



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL CASE NO. 21 OF 2018

ALFETTA WARUIRU MUNGAI.....1ST PLAINTIFF

KOOME MUNENE.....2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....DEFENDANT

BY WAY OF COUNTERCLAIM

NATIONAL BANK OF KENYA.....PLAINTIFF

VERSUS

ALFETTA WARUIRU MUNGAI.....1ST DEFENDANT

KOOME MUNENE.....2ND DEFENDANT

SIGNATURE TOURS & TRAVELS LTD.....3RD DEFENDANT

RULING

1. The defendant sought to move this court vide a notice of motion brought under Section 1A, 1B & 3A of the Civil Procedure Act, Order 11 Rule 3(h) of the Civil Procedure Rules and all other enabling provisions of the law. The notice of motion is dated 17.12.2018 and sought an order for consolidation of this suit with Machakos High Court Civil Suit No. 4 of 2017, Signature Tours & Travels Limited v National Bank of Kenya Limited. The application also sought that the costs of the application be in the cause.

2. The application was based on the grounds that the defendant/applicant engaged in a banker-customer relationship with the 1st to 3rd defendants in the counterclaim and that sometime on 23rd May, 2013 the 1st and 2nd defendants in the counterclaim (the guarantors) in their capacity as directors of Signature Tours and Travels Limited (principal debtor) approached the bank for asset finance facilities. It was stated that a facility of Kshs 617,720,000/- was issued to the principal debtor who defaulted on the facility payments and that the bank sought to recover the outstanding monies. It was stated that the defendants in the counter claim instituted multiple actions against the bank being firstly Nairobi High Court Civil Case 101 of 2016 that was withdrawn by consent; Secondly **Machakos ELC 124 of 2016** that was transferred to the High court and is the instant suit and thirdly, Machakos High Court Civil Case 4 of 2017. It was stated that the aforementioned 2nd and 3rd suits raise common questions of fact as they arise from the same transaction being the grant of facilities to the 3rd defendant in the counterclaim and guaranteed by the 1st and 2nd defendants in the counterclaim. It was stated that the consolidation order will not occasion prejudice to the defendants in the counterclaim and will facilitate the expeditious disposal of the instant suit and that the defendant is apprehensive that if the two suits are handled separately then there may be conflicting decisions given over the same transaction.

3. The application was supported by the affidavit of Samuel Mundia, indicated as the head, commercial transactions and litigation at National Bank of Kenya Limited. Annexed to the affidavit are copies of the letters of offer of the facility marked **SM1**; copy of the legal charge for Kshs 27m/- over property LR 12672/128 in the name of Alfetta Waruiru Mungai marked **SM2**; Copy of legal charge over properties LR 12715/1651 and 1652 marked **SM3**; Guarantees executed by the guarantors marked **SM4**; Individual guarantee executed by each of the guarantors marked **SM5**; Consent to withdraw Nairobi High Court Civil Case 101 of 2016 Marked **SM6a**; Plaint and counterclaim in Machakos ELC 124 of 2016 marked **SM7a and b** and plaint filed in Machakos Civil case 4 of 2017 marked **SM8**.

4. In reply to the application was a replying affidavit deposed by Koome Munene on his behalf and on behalf of the 1st plaintiff on 18.4.2019. It was averred that the application did not meet the criteria for consolidation of suits under Order 11 Rule 3(h) of the Civil Procedure Rules. It was averred that the plaintiffs, grievances, causes of action, orders sought and issues in the instant case are distinct from those of **Machakos HCCC 4 of 2017** and that consolidation will confuse and prolong the issues. It was averred that the plaintiff in **Machakos HCCC 4 of 2017** filed the suit in its own capacity and that if the suits are consolidated and the claims succeed, a single decree and certificate of taxation will be issued that will pose a challenge in execution. It was further averred that the instant suit concerns three properties owned by the 1st and 2nd plaintiffs that were issued as security and it challenged the attempt to dispose of the same in exercise of a statutory power of sale whereas **HCCC 4 of 2017** dealt and challenged the manner in which the defendant bank handled its transaction with the plaintiff.

5. The application was canvassed vide written submissions. Learned counsel for the applicant/defendant framed three issues for determination; Firstly, whether this court has jurisdiction to consolidate the present suit with **HCCC 4 of 2017- Machakos**; Secondly whether the present application met the conditions necessary for consolidation of suits and finally who would bear the costs of the application. On the first issue, counsel placed reliance on the case of **Joseph Okoyo v Edwin Dickson Wasumba (2014) eKLR** that set out the principles for consolidation of suits, and the principles were common questions of law or fact, reliefs or rights claimed arise from the same transaction or series of transactions and for some other reasons. Counsel cited the case of **Law Society of Kenya v Centre for Human Rights & Democracy & 12 Others (2014) eKLR** where it was posited that the consideration of the court was where it was in the interests of justice to consolidate appeals in which the parties are the same and the central issue is the same. Learned counsel for the defendant submitted that the disputes in both suits arose from the same transactions being a banker-customer relationship with the plaintiffs Koome Munene and Alfuetta Waruiru Mungai, and further that the plaintiffs offered properties as security for asset finance facilities that they defaulted in servicing and culminated in three different suits being filed which suits the rights and reliefs claimed are in respect of the same transaction. It was counsel's argument that there are common questions of law and fact in both suits and an order of consolidation would save time and costs as was posited in the case of **David Ojwang Okebe & 11 others v South Nyanza Sugar Co Ltd & 2 Others (2009) eKLR**. Learned counsel submitted that the seven questions of law that run through both suits are firstly, whether the Bank and Signature Tours & Travels Ltd were in a bank-customer relationship; Secondly whether the asset finance facilities amounting to Kshs 617,720,000/- were advanced by the bank to Signature Tours & Travels Ltd; Thirdly whether the plaintiffs are guarantors of asset finance facilities taken by Signature Tours & Travels Ltd; Fourthly, whether the defendants to the counterclaim jointly and severally defaulted in repaying the said asset finance facilities; Fifthly, whether the plaintiffs as guarantors for the loan are jointly and severally liable to repay the defaulted amount as per the counterclaim; Sixthly whether the bank was entitled in law to recover the outstanding loan advanced to Signature Tours & Travels Ltd and guaranteed by the plaintiffs and seventhly whether the bank was entitled to exercise statutory power of sale over the charged property and if it complied with the procedural laws.

6. Learned counsel pointed out to court that in both suits, the parties are the same; represented by the same counsel save for additional counsel who came on record for Signature Tours & Travels Ltd. It was also argued that in both suits, the plaintiffs and Samuel Mundia and Nancy Naswa are listed as witnesses and have filed their witness statements save for the instant suit where Samuel Mundia is yet to file his witness statements. Learned counsel noted that the pleadings in both suits and the averments are the same and that the parties list of documents are the same and further that both suits are pending before this court. Learned counsel in rebuttal placed reliance on the case of **Olkasasi Ltd v Equity Bank Ltd (2015) eKLR** where it was found that liability of the guarantors arose upon default by the borrower. Counsel further submitted that stay of proceedings could be achieved via an application and not as an averment in a replying affidavit. Counsel urged the court to award it the costs of the application.

7. In response, learned counsel for the plaintiff in submissions dated 23.8.2019 submitted that a notice of appeal dated 2.7.2019 had been filed seeking to appeal against the ruling that was delivered in **Machakos HCCC 4 of 2017**. Learned counsel placed reliance on Section 66 and 75 of the Civil Procedure Act and craved for exercise of their right to prosecute their appeal. It was counsel's argument in placing reliance on Order 11 Rule 3(h) of the Civil Procedure Rules that is couched in mandatory terms and it is to the effect that the consolidation order application came too late as the parties have all complied with pretrial directions and that the pleadings closed in June 2018. Counsel in placing reliance on the case of **Korean United Church of Kenya & 3 Others v Seng Ha Sang (2014) eKLR** submitted that the consolidation order would frustrate the parties and confuse the issues as well as cause delay because there would be need to amend the pleadings in both suits to enable the suit proceed as one. Learned counsel reiterated that the reliefs sought in both suits were different and placed reliance on the case of **County Council of Nakuru v Simon Ole Kaminta & 3 Others (2007) eKLR**. Counsel also cited the case of **Eunice Nyairungu v Libey Njoki Munene & 2 Others (2015) eKLR** where the court observed that in one of the suits there was a claim for co ownership whereas the other suit was a claim by a purchaser hence the issues raised separate and distinct issues and separate causes of action that were not related.

8. Having considered the pleadings and rival submissions, the singular issue to be determined is whether the court should grant the order sought for consolidation of suits.

9. Order 11 rule 3 of the Civil Procedure Rules provides that during the pretrial conference the court may consider consolidation. Section 81 of the Civil Procedure Act places a duty on the rules committee to make rules that govern consolidation of suits and appeals and as it is no such rules have been made and therefore I will refer to the case of **Stumberg & Another v Potgieter (1970) EA 323** where Kneller J observed at Page 326 that:

“A broad principle has emerged from English decisions in relation to consolidation applications. It is this, where there are common question of law or fact in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matter should be disposed at the same time, consolidation should be ordered”

10. In **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa (2000) eKLR**, Justice Maraga (as he then was) observed that :

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

1. some common question of law or fact arises in both or all of them; or
2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions, or
3. for some other reason it is desirable to make an order for consolidating them.”

11. Learned counsel for the defendant submitted that both suits stem from a banker-customer relationship and the failure of the plaintiffs to honor their obligations. Counsel for the plaintiffs referred the court to the case of **Korean United Church of Kenya & 3 Others v Seng Ha Sang (2014) eKLR** where it was observed that “Consolidation of suits is done under the inherent powers of the Court and for purposes of achieving the overriding objective of the Civil Procedure Act that is for expeditious and proportionate disposal of civil disputes. Therefore, the main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action” Counsel was of the view that consolidation would confuse issues.

12. In the present suit I have noted that the facts of the suit relate to realization of securities that were advanced to the plaintiffs. The only information that is available as regards HCCC 4 of 2017 is the plaint that is attached to the application. The court cannot tell the related questions of law to be decided in the said case as it has not seen the defendant’s side of the story. Counsel for the plaintiffs also in their submissions imputed that an appeal has been filed against the decision in HCCC 4 of 2017 and it is trite law that submissions cannot take the place of pleadings and I reject that argument.

13. An analysis of the law governing consolidation of suits as gleaned from the Civil Procedure Act and Rules speaks to the fact that the call for consolidation ought to have been made at pre-trial stage and what is currently available are the details of pretrial compliance in respect of the instant suit and not in HCCC 4 of 2017. From where I sit it is difficult to tell how far and what steps have been taken towards the prosecution of HCCC 4 of 2017. Counsel for the defendant has hinted the same in their submissions and as indicated earlier, submissions cannot take the place of pleadings. From the evidence before me consisted in the pleadings, this court is not able to see the common issues from one side of the coin as well as unable to see the common legal and factual issues that run through the said cases on both sides. In order to do justice to both parties, I find it is not desirable to grant the request for consolidation by the defendant. It is appropriate to have the two cases heard separately since the claims and reliefs sought are not similar in the two cases. No evidence on prejudice to be suffered by the parties has been shown by the proponents of the consolidation and as such I am not convinced that the only way to do justice to the parties herein is to order consolidation. It is possible to have the two cases heard side by side within the shortest time possible once all the pre-trial directions have been concluded.

14. In the result it is my finding that the application dated 17.12.2018 lacks merit. The same is dismissed with no order as to costs. Parties are now directed to set down the matter for hearing as a matter of priority.

It is so ordered.

Dated and delivered at Machakos this 6th day of May, 2020.

D. K. Kemei

Judge