the defendant in his capacity as guarantor. He stated that he is advised that in view of separate securities signed by each company the liability of each plaintiff to the defendant in both cases was separate and distinct and that the law applicable was quite different and that accordingly each suit ought to be heard separately. He stated that the present Muturi suit is filed by the Plaintiff in his capacity as guarantor to the borrowing of the principal borrower and the main prayer it seeks is an injunction to stop the bank from selling the suit property which forms the principal security of lending. He said that for that reason the charge document is materially defective and therefore unenforceable in law. In the Muturi case the Plaintiffs seeks the discharge of all the securities signed by the guarantor in favour of the defendant due to the material defect or variation of the security documents signed by the guarantor. That whereas the Mamba case is filed by the principal borrower seeking declaration amongst others that the defendant has breached the principal contract of lending and therefore no monies are due to the Defendant. The Plaintiff also in that case seeks an order for discharge of securities signed by the principal borrower. The deponent said that in view of the matters stated hereinbefore that it ought to be evident that reliefs that are sought in both suits are separate and distinct and are based on separate facts or grounds. That the action of filing the Muturi case by the guarantor was a conscious decision because one of the main complains in this case is that the defendant bank and the principal borrower varied the agreed terms of lending without the consent, knowledge or approval of the plaintiff in the Muturi case. The deponent was concerned that the defendant in the Mamba case had been trying to drag the name of Muturi Investments Limited into the proceedings as a cover up for its misdeeds which are alleged in this suit. The deponent was of the view that consolidation of both suits will be impossible for the court because the court will not be able to draw a distinctive line between the guarantor and the principal borrower and their respective liabilities to the defendant bank. That in any case in Mamba case discovery has not been completed. That there are voluminous documents already filed by the parties in the Muturi case and numerous issues for determination have been framed by the parties in Muturi suit. The deponent said that in the Muturi case the Defendant had failed to file a counterclaim for the monies against the guarantor. In the present consolidation proposed by the defendant the deponent was of the view that the objective was intended to cure this defect.

The Defendant counsel in his oral submission stated that both cases are still pending before this court. That they raises similar law and facts as required by Order XI rule 1 and 2 of the Civil Procedure Rules. That the consolidation is in the interest of justice to ensure that there are no conflicting decisions in two cases. The consolidation will not prejudice the parties but will indeed save the court's time. Counsel said that it is possible to demonstrate that the issues in Muturi are exactly the same as the issues in Mamba case. Counsel took the court to the various paragraphs from the Muturi and the Mamba case to show the similarity in both cases. She referred to the documents that have been pleaded in both suits which will require the court to make an interpretation. She was of the view that if the two cases were to go before two different judges the courts will be embarrassed if the matters are decided differently and if those documents are interpreted differently.

The Plaintiff's counsel in opposition accepted that the issue of consolidation is a matter for the discretion of the court. He however stated that it does not mean from the arguments relied upon by the defendant that where the issues of fact or law are the same that consolidation must be made. He stated that it is the plaintiff's point of view that if consolidation is ordered the Plaintiff will suffer prejudice. He also faulted the defendant for having waited for one year since the filing of this suit to make the present application. He was of the view that the defendant in his application ought to fail for they have failed to indicate what prejudice they would suffer if the suits are heard separately. In view of the discovery not being complete in the case of Mamba he was of the view that would delay the hearing of this suit. He further stated that in the Mamba case the defendant has counterclaim for Kshs.163 million whereas in this case there is no counterclaim. He therefore submitted that an attempt to consolidate is to mend the lack of a counterclaim in the Muturi case.

The court has taken note of the rival arguments of the parties. Order XI rule 1 (a) and (b) provides as follows:-

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, as 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.**

It is obvious that this rule affords the court the discretion in regard to an application such as the one before the court. Having examined the pleadings I am of the view that the two actions have a common question of law and of fact in that they relate to the same lending and hence the documents which shall be relied upon shall also require similar interpretation from the court. It is clear to me that to order the suit to be heard separately will mean that the evidence submitted by the parties will be duplicated in both cases. There is therefore, the danger and every likelihood that the different courts could reach different decisions in the two cases. I find no substance in the arguments offered by the Plaintiff for what is at stake is not the distinctiveness of Muturi or Mamba but rather the interpretation of the documents relating to the common lending. I find that there is sufficient common question of law and fact in both suits to render it desirable that the suit be disposed at the same time. Being therefore of that mind the following are the orders of this court:-

- (1) That this suit shall and is hereby consolidated with HCCC Milimani 624 of 2005. This suit shall be the lead suit.
- (2) That in that consolidated suit **Muturi Investments Limited** shall be the 1st Plaintiff and **Nairobi Mamba Village Limited** shall be the 2nd Plaintiff while **The National Bank of Kenya Limited** shall be the Defendant.
- (3) The costs of the Chamber Summons dated 1st August, 2006 shall be in the cause.

MARY KASANGO

JUDGE

Dated and delivered this 6th day of November, 2006.

MARY KASANGO

JUDGE