



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 576 OF 2014 CONSOLIDATED WITH HCCC NO. 198 OF 2019

THRIFT ESTATES LIMITED.....1ST PLAINTIFF

DAKAGI HOLDINGS LIMITED.....2ND PLAINTIFF

VERSUS

SPIRE BANK LIMITED.....1ST DEFENDANT/RESPONDENT

ETRADE COMPANY LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. Through the application dated 25th June 2020 the applicant seeks orders for the consolidation of Civil Case No. 576 of 2014 Thrift Estates Limited and Another v Spire bank Limited and Another and Civil Suit No. 198 of 2019 Spire Bank Limited v Thrift Estates Limited and 3 Others. They also seek orders for leave to amend the Plaintiff in Civil Suit No 576 of 2014.

2. The application is supported by the affidavit of **Mr. Daniel Kamita** and is based on the following grounds: -

1) THAT the 1st Applicant took a loan of Kenya Shillings Thirty million shillings Kshs 31,000,000

2) THAT the loan was secured by the 2nd applicant /plaintiff via all that piece of land known as Land Reference Number 14902/70(IR.No.89871)

3) THAT the 3rd and 4th Applicants guaranteed the loan to the 1st Applicant securing Payment of the amount of Kenya Shillings Thirty Million (Kshs.30, 000,000)

4) THAT the 1st and 2nd Applicants instituted Civil Case No.576 of 2014 challenging the intended sale in exercise of the statutory power of sale on the basis that:

a. under valuation of the property

b. Added unlawful interest and charges

c. Failure to issue mandatory statutory notices.

5) THAT this Honourable Court on 30th April, 2015 stayed the sale of the suit property but the same was sold nevertheless to the 2nd Respondent for a grossly understated sum of Kshs. 42,750,000/- and thus the same is illegal, null and void.

6) THAT the said ruling was challenged by the 1st Respondent and later by the 2nd Respondent and in the Court of Appeal in Civil Appeal No. 109 of 2017 and 156 of 2015 (consolidated).

7) THAT 1st and 2nd Applicants thus need to amend the Plaintiff to reflect these current facts noting that the sale took place after the suit had already been instituted.

3. The 1st defendant opposed the application through the replying affidavit of its legal officer **Mr. John Wageche** who states that the

application is an attempt, by the defendants, to reopen and revisit issues that had been canvassed and concluded before the Court of Appeal and that the suit property has since been sold. He avers that the instant suit is in respect to a claim for an alleged debt owing from the defendants and that no common question of law or fact arises from both suits.

4. The applicants' case is that the main parties in the two suits are the same save for the interested party who will not be prejudiced by the application. The applicants submitted that the issue in dispute in both suits is the loan of Kshs 30,000,000 advanced by the 1st respondent and secured by the 2nd applicants' property.

5. On their part, the respondents submitted that there are distinct questions of fact and law that ought to be tried separately. According to the respondents, the applicants seek orders of injunction whereas the respondents seek to recover a liquidated sum.

6. I have carefully considered the rival arguments made parties herein and I note that the main issue for determination is whether the applicants have made out a case for the consolidation of the two suits.

7. Order 11 rule 3(1)(h) of the Civil Procedure Rules provides that; -

“(3) 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

(h) Consider consolidation of suits”

8. In *Stumberg & Another v Potgeiter 1970 E.A. 323* as it was held: -

“that in proportion to 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”

9. In *Law Society of Kenya v, The Centre for Human Rights and Democracy, Petition No. 14 Of 2013*, the Supreme Court of Kenya had this to say about consolidation of suits:

“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 it intended to occasion any disadvantage towards the party that opposes it”

10. Similarly, in *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa (2000) eKLR* the court held as follows:

“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 question of law or fact arises in both or all of them;

b) The rights or reliefs claimed in them are in respect of or arise out of the same transaction;

c) For some other reason, it is desirable to make an order for consolidating them;

11. A perusal of the pleadings filed herein reveals that the prayers sought in HCC 576 of 2014 relate to the sale of the property known as LR NO 14902/70(IR. NO.89871) while in HCC 198 of 2019 the prayers sought are for recovery of the amount realized from the sale of the same property.

12. Applying the dictum in the above cited cases to the instant application, I find that there are common questions of law and facts arising from the two suits that the applicants seek to consolidate. I therefore find that the applicant has made out a case for the consolidation and that it will save the courts time and resources as well as the parties' costs to have the two suits consolidated. I therefore allow the application dated 25th June 2020 with no orders as to costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 1ST DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID -19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Awino for 1st Defendant in 567/14

Mr. Gichuhi for Eredi for 2nd Defendant in 567/14

Mrs Karanu for plaintiff in 198/2019

Court Assistant: Sylvia.