New Attitude Limited v Equity Bank Limited & another (Commercial Case E187 of 2023) [2024] KEHC 6283 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6283 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E187 OF 2023

MN MWANGI, J

MAY 15, 2024

BETWEEN

NEW ATTITUDE LIMITED ..... PLAINTIFF

AND

EQUITY BANK LIMITED ..... 1ST DEFENDANT

PHILIPS INTERNATIONAL AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. The 1st defendant filed a Notice of Motion application dated 13th September, 2023 under the provisions of Sections 1A, 1B & 63(e) of the *Civil Procedure Act*, Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 and the inherent powers of the Court seeking the following orders -

    i. Spent;

    ii. Spent;

    iii. That the default judgment entered against the 1st defendant and all consequential orders be set aside;

    iv. That the 1st defendant be allowed to enter appearance and file a defence;

    v. That this suit be consolidated with High Court Comm Case No. E082 of 2020 Muga Developers Limited versus Equity Bank (Kenya) Limited & 4 others; and

    vi. That the costs of this application be provided for.

2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn on 13th September 2023 and 5th December 2023, by Kariuki King'ori, the 1st defendant's Legal

Services Manager. In opposition thereto, the plaintiff/respondent filed a replying affidavit sworn by Peter Kiarie Muraya, the plaintiff's Director, on 7th November, 2023.

3. The instant application was canvassed by way of written submissions which were highlighted on 12th February, 2024. The 1st defendant's submissions were filed by the law firm of Hamilton Harrison & Mathews Advocates on 5th December, 2023, whereas the plaintiff's submissions were filed on 29th January, 2024 by the law firm of Murgor & Murgor Advocates.

4. Mr. Ondieki, learned Counsel for the 1st defendant relied on the case of *Patel v East Africa Cargo Handling Services Limited* [1974] EA 75 at page 76G to 77B where the Court set down the principles to be considered in deciding whether to set aside an exparte order and submitted that the 1st defendant's draft statement of defence raises triable issues, thus the judgment in default should be set aside so as to allow the dispute between the parties herein to be determined on merits. He also stated that the 1st defendant's failure to enter appearance or defend this suit is not intentional. He submitted that the 1st defendant became aware that default judgment had been entered against it on 6th July, 2023 since it had not been served with a notice of entry of judgment prior to that date.

5. The 1st defendant indicated that it made enquiries in its offices and discovered that the summons to enter appearance, which was a loose document not affixed to the bound volumes of the plaint and the injunction application, was not forwarded to its Legal Department together with the bound volumes by the Officer who received the Court papers, who is not a legal person, as a result of an inadvertent error on the 1st defendant's part. That upon confirming that summons to enter appearance had indeed been served, the 1st defendant had to go through its records in order to recover all the necessary information to enable it respond to the plaintiff's allegations. Mr. Ondieki contended that the instant application was filed as soon as the said information which relates to transactions from over 6 years ago had been recovered. In addition, he stated that it took some time to recover the said information in view of the fact that the 1st defendant has a wide customer base of approximately 17.5 Million customers, and it maintains documentation for all its customers and archives records as time passes.

6. On the issue of consolidation of suits, Mr. Ondieki cited the case of *Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others* [2014] eKLR, where the Court followed the decision in *Stumberg & another v Potgeiter* 1970 EA. 323 and informed this Court that the plaintiff company is inextricably linked with Muga Developers Limited since both companies share the same Directors and Shareholders. He submitted that the 1st defendant placed Muga Developers Limited under receivership to recover the sums owed to it and the said company challenged the receivership in High Court Commercial Case E082 of 2020 on grounds that it has fully repaid its loan to the 1st defendant, which suit is still pending in Court. It was stated by Counsel that Muga Developers Limited undertook a project to construct housing units on LR No 28223/33 which property was charged to the 1st defendant.

7. Mr. Ondieki submitted that sometime in the year 2016 at the instance of Muga Developers Limited, undeveloped portions of LR No. 28223/33 were excised and transferred to the plaintiff and charged to the 1st defendant, to limit the risk posed to the Fourways Junction Project because of infighting of Directors within Muga Developers Limited. Counsel stated that as a result, the plaintiff's finances and those of Muga Developers Limited were intertwined in relation to the financing that was being extended under the facility letter dated 19th February, 2019 that was offered to the plaintiff and Muga Developers Limited, and any repayments made by either company were applied to reduce the indebtedness of both companies. Mr. Ondieki stated that Muga Developers Limited in a letter dated

9th May, 2019 written by Peter Muraya, instructed the 1st defendant to sell plots C3, C4 & C5 owned by the plaintiff, so as to reduce the debt owed to the 1st defendant.

8. It was submitted by Mr. Ondieki that the plaintiff's indebtedness cannot be separated from that of Muga Developers Limited. He contended that the validity of the facility letter dated 19th February, 2019 which the plaintiff disputes can only be determined where the two companies are involved in the same suit. In submitting that this suit ought to be consolidated with High Court Commercial Case E082 of 2020 Muga Developers Limited versus Equity Bank (Kenya) Limited and 4 others, as the common issue to be determined is the indebtedness of the two related companies to the 1st defendant as a result of the consolidated facility of 19th February, 2019, learned Counsel referred to the Supreme Court case of *Law Society of Kenya v Center for Human Rights & Democracy & 12 others* [2014] eKLR.

9. Counsel further submitted that other than the common issues of law and fact, the other issues to be taken into account are that the witnesses in the two matters would be the same and the parties in the two suits are also represented by the same firms of Advocates, and that consolidating the two suits will save the Court's time and resources. He argued that there will be no disadvantage suffered by the plaintiff if the two suits are consolidated since the hearing of High Court Commercial Case E082 of 2020 is yet to start.

10. Mr. Otieno, learned Counsel for the plaintiff relied on the case of *James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR and the provisions of Order 10 Rule 11 of the Civil Procedure Rules, 2010 and submitted that the 1st defendant does not dispute that on 5th May, 2023, it was duly served with summons to enter appearance, plaint, verifying affidavit, witness statement and bundle of documents but it failed, ignored and/ or neglected to enter appearance and file a statement of defence, and for that reason, the default judgment sought to be set aside is a regular one. He submitted that the 1st defendant's draft defence annexed to its affidavit does not raise any triable issues. He contended that the plaintiff's claim is not only plain and simple but is also supported by the 1st defendant's statement of accounts which confirm that the proceeds of sale of the plaintiff's charged parcels of land known as LR. Numbers 28223/33 C1, C2, C3, C4 & C5, paid the 1st defendant a total of Kshs 761,000,000/=, which is in excess by Kshs 253,533,555.60, in full service of the loan facility advanced to the plaintiff.

11. Counsel referred to the case of *Board of Management St Augustine Secondary School v Chambalili Trading Co. Ltd* [2021] eKLR and stated that no prejudice shall be suffered by the 1st defendant if the instant application is dismissed, as to the contrary, the plaintiff stands to suffer great prejudice in the form of a plethora of cases by the chargor and its buyers, in the event the application herein is allowed. He further stated that if the application herein is allowed the plaintiff will make an application for summary judgment in view of the 1st defendant's unequivocal admissions and acknowledgements. Mr. Otieno argued that the 1st defendant's alleged negligence and recklessness does not amount to sufficient cause which is rational, plausible, logical, convincing and reasonable, and which does not leave doubt in the Court's mind.

12. Mr. Otieno cited the case of Grace Cherotich Kemboi v Simon Kipkoech Ngotwa & another [2020] eKLR and stated that the 1st defendant has inordinately delayed in filing the instant application since the default judgment in question was entered on 12th June, 2023. He referred to the Court of Appeal case of *K v K* [1993] eKLR and submitted that the Court's discretion to set aside judgment must be exercised judiciously. He relied on the Supreme Court case of *Law Society of Kenya v Center for Human Rights & Democracy & 12 others* (*supra*) and submitted that the instant application has not met the threshold for grant of an order for consolidation of the two cases sought to be consolidated. He stated

that consolidation of this suit and High Court Commercial Case No. E082 of 2020 would confer undue advantage on the 1st defendant and occasion disadvantage on the plaintiff.

13. Counsel for the plaintiff argued that the parties in the two suits are different, the causes of action and the subject-matters in the two suits are worlds apart since the subject of this suit is a loan agreement dated 9th November, 2016 and a letter of offer dated 24th August, 2016, and it challenges the sale of all that property known as LR. No. 209/7733 Muchai Drive by the defendants for a purported outstanding loan of Kshs 507,946,444.40. That HCOMM E082/2020 on the other hand is founded on loan agreements dated 28th March, 2011 and 19th September, 2016, and challenges the notice dated 10th February, 2020 appointing a Receiver Manager and the placement of Muga Developers Ltd in receivership. In addition, Counsel stated that the reliefs sought in the two suits are totally different with no point of convergence at all.

14. Mr. Otieno asserted that the facility letter dated 19th February, 2019 relied on by the 1st defendant was not a loan facility but an Unconfirmed Standby Letter of Credit, which was no more or no less than a five-month guarantee by the 1st defendant to Muga's contractor, Roko Construction (Kenya) Limited that upon completion of the agreed unfinished housing units within five months and in the event that Muga Developers Ltd was unable to pay it for the construction works, the 1st defendant as a guarantor, would pay Roko Construction (Kenya) Limited for the construction works and claim the same from Muga Developers Ltd and the plaintiff. He argued that by letters dated 29th March, 2019, Muga Developers Ltd cancelled the SBLC together with the contract to Roko Construction (Kenya) Ltd for failure to mobilize and undertake the construction works at the Fourways Junction Project as agreed. Counsel indicated that by a letter dated 9th May, 2019, Muga Developers Ltd informed the 1st defendant that they had held preliminary instructions (sic) with Roko Construction Ltd and could not proceed with the SBLC as offered.

15. Mr. Otieno submitted that in view of the above, and the admission at paragraph 30 of the replying affidavit dated 12th September, 2023 that no disbursements were made under the SBLC, there is no doubt that the SBLC offer was cancelled and/or deemed to have been automatically withdrawn pursuant to Clauses 6.1.5 and 18. Further, that the 1st defendant having admitted at paragraph 30 of its replying affidavit sworn on 12th September, 2023 that the unconfirmed and conditional SBLC was withdrawn in terms of Clause 18 for breach of Clause 4.5, cannot and should not be allowed to approbate and reprobate by incorrectly averring that even though the SBLC facility was not disbursed, the agreement to consolidate the facilities remains valid. He relied on the Court of Appeal case of *Wagichiengo v Gerald* [1988] eKLR, and stated that once a conditional contract is withdrawn or cancelled then the parties thereto are discharged of all the obligations and rights stipulated therein, and the terms and conditions thereof rendered void ab initio, and the parties fall back to their pre-contract positions.

16. Mr. Otieno submitted that the statutory demands served on the plaintiff herein are strictly confined to the loan agreement dated 9th November, 2016 and the Offer Letter dated 24th August, 2016 and the sums disbursed thereunder. He stated that the said statutory demands specifically called for the payment of Kshs 507,946,444.40 as at 24th May, 2019, and not the supposed consolidated debt of Kshs 1,844,204,365.00. In addition, that the said statutory demands do not make reference to the SBLC dated 19th February, 2019. He submitted that the statutory demands served on Muga Developers Ltd only refer to the loan agreements dated 28th March, 2011 and 19th September, 2016 and they do not make reference to the SBLC dated 19th February, 2019. Counsel cited the case of *Andrew Ireri Njeru & 2 others v Attorney General & 3 others* [2018] eKLR and contended that there is also no evidence

demonstrating that all the litigants whose suits would be affected by an order of consolidation had been duly served with the instant application.

17. In a rejoinder, Mr. Ondieki submitted that the letter dated 9th May, 2019 was signed and there is no evidence of cancellation of the same. He further submitted that the amounts owing at the time of the auction were verified. Counsel contended that the pre-action letters were written in the year 2019 and there were allegations of fraud going back to the year 2017 that had to be verified. He argued that there is no basis in law that since the plaintiff in HCCOMM No. E082 of 2020 is in receivership, consolidation of the two cases will amount to placing the plaintiff herein in receivership.

ANALYSIS AND DETERMINATION.

18. I have considered the application herein, the grounds on the face of the Motion and the affidavits filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The issues that arise for determination are-

    i. Whether the interlocutory judgment entered against the 1st defendant should be set aside and the 1st defendant be granted leave to file a statement of defence; and

    ii. Whether the consolidation of Nairobi HCCOMM Case No. E082 of 2020 and this suit is merited.

19. The 1st defendant in its affidavit in support of the application herein deposed that failure to enter appearance and file a defence was inadvertent, it has a valid and reasonable defence and is desirous of defending the action. It averred that this matter is related to High Court Commercial Case Number E082 of 2020 Muga Developers Limited v Equity Bank Kenya Limited & 4 others which is pending before this Court (differently constituted). It was averred that the plaintiffs in the said cases are co-borrowers in a facility letter dated 19th February, 2019, which is the most recent facility that was advanced to them. The 1st defendant contended that the issue for determination in both suits is whether the plaintiffs therein are co-borrowers under the facility letter dated 19th February 2019, and whether they are indebted to the 1st defendant.

20. It was stated by the 1st defendant that if the two cases are not consolidated, there is a risk of two Courts of concurrent jurisdiction reaching conflicting decisions on matters arising from the same facility letter and the same transaction. The 1st defendant also stated that consolidating the suits will assist the Court in resolving the dispute between the parties in a just, proportionate, affordable, effective and expeditious manner.

21. The 1st defendant asserted that any prejudice that the plaintiff is likely to suffer as a result of the default judgment herein being set aside can be adequately compensated by an award of thrown away costs assessed by this Court, which it is prepared to pay to the plaintiff.

22. The plaintiff in its replying affidavit averred that whereas the 1st defendant alleges that the transactions in question took place more than six (6) years ago hence it took an unspecified amount of time to go through the records of transactions, there are pre-litigation letters on record dated 30th July, 2019, 8th October, 2019, 15th October, 2019, 25th October, 2019 and 14th November, 2019 addressed to the 1st defendant calling into question the alleged transactions, thus the 1st defendant had enough time to go through its records to verify the plaintiff's claims.

23. The plaintiff further averred that this Court is not seized of High Court Commercial Case No. E082 of 2020 and the 1st defendant has not sought for its transmission to this Court and for joinder of all the parties therein who would most definitely be affected by a consolidation order. The plaintiff stated that there was no agreement to consolidate its financial facilities with those of Muga Developers Ltd

and the SBLC offer was only for a limited period of five (5) months, and that the 1st defendant having confirmed that no funds were disbursed, the SBLC was deemed withdrawn under Clause 18 thereof.

24. The plaintiff asserted that the withdrawn/cancelled SBLC was clear that the outstanding facilities under Annexures 1 shall continue to run under the existing terms and conditions. In that there would be no modification, consolidation, alteration, deletion and addition, whatsoever, to the said existing terms and conditions. The plaintiff stated that nothing would have been easier than for it to have specified that the outstanding facilities were henceforth consolidated.

25. The 1st defendant in a rejoinder contended that since the plaintiff and Muga Developers Limited are related companies, thus inextricably linked financially, it also had to review Muga Developers Limited's records with transactions as far back as the year 2011 before it could file a defence to the plaintiff's plaint, as is evident in the draft defence.

26. It averred that the letters highlighted in paragraphs 12 of the plaintiff's replying affidavit were received by the 1st defendant, but the issues in this suit are not limited to the matters set out in those letters hence there was a need for the 1st defendant to extract records pre-dating those letters.

27. The plaintiff further averred that the other defendants in HCCC E082 of 2020 are George Weru and Muniu Thoiti, Receivers appointed by the 1st defendant, and are also represented by the law firm of Hamilton Harrison & Mathews. That Sanyi Jituan Investment Kenya Limited, the 4th defendant, was a party that bought property charged by Muga Developers Limited which the latter company was challenging in the suit, and has never entered appearance or participated in the proceedings.

Whether the interlocutory judgment entered against the 1st defendant should be set aside and the 1st defendant be granted leave to file a statement of defence.

28. Setting aside of default judgments is provided for under Order 10 Rule 11 of the *Civil Procedure Rules*, 2010 that states as hereunder -

> "Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just."

29. Although Courts have the discretion to set aside an exparte judgment, the said discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error, but not to assist a party that has deliberately sought whether by evasion or otherwise to obstruct or delay the course of justice, this was the Court's holding in the case of *Shah v Mbogo & another* [1967] EA 116 at page 123.

30. It is not disputed that the 1st defendant was duly served by the plaintiff with the plaint and all its accompanying documents, an application for injunction filed under certificate of urgency, together with summons to enter appearance on 5th May, 2023. The 1st defendant however averred that its employee who received the said documents inadvertently failed to forward the summons to enter appearance together with the other Court documents to its legal department, as the said summons were not bound together with the plaint. It was stated that the said person who has no legal background, did not understand the importance of the summons and the need for the same to be forwarded to the 1st defendant's legal department.

31. The 1st defendant explained that is the reason as to why it instructed its Advocate on record to promptly file a Notice of Appointment and respond to the plaintiff's application for injunction dated 3rd May, 2023, but failed to issue them with instructions to enter appearance in this matter.

32. It is evident from the record that an interlocutory judgment was entered against the defendants herein and directions were given for this matter to be mentioned on 6th July, 2023 for the Judge seized of the hearing of the case, to give a date for formal proof. Although the Court record shows that interlocutory judgment was entered, the date as to when the said order was granted is not indicated on the body of the ruling. The plaintiff does not dispute that it never served the 1st defendant with a notice for entry of judgment after the interlocutory judgment was entered against it. That being the case, the 1st defendant only became aware that interlocutory judgment had been entered against it on 6th July, 2023 on being informed by the Court.

33. When dealing with an application for setting aside an interlocutory judgment, the Court has to consider whether the defendant's defence raises triable issues or if it is only meant to frustrate the plaintiff. That issue was addressed by the Court in the case of *Patel v EA Cargo Handling Services Ltd* (*supra*) as follows -

> " The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on the merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

34. Further, in the case of *Thorn PLC v Macdonald* [1999] CPLR 660, cited by the Court in *International Air Transport Association & another v Roskar Travel Limited & 3 others* (Civil Case E457 of 2020) [2022] KEHC 200 (KLR), the Court of Appeal highlighted the principles to be considered when dealing with an application for setting aside a default judgment as hereunder -

> " (i) while the length of any delay by the defendant must be taken into account, any pre-action delay is irrelevant;
>
> (ii) any failure by the defendant to provide a good explanation for the delay is a factor to be taken into account, but is not always a reason to refuse to set aside;
>
> (iii) the primary considerations are whether there is a defence with a real prospect of success, and that justice should be done; and
>
> (iv) prejudice (or the absence of it) to the claimant also has to be taken into account.

35. In this instance, in view of the fact that the interlocutory judgment against the 1st defendant herein is regular, the 1st defendant has a duty to demonstrate that its defence against the plaintiff's claim raises triable issues. On perusal of the 1st defendant's draft statement of defence annexed to its supporting affidavit, I note that the defendant contends that it advanced to the plaintiff a loan of Kshs 400,000,000/= secured by a first charge over LR No. 28223/33 sub-plot C and a charge over LR No. 209/7733. The 1st defendant avers that the plaintiff and Muga Developers Limited subdivided LR No. 28223/33 sub-plot C into a number of sub-plots running from C1 to C 11, some of which were sold between the years 2017 and 2018 to reduce the plaintiff's indebtedness to the 1st defendant.

36. Despite the said sale, the plaintiff remained indebted to the 1st defendant causing it to issue the plaintiff with a demand under Section 90 of the *Land Act*. The plaintiff approached the 1st defendant with a request to consolidate its facilities with those of Muga Developers Limited and requested for

advancement of further sums for completion of Fourways Junction. The 1st defendant stated that in February 2019, it agreed to restructure the plaintiff's and Muga Developers Limited's debts, by consolidating their debts. The 1st defendant position is that by a letter dated 19th February, 2019 it got into an agreement with the plaintiff and Muga Developers Limited for the issuance of an Unconfirmed Standby Letter of Credit to facilitate completion of the development of Fourways Junction and to consolidate the existing facilities held by the two companies making them co-borrowers.

37. However, the two companies did not meet conditions for drawdown of the unconfirmed Standby Letter of Credit thus the facility was not disbursed. It asserted that the above notwithstanding, the agreement to consolidate the facilities remains valid. It was stated by the 1st defendant that in May 2019, the plaintiff and Muga Developers Limited had fallen into arrears, thus by a letter dated 9th May, 2019, Muga Developers Limited proposed to the 1st defendant to sell plots C3, C4, C5 & C6 to reduce the outstanding debt which was done, but the plaintiff and Muga Developers Limited were still indebted to the 1st defendant. Consequently, on 30th May, 2019 and 12th September, 2019 the 1st defendant issued the plaintiff and the Chargor with notices under Sections 90 & 96 of the *Land Act* demanding immediate payment of Kshs 507,946,444.00 and Kshs 507,946,662.25 due under the charge.

38. Thereafter, the plaintiff wrote to the 1st defendant on 15th October, 2019 admitting that it owes the 1st defendant Kshs 507,000,000/= and proposed to sell plots C3, 34 & C5 at approximately Kshs 483,000,000/=, which funds would be used to settle its debt to the 1st defendant. The 1st defendant stated that the said plots were sold in December 2019 for Kshs 448,240,000/=, which funds were applied towards reduction of the plaintiff's and Muga Developer Limited's consolidated debt. In view of the above, it is my considered view that the 1st defendant's statement of defence raises triable issues. This is because from the contents of the said defence captured above, the Trial Court will have to determine whether the plaintiff is still indebted to the 1st defendant and if it is, to what extent. The Court will also have to determine whether by a facility letter dated 19th February, 2019, the plaintiff's debt and that of Muga Developers Limited were consolidated, thereby allowing the 1st defendant to apply the proceeds of the sale of plots C3, 34 & C5 towards reduction of the plaintiff's debt and that of Muga Developers Limited.

39. As explained before in this ruling, the 1st defendant became aware that an interlocutory judgment had been entered against it on 6th July, 2023. The present application was filed on 14th September, 2023, which is approximately two and a half months later. The 1st defendant has attributed the delay in filing the instant application to the time it took to retrieve the plaintiff's and Muga Developer's Limited's records, which date back to the year 2017. On perusal of the 1st defendant's draft statement of defence which consists of 38 paragraphs, it touches on both the plaintiff's and Muga Developers Limited facilities that date back to the year 2011, I am as such persuaded that the said delay in filing the present application is not so inordinate as to be rendered inexcusable.

40. In view of the fact that this matter had not yet proceeded to formal proof hearing by the time the instant application was filed, and a date for formal proof hearing had not been set, this Court finds that no prejudice will be suffered by the plaintiff if the interlocutory judgment against the 1st defendant is set aside, and if the 1st defendant is allowed to file a defence against the plaintiff's claims.

41. In the end, this Court finds that the 1st defendant has made out a case to warrant being granted an order setting aside the interlocutory judgment entered against it, and for leave to be granted to the 1st defendant to file a statement of defence.

Whether the consolidation of Nairobi HCCOMM Case No. E082 of 2020 and this suit is merited.

42. The Supreme Court in the case of *Law Society of Kenya v Center for Human Rights & Democracy & 12 others* [2014] eKLR addressed the issue of consolidation of suits and held that -

> " 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."

43. It is not disputed that the plaintiff herein and the plaintiff in Nairobi HCCOMM No. E082 of 2020 share the same Directors and Shareholders. The 1st defendant's prayer for consolidation of this suit and Nairobi HCCOMM No. E082 of 2020 is heavily anchored on the facility letter dated 19th February, 2019 which the 1st defendant avers made the two plaintiffs' co-borrowers and consolidated their pre-existing debts. The plaintiff on the other hand contended that the facility letter did not consolidate its debt with that of Muga Developers Limited, and to the contrary, the Unconfirmed Standby Letter of Credit, which was no more or no less than a five-month guarantee by the 1st defendant to Muga Developer Limited's Contractor, Roko Construction (Kenya) Limited, was to the effect that upon completion of the agreed unfinished housing units within five months, and in the event that Muga Developers Limited was unable to pay it for the construction works, the 1st defendant as a guarantor, would pay Roko Construction (Kenya) Limited for the construction works, and claim the same from Muga and the plaintiff.

44. The plaintiff submitted that by letters dated 29th March, 2019, Muga Developers Ltd cancelled the SBLC together with the contract to Roko Construction (Kenya) Limited for failure to mobilize and undertake the construction works at Fourways Junction project as agreed. Further, that by a letter dated 9th May, 2019, Muga Developers Limited informed the 1st defendant that they had held preliminary instructions (sic) with Roko Construction (Kenya) Limited and could not proceed with the SBLC as offered.

45. On perusal of the letter dated 29th March, 2019 addressed to the 1st defendant by Muga Developers Ltd, I note that the said company communicated to the 1st defendant of its intention to cancel the Unconfirmed Standby Letter of Credit. Further, the 1st defendant in its draft statement of defence and its replying affidavit sworn on 12th September, 2023 confirms that no disbursements were made under the SBLC.

46. On perusal of Clause 18 of the facility letter dated 19th February, 2019, I find that it states –

> " The offer hereby made is open for acceptance within thirty (30) days from the date of this letter and if not accepted unconditionally within that period, it will be deemed to be withdrawn from the date of expiry thereof. Notwithstanding, the Facility is available for drawdown for a period of one hundred and eighty (180) days from the date of the said acceptance at the offer failing which the Facility shall be deemed to have been withdrawn."

47. In view of the above provisions, the fact that the 1st defendant confirms that no disbursements under the said facility letter were made, together with the letter dated 29th March, 2019 addressed to the 1st defendant by Muga Developers Ltd, my considered view is that the facility letter dated 19th February, 2019 was withdrawn and/or cancelled, therefore the terms therein were not applicable and/or binding to either the plaintiff, Muga Developers Limited or the 1st defendant herein. Further, the 1st defendant has not demonstrated by providing any agreement between the said parties other than the facility letter

dated 19th February, 2019, which also does not provide for consolidation of the plaintiff's and Muga Developers Limited's pre-existing debts.

48. In addition to the foregoing, it is evident that this suit and Nairobi HCCOMM No. E082 of 2020 arise from two different causes of action as can be seen from the demand letters and the plaints in the two suits. The subject matter of this suit is a letter of offer dated 24th August, 2016 and a loan agreement dated 9th November, 2016, and the suit challenges the sale of all that property known as LR. No. 209/7733 Muchai Drive by the defendants for a purported outstanding loan of Kshs 507,946,444.40. On the other hand, the subject matters in Nairobi HCOMM No. E082 of 2020 are loan agreements dated 28th March, 2011 and 19th September, 2016. The suit therein challenges the notice of appointment of a Receiver and Manager dated 10th February, 2020 and the placement of Muga Developers Ltd in receivership. It is also noteworthy that the two suits seek very different reliefs.

49. In the case of *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2000] eKLR, the Court when dealing with an application for consolidation of suits held the following-

> " 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 consolidating them."

50. Having considered the issues under contestation in the two suits, I am not persuaded that there exists a common question of law and fact in this suit and in Nairobi HCOMM No. E082 of 2020, and that and the reliefs claimed in the two suits are in respect of the same transactions. I am also not persuaded that it is in the interest of justice to consolidate this suit with Nairobi HCCOMM No. E082 of 2020. Consolidating them would only lead to convoluting the matters in dispute. There is therefore no need for consolidation of the two suits.

51. In the circumstances, this Court finds that the instant application is partly successful. As a result, I make the following orders –

i. The interlocutory judgment entered as against the 1st defendant and all consequential orders thereto are hereby set aside;

ii. The 1st defendant is at liberty to file its statement of defence and all compliance documents within 30 days from today;

iii. The 1st defendant shall pay thrown away costs of Kshs 10,000/- to the plaintiff within 30 days from today failure to which the interlocutory judgment and all ex parte proceedings shall remain in force; and

iv. Other costs to abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Bob Otieno for the plaintiff

Mr. Lawson Ondieki for the 1st defendant

No appearance for the 2nd defendant

Ms B. Wokabi – Court Assistant.