



**Kinuthia v Ndiritu (Miscellaneous Civil Application E456 of 2022)  
[2024] KEHC 5772 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5772 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
MISCELLANEOUS CIVIL APPLICATION E456 OF 2022**

**JWW MONG'ARE, J**

**MAY 13, 2024**

**BETWEEN**

**MOSES KINUTHIA ..... PLAINTIFF**

**AND**

**JOSEPH MALOGO NDIRITU ..... DEFENDANT**

**RULING**

1. By an application dated 23<sup>rd</sup> December 2022 the Plaintiff/Applicant has moved the Court under Section 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 36 Rules 1 and 2 and Order 51 of the [Civil Procedure Rules](#) seeking the following Orders:-
  1. That summary judgment be entered against the Defendant in the sum of Kshs.104,000,000/=.
  2. That the said amount to continue to accrue interest at Court rates from 21<sup>st</sup> January 2019 until payment in full.
2. The application is supported by the grounds set on its face and the supporting affidavit of Moses Kinuthia. The Defendant having been served with the application did not file any response. Instead, the Defendant on 5<sup>th</sup> January 2023 filed his own Notice of Motion application brought under Order 11 Rule 3, Order 51 Rule 1 of the [Civil Procedure Rules](#) & Sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following orders:-
  1. An order do issue consolidating the instant suit with Misc. Cause No. E813 of 2020(OS) and the same be heard and determined by lady Justice Mshila Abigail.
  2. Upon consolidation, the Defendant/Applicant be granted subsequent leave to file his statement of Defence/Replies in the respective suit in terms of the Defendant's witness statement filed in Misc. Cause No. E813 of 2020(OS).



3. The Honourable Court do make such other and further Orders as it may deem fit, necessary and expedient in the interest of justice.
4. That costs of this application be in the cause.
3. The Application is supported by the grounds set on its face and the supporting affidavit of John Malogo Ndiritu sworn on 5<sup>th</sup> January 2023. The original application was erroneously dated as having been filed on 26<sup>th</sup> April 2022 but this date was corrected by an amendment to reflect the proper date of filing being the 5<sup>th</sup> January 2023. The Plaintiff opposed this application and filed a replying affidavit sworn by Moses Kinuthia on 27<sup>th</sup> October 2023.
4. I have considered carefully the two motions filed in this matter and the rival submissions filed by the parties and highlighted before me and I note that there two issues that arise for determination by the Court, to wit:-
  - i. Whether the prayer for summary judgment should be granted?
  - ii. Whether the Court should allow consolidation of the two matters?
5. In considering request for entry of summary judgment I have considered the arguments put forward by the parties and the dictates of the *civil procedure Act* and Rules. Before considering the said application, it is important for the Court to consider the application brought by the Defendant seeking to consolidate the two separate suits and have them heard together. As stated earlier, the application was vehemently opposed by the Plaintiff.
6. To address the question as to whether the two separate suits should be consolidated the Court is guided by decisions various decisions emanating from the Courts. The jurisdiction to consolidate suits is donated by order 11 Rule 3 of the *Civil Procedure Rules*. In *Prem Lala Nabata & Anor v Chandi Prasad Sikaria* [2007] 2 Supreme Court Cases 551, the India Supreme Court held: -

“It cannot be disputed that the Court has power to consolidate suits in appropriate cases.... The main purposes of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights or relief claimed in the suits are in respect or arise out of the same transactions or series of transactions; or that for some other reasons it is desirable to make an order consolidating the suit.”
7. In determining the question on consolidation of suits the Supreme Court had this to say in *Law Society of Kenya v Center for Human Rights & Democracy & 12 Others* [2014] eKLR, when it held: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”



8. In *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2000] eKLR, the Court held: -

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same Court where: -

- a. Some common questions of law or fact arises in both or all of them.
  - b. The rights or reliefs claimed in them are in respect of the same transactions;
  - c. For some other reasons, it is desirable to make an order for consolidating them.”
9. From the foregoing, it is clear that the Court has a wide discretion in ordering consolidation of suits. Consolidation will be ordered if there is a common question of law or fact in the suits, the reliefs or rights sought arise from the same or a series of transactions, or for any other reason such as for convenience, avoiding multiplicity of suits, expedition and in order to meet the overriding objective set out in the *Civil Procedure Act*, Cap 21 Laws of Kenya.
10. The grounds upon which the present application was made were inter-alia, that the suits raise a common question of law and fact, in that the entire pleadings and suit herein lay on the enforcement of the Deed of Settlement dated 21<sup>st</sup> December 2018, between the parties herein which has enjoined their advocates on record hence and resulted in the filing of Misc. Cause No. E813 of 2020(OS) wherein the parties are *Daniel Muriuki T/A Oundo Muriuki & Co. Advocates v Martin Mbichire T/A as Mbichire & Co. Advocates*.
11. The Applicant in making this application admits that the suit between the said advocates is part heard and that the Plaintiff and his Advocates have already testified and closed their case. What remains in the said suit is for the Defendant and his Advocate to put forward their defence, and the matter was scheduled hearing on 21<sup>st</sup> February 2023 when this application was filed.
12. I have looked at the two suits carefully and note that indeed the suit between the two Advocates having been filed in 2020 is already partly heard. The present suit was filed in 2022. In opposing this application, the Plaintiff argues that the two suits although emanating from the impugned Deed of settlement are not similar and are not premised on the same cause of action. That the Professional undertaking sought to be enforced in Misc. Cause No. E813 of 2020 is a distinct and separate contract, while the suit between the Plaintiff and the Defendant emanates from a breach of contract which the Plaintiff seeks to enforce in HCC Civil Cause No E456 of 2022.
13. It is important to note while the issues in the two suits are drawn from the deed of settlement, the parties to the said suits are not the same. The suit in Misc. Cause Application in E813 of 2020(OS) is filed by Advocate on record for the plaintiff against the Advocate on record for the Defendant, the Plaintiff in the said suit has moved the Court seeking the following Orders:-
- i. This Honourable Court be and is hereby pleased to order the Defendant to honour his professional undertaking dated 4<sup>th</sup> December 2018 and return the duly executed Share Transfer Forms for Bush Air Safaris Limited to the Plaintiff.
  - ii. The Defendant do bear the costs of the suit.
14. While the present suit being HCC Civil Case No. E456 of 2022 the Plaintiff and the Defendant are parties to the Deed of Settlement and that the Plaintiff seeks the following Orders:-
- a. Kes. 104,000,000 as particularized under paragraph 57 above.



- b. Interest on (a) above at 14% rates annum from 21<sup>st</sup> January 2020.
  - c. Costs of this suit.
  - d. Any other order that the Court shall deem fit to grant.
15. I have considered the arguments put forward by the two parties and I take cognizance that the matter in Misc. Cause No E813 of 2020 is already part heard by the Court. I also note that the two suits although joined by the Deed of settlement between the Plaintiff ostensibly seek different and separate reliefs from the Court and that they are between two different sets of parties. I am therefore not persuaded that these two suits should be consolidated and heard together. The application for consolidation is therefore defeated and the same is dismissed with costs to the Plaintiff.
16. Turning to the second issue before me, the Plaintiff on 23<sup>rd</sup> December 2022 filed an application under Order 36 Rules 1 and 2 of the Civil Procedure Rules seeking to have the Court enter judgment against the Defendant for the liquidated claim in the sum of Kshs.104,000,000/=. The plaintiff also sought interest at Court rates from 21<sup>st</sup> January 2019 till payment in full together with costs. The Defendant did not file a response to this application. Instead, the Defendant filed his own motion seeking to consolidate this suit with Misc. E813 of 2020. The Court has already, within this ruling, determined the question of consolidation herein before.
17. Order 36 Rule 1 and 2 provide as follows:-  
Summary judgment [Order 36, rule 1]
- (1) In all suits where a plaintiff seeks judgment for—
    - (a) a liquidated demand with or without interest; or
    - (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the Defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
  - (2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.
18. I have perused through the record in this case and note that the Plaintiff herein was filed on 18<sup>th</sup> November 2018 and that the Defendant, upon being served with the Summons to enter appearance and Defence, filed a Notice of Appointment of Advocates dated 14<sup>th</sup> December 2022. The Defendant has not filed a defence to the above suit. However, the Defendant in his application for consolidation of this suit with Misc. Cause No E813 of 2020, did in the said application at prayer No. 2 thereof plead as follows:-
2. upon consolidation, the Defendant/Applicant be granted subsequent leave to file his statements of Defence/Replies in the respective suit in terms of the Defendant's witness statement filed in Misc. Cause No. E813 of 2020(OS).
19. To the supporting affidavit in the said application there is not attached a draft defence for the Court to consider. Despite having had ample opportunity to file its defence, the Defendant did not do so. The Defendant filed submissions to the motion before this Court which I have carefully considered. I note that nowhere in the said submissions or the Replying affidavit does he offer an explanation as to why there is no defence filed to date to challenge the suit by the Plaintiff. I note however the claim by the



Plaintiff before the Court is a claim for a liquidated sum of money with interest and cost, and pursuant to the dictates of Order 36 Rule 1 and 2 cited above, the Applicant has met the threshold for a grant of the Orders set out therein. I therefore find and hold that the said application has merit and I grant the same. Consequently, I enter judgment in favour of the Plaintiff against the Defendant as follows;

1. The sum of Ksh. 104,000,000/=.
  2. Interest at Court rates at 14% per annum from the date of filing suit being 18<sup>th</sup> November 2022 till payment in full.
  3. Costs of this suit.
20. Subsequent to these Orders, the suit in Misc. Cause No. E813 of 2020(OS) may proceed to full trial.  
It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF MAY, 2024.**

.....  
**J.W.W. MONG'ARE**

**JUDGE**

In the Presence of:-

Mr. Kiplangat for the Plaintiff

Mr. Mbichire for the Defendant

Amos - Court Assistant

