



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 64 OF 2016**

**TRANSCEND MEDIA GROUP.....PLAINTIFF**

**VERSUS**

**THE STANDARD GROUP LIMITED.....DEFENDANT**

**RULING**

1. The notice of motion dated 27<sup>th</sup> January 2021 by the defendant is brought under sections 1A, 1B & 3A of the Civil Procedure Act, Order 11 Rule 3(1)(h) and Order 51 Rule 1 of the Civil procedure rules seeking the following orders:

1. That this Honourable Court be pleased to order the consolidation of the following suits:

(a) Civil suit No. 64 of 2016 – Transcend Media Group v The Standard Group Limited; and

(b) Civil suit No. 158 of 2016 – Peter Lai Muthoka v The Standard Group Limited.

2. Further proceedings in civil suit No. 158 of 2016 be stayed.

3. In the result the two suits be heard together;

4. The costs of this application be in cause.

2. It is supported by the grounds on its face namely:

(a) The said suits are all pending the High Court of Kenya.

(b) The facts upon which the current suit civil suit No. 64 of 2016 are substantially similar and revolve around the same article titled “REVEALED: NEW NAMES IN KSHS 2 BILLION NYS DEALS” which the plaintiffs in both cases claim is defamatory.

(c) The parties are related in that the plaintiff in the civil suit No. 158 of 2016 is a director of the plaintiff in civil suit No. 64 of 2016 thus share similar interests.

(d) Consolidating the two suits would save the honourable Court’s time and resources and as result save the parties’ costs, expedite the hearing and determination of the said suits and lead to a common order which will not embarrass the judicial process as would have happened if the two suits were to be heard and determined separately.

(e) In light of the foregoing the Honourable Court has jurisdiction under sections 3A and 3B of the Civil Procedure Act and under Order 11 Rule 3(1) (h) and that the orders sought hereinabove if granted will achieve the overriding objectives of the honourable court and be just to all parties in both suits.”

3. The application is further supported by an affidavit by Millicent Ngetich sworn on 27<sup>th</sup> January 2021. She has deponed that the two suits they seek to consolidate are similar as the claims arise from the same article titled “REVEALED NEW NAMES IN KSHS 2 BILLION NYS DEALS” which both plaintiffs claim to be defamatory. To her a consolidation of the suits will save on costs as well as judicial resources and none of the parties in the suits will suffer undue prejudice if the application is allowed.

4. The plaintiff/respondent filed a replying affidavit by Peter Lai Muthoka the plaintiff in Milimani HCC No. 158 of 2016 opposing the application. The deponent avers that the plaintiff herein has sued in its capacity as a company while he has sued in his personal capacity. That the reliefs sought are different. He further depones that he has already testified in HCC No. 58 of 2016 and each of the plaintiffs has

separate witnesses, with different testimonies. He annexed copies of the witness statements (PLM3) and correspondences between the advocates (PLM4).

5. He also questions the standing of the firm of Limo & Njoroge advocates since there is no notice of change of advocates filed by them nor an application by the firm of Makhecha & Gitonga advocates to cease acting. He contends that consolidating the two suits will prejudice both parties.

6. In his oral submissions Mr. Pamba for the defendant/applicant has reiterated on the grounds in support of the application and the supporting affidavit. He submitted that it is only the plaintiff who has testified in HCC No. 158 of 2016, and consolidation can be done at any time as long as there is no injustice to the parties. That parties can always decide on how to proceed upon consolidation.

7. On representation he contends that they have instructions in both suits to act for the defendant. They filed a notice of change of advocates. He further argues that having the two cases heard by different courts may lead to two (2) different decisions being made.

8. M/s Dave for the plaintiff/respondent in response to the submissions reiterated the averments in the replying affidavit. She has submitted that the plaintiffs in both suits have sought damages in different capacities and the said claims are also different.

9. She also argues that the other suit has already proceeded with one witness testifying. For the respondent, consolidation of the suits will prejudice the plaintiffs in both suits. She submits that they are yet to be served with any notice of change of advocates.

10. In reply Mr. Pamba for the defendant/applicant submits that the reliefs flow from the same transaction which is the article. That the court would be able to apportion the reliefs according to the evidence that will be presented. He reiterated that he represents the defendant in both suits since September 2020 and a notice of change of advocates dated 25<sup>th</sup> September 2020 was filed. He referred to the witness statement of the witness who has testified which is in this file.

### **Analysis and determination**

11. I have considered the application, affidavits and the oral submissions by both counsel. The issue falling for determination is whether the defendant/applicant has made out a case for consolidation of this case (HCC No. 64 of 2016) and HCCC No. 158 of 2016.

12. The law applicable is found under Order 11 Rule 3(1)(h) of the Civil Procedure Rules which states:

***“3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—***

***(a) .....***

***(h) consider consolidation of suits;”***

13. In the case of **Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** as stated in **Stumberg & Anor v Potgelta [1970] EA 322** laid down principles that guide consolidation of suits to be:

***“Where there are common questions of law or facts in actions having sufficient importance in proportion of the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered.”***

14. Further in the case of **Law Society of Kenya vs The Centre for Human Rights and Democracy**, Supreme Court of Kenya Petition No. 14 of 2013 the Supreme Court stated thus:

***“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 meant to confer any undue advantage upon the party that seeks it, nor was intended to occasion any disadvantage towards the party that opposes it.”***

15. From case law and the civil procedure rules cited above the following principles need to be considered when handling consolidation of cases:

(i) that the suits should have common questions of law and facts;

(ii) the reliefs sought in both cases in respect of or arise from the same transaction or a series of transactions;

(iii) whether any party will be disadvantaged or prejudiced or whether consolidation will confer any undue advantage to the other party.

16. A perusal of the two complaints PLM1 & 2 shows that the claim by the two plaintiffs arises from an article published in the “Standard Newspaper” of 19<sup>th</sup> February 2016 under the headline “REVEALED: NEW NAMES IN KSHS 2 BILLION NYS DEALS”. The plaintiffs have also quoted the words in the said article which to them were offensive. The said quoted words are similar in both complaints.

17. It is therefore clear that the two plaintiffs' claim is against the same defendant and the cause of action arises from the same article published in the standard newspaper of 19<sup>th</sup> February 2016. Each of the plaintiffs has attached an interpretation to the wording of the article complained of, and that will be an issue for interpretation by the court.

18. I therefore find that the two suits have common questions of law and facts.

19. A look at the reliefs sought in both complaints confirms that they are one and the same. It's clear they arise from the same transaction.

20. None of the parties will be prejudiced in any manner. Each will be given an opportunity to testify and call witnesses. The fact that the plaintiff in HCC No. 58 of 2016 has testified cannot in itself be a bar to consolidation. Upon consolidation all parties will choose on how to proceed, and directions will be given by the court.

21. In the case of **Korean United Church of Kenya & 3 others v Seng Ha Sang [2014] eKLR** the court held:

***“Consolidation of suits is done for the purposes of achieving the overriding objective of the Civil procedure act that is, for expeditious and proportionate disposal of civil disputes. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action.”***

22. I find these two cases to fit the docket for consolidation to save on the court's time and resources. Secondly consolidation would avoid different decisions being arrived at if different courts were to handle the case separately, since the claims arise from the same facts.

On the issue of notice of change of advocates I have seen the notices filed in both files dated 17<sup>th</sup> September and 25<sup>th</sup> September 2020 respectively. The notices are copied to both the former advocates and the advocates of the plaintiffs in both suits.

23. I am therefore satisfied that the defendant/applicant has satisfied the threshold for grant of an order for consolidation of suits. I therefore order for consolidation of the two suits (HCC No. 64 of 2016 and HCC No. 158 of 2016) with the lead file being the latter file.

24. Parties to take a mention date for directions for the two suits before Justice Thurinira Jaden who has already taken the evidence of the plaintiff in HCC No. 158 of 2016. In the meantime proceedings in HCC No. 158 of 2016 to be stayed until then.

25. Costs in cause.

Orders accordingly.

**DELIVERED, SIGNED AND DATED THIS 13TH DAY OF APRIL 2021 IN OPEN COURT AT NAIROBI.**

**H. I. ONG'UDI**

**JUDGE**