



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO.E 201 OF 2021

ARNOLD KIPKIRUI LANGAT.....APPLICANT

-VERSUS-

ATTICON LIMITED.....1ST DEFENDANT/RESPONDENT

FRANKLIN MITHIKA LINTURI.....2ND DEFENDANT/RESPONDENT

EMILY NKIROTE BUANTAL.....3RD DEFENDANT/RESPONDENT

BRENDA MITHIKA..... 4TH DEFENDANT/RESPONDENT

FAMILY BANK LIMITED.....5TH DEFENDANT/RESPONDENT

LAND REGISTRAR, MERU.....6TH DEFENDANT/RESPONDENT

LINKIT LIMITED..... 7TH DEFENDANT/RESPONDENT

REGISTRAR OF COMPANIES..... 8TH DEFENDANT/RESPONDENT

RULING

1. On 8/4/2021, the plaintiff was granted permission to institute a derivative suit in favour of **LINKIT LIMITED**, the 7th defendant. Pursuant thereto, he lodged this suit by way of plaint dated 19/4/2021. In the suit, the plaintiff has made various allegations, basically of fraud, principally against the 1st, 2nd, 3rd and 5th defendants.
2. The claims concerned a charge dated 26/6/2017 that the 5th defendant created over the 7th defendant's property known as **LR Number Ntuma/Igoki/4432** situated in Kambakia Area in Meru County (*"the suit property"*), whereby it advanced the 1st defendant a sum of Kshs. 7,200,000/=.
3. In the suit, the plaintiff prayed for various reliefs including, the voiding of the said charge, the discharge thereof and for general damages.
4. On 25/5/2021, the plaintiff lodged a Motion of Notice under **Orders 11 Rule 3 and 51 Rule 1 of the Civil Procedure Rules** and **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act**. He prayed that this suit be consolidated with **HCC No. 138 of 2018, Barons Estate Ltd vs Atticon Ltd & 5 Others**, and **HCC No. E 029 of 2019 Noniko Holdings Ltd & 2 Others vs Atticon Ltd & 6 Others** (hereinafter *"the said suits"*).
5. The grounds for the application were set out in extenso, in body of the Motion and the Supporting Affidavit of the plaintiff sworn on 25/5/2021. These included that; the three suits arose out of a series of similar transactions where they sought nullification of the charges created by the 5th respondent over the plaintiff's properties, that there will be same questions of law and fact in the three suits, that the parties in the 3 suits are similar and that the parties are interrelated in the 3 suits. That in the premises, consolidating the 3 suits will facilitate efficient and expeditious disposal of the issues between the parties. It will save the court's time.
6. The application was opposed by the defendants through two preliminary objections dated 31/5/2021 and 3/6/2021, respectively. There was also the 5th defendant's affidavit in reply sworn by **Keziah Rutto** on 2/6/2021 in opposition to the Motion.

7. The Preliminary Objections were to the effect that the present suit was an abuse of the Court process as there was another suit, namely the **Meru CMCC No. 39 of 2019 Linkit Ltd & Anor vs Atticon Ltd & 7 Others** (“the Meru Suit”) over the same subject matter which had been dismissed on 16/6/2019; that the substratum of the suit whether the 7th defendant authorized the issuance of the impugned security is a dispute between its shareholders and directors, that in the premises it is an issue for arbitration under **section 6 of the Arbitration Act** and this Court lacks the jurisdiction to entertain the suit and the Motion.

8. In the replying affidavit, it was contended that the Meru Suit was dismissed vide the ruling of the Court dated 19/7/2019. That an attempt to revive the suit failed as the plaintiff withdrew the **Meru Hc Misc CA No 54 of 2020** on 19/8/2020.

9. It was further contended that the suit property is situate in Meru and the suit should have been filed thereon and the suit is therefore an abuse of the court process. That the 3 suits are at different stages of prosecution whereby one is about to be heard on 7/7/2021. The other suit has been pronounced on an interlocutory application by **Okwany J.**

10. It was further contended that the charges in the other suits were in respect of other properties being **LR. No. NRB/Block 93/1964, 1965 and 1963 and Flat No C7 and LR. No 12239/23** for various sums which were subject to separate and distinct legal contracts.

11. Learned Counsels appeared virtually on 9/6/2021 and orally submitted on both the preliminary Objection and the Motion. The Preliminary Objections were treated as part of the defendants’ grounds of opposition to the Motion.

12. I have carefully considered the depositions on record and the oral submissions of learned counsel. I propose to deal with the Preliminary Objections first.

13. The Objection was that the matter is res-judicata the Meru Suit and that the matter is basically a dispute between directors and shareholders of the 7th defendant. In the premises, under Article 32 of the 7th defendant’s Memorandum of Articles, the matter is for Arbitration and this Court lacks jurisdiction by virtue of **Section 6 of the Arbitration Act.**

14. On *res-judicata*, I have seen the plaint in the Meru Suit. The case was by both the plaintiff and the 7th defendant against the present defendants who included the Attorney General.

15. That suit was lodged before the Chief Magistrate’s Court, Meru. I have seen the plaint that commenced the said suit vide a Ruling delivered on 19/6/2019 the **Hon Mbicha SRM** made the following findings: -

a) **That there had been no resolution by the 7th defendant for bringing that suit.**

b) **That the suit was in the nature of a derivative suit and leave or permission under section 239 of the Companies Act was required.**

c) **More importantly, that by virtue of clause 32 of the Articles of Association of the 7th defendant, the Court lacked jurisdiction and the matter was referred to arbitration.**

16. Two issues arise from the foregoing. If the matter fell under the Companies Act ie that it was a derivative suit as held by that court, which it was, the Meru Chief Magistrates Court lacked jurisdiction to entertain the suit. Paragraphs 11,12,13 and the prayers in the plaint in that suit point towards: -

a) **That the subject matter was the alleged unlawful creation of a security over the suit property.**

b) **The suit property belonged and still belongs to the 7th defendant.**

c) **The prayers sought were for the benefit of the company, the 7th defendant.**

17. This was clearly a suit that was brought for and on behalf of or for the benefit of the 7th defendant. By virtue of the principle of the legal personality of the 7th defendant, the plaintiff could not have brought the said suit as he sought to in that case. The suit was a non-starter from inception.

18. In so far that the suit was supposed to be a derivative suit, the Meru Court lacked jurisdiction to entertain the same. This is so because, permission to proceed in a derivative suit under **sections 238, 239 and 240 of the Companies Act, 2015** can only be granted by the High Court. This is by virtue of **Section 3 of that Act** which provides:

“the Court means unless some other court is specified, the High Court.”

19. In this regard, the Court holds the view that in so far as the said suit was brought for the benefit of the company, the 7th defendant, that was a derivative suit and the competent court was the High Court and not the Chief Magistrates Court (the Senior Resident Magistrate for that matter). Accordingly, the suit was not filed in a competent court and no binding determination could be made thereon.

20. Even if I was wrong in the foregoing, the suit was still lodged in the wrong court. A court without jurisdiction. And collorary to that, in so far as it was determined by the Chief Magistrates Court, that was not a competent court in terms of section 7 of the Civil Procedure Act

for resjudicata to attach.

21. A look at the ruling of the Meru Court at pages 7 & 8 of the ruling of 19/6/2019, that court held as follows:-

“a) from the foregoing, I find that the dispute herein is primarily between the 1st plaintiff and its shareholders and/or directors. The true disputants herein are the plaintiff and the 4th defendant and they are thus bound by the Articles of Association to refer their disputes and differences arising between the company and themselves to arbitration.

.....

b) THAT the suit herein be and is hereby stayed and the parties herein referred to Arbitration as per clause 32 of the 1st Plaintiff's Articles of Association.

c) THAT upon expiry of one (1) year from the date of delivery of this Ruling herein without any progress report from the parties herein or conclusion of the Arbitration contemplated in (b) above, this suit shall be marked as dismissed with no orders as to costs.”

22. By its own admission, the Meru Court lacked jurisdiction to entertain the Meru Suit. *Section 7 of the Civil Procedure Act* applies where the previous suit is filed and determined by a competent court. The Meru court lacked jurisdiction under the *Companies Act, 2015* to determine the Meru suit and by its own admission because of the *Arbitral clause in Article 32 of the Articles of Association* of the 7th defendant. To that extent the suit herein is not *res-judicata*.

23. The second objection is that by dint of *Article 32 of the Articles of Association* of the 7th defendant, the matter is for arbitration. In that regard, under *section 6 of the Arbitration Act*, this court lacks jurisdiction to entertain the suit.

24. With utmost respect, a preliminary objection is raised on the basis that the facts are not in dispute. It is in the nature of a demurrer which is raised on a pure point of law and on the basis that the facts are agreed and are not to be established. See the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696.**

25. I have looked at the plaint in this suit. Paragraphs 13, 15, 16, 17, 18 and 19 make allegations against the 1st, 2nd, 3rd and 5th defendants. These are neither shareholders nor directors of the 7th defendant. The only shareholders and/or directors pleaded are the plaintiff and the 4th defendant. There are no allegations in the nature of the dispute between the directors and shareholders of the 7th defendant in terms of Article 32 of the Articles of Association of the 7th defendant. The declaration sought against the 4th defendant flow directly from the provisions of *Sections 238, 239, 241 and 243 of the Companies Act*, this being a derivative suit.

26. Accordingly, the two preliminary objections are without merit and are hereby dismissed with costs.

27. That now leave the Court to deal with merits of the application. The plaintiff basically seeks an order for the consolidation of this suit with the said suits. The grounds are basically that the causes of action in all the suits relate to acts of alleged fraud by the 1st, 2nd, 3rd and 5th defendants perpetrated against all the plaintiffs in the 3 suits upon their respective properties. That the questions of law and fact are the same, that the witnesses will be the same and that it will therefore be convenient and expedient to try all the suits together.

28. The jurisdiction to consolidate suits is donated by *order 11 Rule 3 of the Civil Procedure Rules*. In **Prem Lala Nahata & Anor vs Chandhi 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.”

29. In **Law Society of Kenya vs Center for Human Rights & Democracy & 12 Others [2014] eKLR**, the Supreme Court of Kenya 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.”

30. In **Nyati Security Guards & Services Ltd vs 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.”

31. From the foregoing, it is clear that the Court has a wide discretion in ordering consolidation. 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**. See **John Gakure & 148 Others vs Dawa Pharmaceuticals Company Ltd CA 299 of 20 , 07**.

32. The grounds upon which the present application was made were *inter-alia*, that the suits raise a common question of law and fact, that the transactions are inter-related and it would be convenient to try all the suits together. The Motion was opposed on the grounds that the suits are at different levels of trial.

33. I have looked at the copies of the complaints in **HCCC No. E 138 of 2018** and **E 029 and 2019** as well as in the present suit. The common thread in all the suits is that all the main defendants are the same, that is **Atticon Ltd**, (1st defendant) **Franklin Mithika Linturi** (2nd defendant) **Emily Nkirote Buntai** (3rd defendant) **Family Bank Ltd** (5th defendant), **Registrar of Companies** (8th defendant) and **Registrar of Lands** (6th defendant).

34. In all the suits, the claim is that the 1st, 2nd, 3rd and 5th defendants, in a series of transactions, perpetrated a fraud as a result of which the 5th defendant charged the various properties belonging to the plaintiffs in the three suits. The said charges are said to have been created on 18/8/2015, 29/5/2017 and 26/6/2017, respectively. It is clear that the issues in all the suits are basically the same and the witnesses will be the same.

35. In the Court's view, it would be convenient and expedient to try all the suits together as it would obviate the multiplicity of suits. It will lead to the determination of all the issues arising in all the 3 suits at the same trial. It will be less costly and will save the Court precious judicial time.

36. As regards the opposition to the application that the suits are at different stages of trial, that per se cannot be a bar to an order for consolidation. None of the suits has been heard. The one that is ready for trial is **HCC No. E 138 of 2019** which is set for hearing on 7/7/2021.

37. In **Benson G. Mutahi & Raphael Gichove Munene Kabutu & 4 Others [2014] eKLR**, the court held: -

“It is also clear from a reading of the Court of Appeal's decision in NGUMBAO VS MWATATE & 2 OTHERS [1988] KLR 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded. Therefore submissions of Mr Muyodi that this case cannot be consolidated with Kerugoya ELC Case No. 809 of 2013 (OS) because it is part heard, does not find support in any case law and in any case, no case was cited for the proposition.”

38. I would reiterate the foregoing here and add that, there would be no prejudice to be suffered by any of the parties herein if the consolidation sought is granted. The submission that **Okwany J** has already expressed herself in one of the suits on an interlocutory application cannot be a bar to consolidation. This is so because, it is not necessarily the Judge who considers an interlocutory application in a matter who has to conduct the trial. The decision referred to was in respect of an injunction application which was dismissed. That was on a preliminary basis and the merits of the suit had not been delved into.

39. In view of what I have stated above, it is my view that rather than tire 3 courts with the 3 suits which raise similar and common questions of law and fact, Article 159, which dictates that justice should be dispensed without undue delay as well as the overriding objective of the Civil Procedure Act, calls for the consolidation of these suits.

40. Accordingly, the application dated 25/5/2021 is meritorious and is allowed as follows: -

a) this suit is hereby consolidated with HCCC No E 138 of 2018, Barons Estate Ltd vs Atticon Ltd & 5 Others and HCCC No. E 029 of 2019, Noniko Holdings Ltd & 2 Others vs Atticon Ltd & 6 Others.

b) This suit will be the head file.

c) Pursuant to prayer No (b) of the Motion Article 159 (2) (b) of the Constitution and the overriding objective of the Civil Procedure Act Cap 21 Laws of Kenya, I direct that: -

(i) The defendants herein who were served with summons way back in May, 2021 do file and serve their respective defences within 7 days of this ruling.

(ii) The parties do file and exchange their consolidated witness statements that are cross referenced with their respective bundle of documents within 14 days after the filing and service of the defences.

(iii) A mention date be given at the delivery of the ruling for case conference.

(d). Each party do bear own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JULY, 2021

A. MABEYA, FCI Arb

JUDGE