



**Lim & another v Diamond Trust Bank & 2 others (Commercial Case E068 of 2018)  
[2024] KEHC 1046 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1046 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E068 OF 2018  
A MABEYA, J  
FEBRUARY 9, 2024**

**BETWEEN**

**SUN PIL LIM ..... 1<sup>ST</sup> PLAINTIFF**

**DAEHAN PHARMACEUTICAL LTD ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**DIAMOND TRUST BANK ..... 1<sup>ST</sup> DEFENDANT**

**JONG CHAN LEE ..... 2<sup>ND</sup> DEFENDANT**

**JONGMIN JAY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. On 4/10/2023, PW2 concluded his testimony and the plaintiffs closed their suit. It was the time for defence hearing on 5/10/2023, when Mr. Kiragu SC, Learned Counsel for the 2<sup>nd</sup> defendant made an application that the 2<sup>nd</sup> defendant should call evidence before the 1<sup>st</sup> defendant.
2. He submitted that the Court had the discretion to choose the party that would come first in giving evidence by virtue of Order 18 rule 1 of the Civil Procedure Rules. His argument was that, based on the agreed issues, the dispute was whether the withdrawals of funds from the plaintiff's accounts with the 1<sup>st</sup> defendant were authorized and that the 2<sup>nd</sup> defendant had admitted to making the withdrawals.
3. That it would cause injustice if the 1<sup>st</sup> defendant was made to testify first without the cross examination of the 2<sup>nd</sup> defendant. He further submitted that the 2<sup>nd</sup> plaintiff and the 2<sup>nd</sup> defendant were on the same side. He cited *Sarkar's Code of Civil Procedure*, 11<sup>th</sup> Ed, 2006 in support of his submissions that there was discretion in choosing who is to start among the defendants.



4. Mr. Mwenda, Learned Counsel for the plaintiffs opposed the application. He submitted that his clients had only sued the 1<sup>st</sup> defendant. That the other defendants were not in the original suit but were introduced by the 1<sup>st</sup> defendant.
5. He observed that in view of order 18, the plaintiff had the right to begin and the defendants had the right to hear the accusations levelled against them. That since the other defendants were brought in by way of cross suit, the 1<sup>st</sup> defendant was the plaintiff and the rest of the defendants were qua defendants.
6. On her part, Mrs. Odiya, Learned Counsel for the 2<sup>nd</sup>, 7<sup>th</sup> and 8<sup>th</sup> defendants submitted that the plaintiffs' suit was as against the defendant and not the defendants in the counterclaim. That the suit should proceed in the normal manner and there be a cross suit.
7. I have considered the submissions of Learned Counsel. In the original action, the plaintiffs' case against the 1<sup>st</sup> defendant bank was for the sums deposited in their account held with the 1<sup>st</sup> defendant that had been withdrawn. Faced with the claim, the 1<sup>st</sup> defendant made a counter-claim against the other defendants recover the amount in dispute from them.
8. Order 18(1) of the Civil Procedure Rules gives a plaintiff the right to begin in a case because, he has the burden to prove his case. It provides: -
 

“The plaintiff shall have the right to begin unless the court otherwise orders.”
9. The right to begin is governed by the rules of evidence. It is clear that the party on whom the burden of proof lies should begin. In the present case, the plaintiffs in the original case having presented their case, naturally, it would be upon the defendant to give a rebuttal. In the normal order of things, the 1<sup>st</sup> defendant ought to start in giving evidence. From the pleadings however, it would appear that the 1<sup>st</sup> and 2<sup>nd</sup> defendant in the counterclaim are in support of the plaintiff's case.
10. In the text cited by Mr. Kiragu SC, Sarkar's Code of Civil Procedure, the learned author observes at page 1465 thus: -
 

“As regards the defendants inter se which of the defendants should begin has not been dealt with in Order 18. The defendants who wholly or in part support the case of the plaintiffs should be called upon to lead evidence.”
11. In the Indian case of *Shah Hiralal Himatlal and others. vs M. G. Pathak and others*, AIR 1964 Guj 26, the court delivered itself thus: -
 

“So far as the defendants go, the question which of three defendants should begin has not been dealt with in Order 18, C. P. Code. But on general principle, if any of the defendants supports the plaintiff in whole or in part, then he should address the Court and lead his evidence first before the other defendants who do not support wholly or in part the plaintiff's case. The order in which defendants lead evidence becomes important only when some of them support the case of the plaintiffs in whole or in part while the others do not. If all the defendants completely oppose the plaintiff's case, then the question of order of leading evidence amongst the defendants is immaterial. It is only when the defendants are divided into two groups, one group consisting of the defendants supporting the plaintiff's case in part and the other group consisting of defendants, who do not support the plaintiff's case in any part that the question of order of leading evidence becomes important. In such cases among defendants the order of leading evidence should be as follows:(1) those defendants who fully support the case of the plaintiff, (2) those defendants who partly



support the case of the plaintiff and (3) those defendants who do not support the case of the plaintiff in any part”

12. I fully agree with the said rendition as the proper position in law. This is because, for good order, when any of the defendant supports the case for the plaintiff, the flow of both the evidence and issues that fall for determination of such defendant and the plaintiff is sequential. It should be settled first before requiring that defendant who do not support the plaintiff's case. The latter's testimony then follows as a rebuttal.
13. In my view, that should be the sequence because, if the defendant who does not support the plaintiff's case offers his evidence first and then followed by that defendant who is in support of the plaintiff's case, then as a matter of course a need shall arise for the other defendant to return and rebut the latter testimony. That might be a waste of the precious meagre judicial time.
14. In the present case, the 2<sup>nd</sup> defendant admitted the plaintiffs' claim in its defence. In view of this admission, the plaintiff in the counterclaim is absolved of the duty to begin and the defendants in the counterclaim should be called upon to give evidence first.
15. In view of the foregoing, I find that the application by Mr. Kiragu SC is merited. I find that the 2<sup>nd</sup> defendant should give evidence first before the 1<sup>st</sup> defendant as this would tidy up the process and bring out the issues between the parties clearly for the Court's determination.
16. Accordingly, the 1<sup>st</sup> defendant's application is hereby allowed. The 2<sup>nd</sup> defendant to prepare and give evidence in the next hearing date.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

