



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**HIGH COURT CIVIL CASE NO. 407 OF 2008**

**ELECON DEVELOPERS LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED..... DEFENDANT**

**RULING**

1. The Notice of Motion dated 13<sup>th</sup> July 2018 is for the following prayers:-

a) THAT this Honourable Court be pleased to order a consolidation of this suit with HCCC NO. 1766 OF 2000, ALCON HOLDINGS LIMITED VS KENYA COMMERCIAL BANK LIMITED.

b) THAT further proceedings in HCCC NO. 1766 OF 2000 be stayed until further orders.

c) THAT costs of this application be provided for.

2. The Application is said to be brought under a raft of laws which include Order 11 Rules 1, 3(1) (h) & (2) (j).

3. The claim by Elecon Developers Limited (Elecon) in this suit is for enforcement of a sale agreement dated 10<sup>th</sup> February 2006 between it and Kenya Commercial Bank Limited (The Bank) in which the Bank agreed to sell LR No. 12467 (The suit property) to Elecon. The Bank was selling that property as a chargee over the interest in the suit land. Amongst the prayers sought by Elecon is one for specific performance. Another is for general damages for breach of contract in lieu or in addition to specific performance.

4. The chargor to the said land is Alcon Holdings Limited (Alcon Holdings) who ,through Civil Suit 1766 of 2000, sued the Bank not only seeking to injunct the Bank from exercising its power of sale but challenging the validity of the charge itself. Further details are unnecessary.

5. Both Alcon Holdings Limited and the Bank resist the request for consolidation of the two suits.

6. This Court has given regard to the application, the replies to it and the arguments made in support and against the Motion.

7. The statutory anchor for consolidation of suits is Order II rule 3 of the Civil Procedure Rules where the Court can at a case conference consider consolidation of suits. But even if that occasion has past, the Court still has inherent jurisdiction to consider consolidation in the context of an application brought to it by a party or parties seeking consolidation.

8. As to the principles applicable to consolidation, the Court in Nyati Security Guards & Services Ltd –vs- Municipal Council of Mombasa [2004] eKLR stated:

“Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. 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.

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.

The circumstances in which suits can be consolidated are broadly similar to those in which parties may be joined in one action. Accordingly, actions relating to the same subject matter between the same plaintiff and the same defendant, or between the same plaintiff and the same defendant, or between the same plaintiff and different defendants or between different plaintiffs and the same defendants may be consolidated.

There are however situations where consolidation is undesirable like where in two actions a plaintiff in one is a defendant in the other unless the claim in one is to be treated as a counterclaim in the other. The other situation where consolidation is undesirable is where the plaintiffs in two or more actions are represented by different advocates. In such situation the hearing will be longer than take long and the purpose of saving time will be defeated".

9. This Court agrees with that rendition of the law and observes that the Court in that decision does not close the list of what needs to be considered. Each circumstance will be decided on its own uniqueness. However, consolidation may be declined if it is sought for a reason that is not *bonafide* or which is simply intended to prejudice a party or give another an undue advantage.

10. Although both suits touch on one piece of land, the causes of action are without doubt distinct. In 1766 of 2000, Alcon Holdings presses for its rights as a customer to the Bank and questions the validity of the charge which the Bank sought to enforce. In addition, it contests the manner in which the Bank exercised its purported power of sale. In this matter Elecon attempts to enforce the performance of a contract for the purchase of the suit land in which the Bank had purported to exercise its power of sale as a chargee.

11. It would be obvious that the fate of one suit may affect the other as both Alcon Holdings and Elecon seek to keep the suit land. The tension between the interests of Alcon Holding and Elecon becomes the more clearer when one considers the two disputes from the proposition of law that maybe invoked by Alcon. The following issues may arise:-

- i. If the Bank is found to be in breach of the Agreement for sale with Elecon, can it be said that the sale Agreement extinguished Alcon's equity of redemption.
- ii. If the charge to Alcon is found to be valid but the exercise of the statutory power of sale by the Bank found to be unlawful or otherwise irregular, what would be the remedy for Alcon. Is it damages or recovery of the land?

12. That there could be a good case for consolidation of these suits was clear to this Court when it declined Elecon's application to be joined in 1766 of 2000 as an interested party. In a Ruling of 19<sup>th</sup> October 2017 I noted;

[13] What needs to be asked is whether the Applicant should be allowed the joinder only for purposes of getting a platform to nudge the progress of this matter. Bearing in mind that the Applicant already has civil suit No. 407 of 2008, I must wonder whether the proper application for the Applicant to have brought is not one for consolidation. An Application of that nature will grant the Court an opportunity of considering whether there is a commonality of law and facts in the two suits or whether for some other reason it is desirable to make an order for consolidation.

13. Upto there, the inclination of this Court would be to allow consolidation but there are two issues (which may be interlinked) which the Respondents urge would militate against such an order. One, that it has taken 13 (perhaps 11) years for this application to be brought yet Elecon does not explain the inordinate delay. Second, that a consent compromising Civil Suit No. 1766 of 2000 has been entered and this application comes a little too late.

14. Let me first consider the issue of delay. It is true that this suit was filed 11 years ago and in an affidavit of 18<sup>th</sup> July 2008 sworn in support of a Chamber Summons Mr. Praful Premchand Salva alludes to the existence of HCC 1776 of 2000 as follows:

11. THAT the Plaintiff received a letter dated 16<sup>th</sup> February 2006, addressed to the Defendant's Advocates and copied to the Plaintiff and which said letter I read and I realized that the Defendant had deliberately concealed the existence of Civil Suits in respect of Plot No. L. R No. 209/12467 known as HCCC 1776 OF 2000 and HCCC No. 735 of 2003 annexed herewith and marked 'PPSS' is a copy of the said letter.

15. In that event Elecon has been aware of HCC No. 1776 of 2000 for 11 years now. Elecon then waits until 17<sup>th</sup> August 2016 to seek to be enjoined to Civil Suit No. 1766 of 2008. This is 8 years after it got to learn about that suit.

16. The request for joinder was declined by Court on 19<sup>th</sup> October 2017. Important in this context is that in the Ruling of Court of 19<sup>th</sup> October 2017, the Court observed that consolidation of the suits may have been the proper course open to Elecon. Does Elecon take the cue and promptly move Court for consolidation? No! It files the current application on 21<sup>st</sup> January 2019, this is about 14 months later.

17. This Court has carefully looked at the application and the affidavit of Praful Premchand Salva in support. Nowhere is the delay explained. It is not explained why it has taken Elecon 11 years to move this Court for consolidation or in any event 14 months to pursue the course which the Court alluded to in its Ruling of 19<sup>th</sup> October 2017. This lengthy passage of time once not explained is undue and

inordinate delay.

18. That delay is further complicated with a development in HCCC No. 1766 of 2000. On 25<sup>th</sup> October 2018 the parties in that suit compromised the suit by consent as follows:-

By consent, subject to consent of 8<sup>th</sup> November 2017, the parties agree as follows:-

1. Both parties be at liberty to market the suit property LR. No. 12467 for sale.
2. The Defendant be at liberty to commission an independent valuation of the property.
3. The costs for valuation and marketing be netted off from the sale proceeds.
4. Mention on 12<sup>th</sup> February 2019.
5. Orders to apply in 735/2003.

19. The Consent of 8<sup>th</sup> November 2017 itself is in the following terms:-

1. The property known as Land Reference Number 12467 (the suit property) will be sold subject to and under the supervision of this Honourable Court.
2. The Plaintiff agrees to remit to the Defendant the sum total of Kenya Shillings Ninety Million (90,000,000) from the proceeds of the Sale (hereinafter the said sum) in full and final settlement of the claims in Civil Suit Number 1766 of 2000 and Civil Suit Number 735 of 2003 and with regard to the charge dated 16<sup>th</sup> October 1995 over the suit property upon execution of the proposed sale Agreement.
3. The said sum will be paid immediately upon execution of the proposed Sale Agreement but not later than one (1) month hereof.
4. The title documents will thereafter be discharged and released to the Plaintiff.
5. Upon the payment of the said sum this suit together with suit Number 735 of 2003 be marked as settled.
6. The matter be mentioned after two months (2) from the date hereof to confirm the settlement.

20. In effect Civil Suit No. 1766 of 2000 is all but compromised. I say so notwithstanding that on 22<sup>nd</sup> January 2019, this Court, in an ex parte session granted order (c) of the application now before Court in the following terms:-

(c) THAT pending the hearing and determination of this Application herein, this Honourable Court hereby sets aside the Consent Orders in HCC No. 1766 of 2000 entered on 8<sup>th</sup> November 2017 by which KCB of the one hand and Alcon Holdings of the other hand, compromised the proceedings in the said HCC No. 1766 of 2000 without involving Elecon or caring for Elecon's interest upto the date of Directions (in the first instance).

21. Although those interim orders "set aside" the consent entered in 1766 of 2000, they were to last upto the hearing and determination of this application.

22. Having now considered the matter after full argument of parties, this Court declines to confirm the interim orders granted on 22<sup>nd</sup> January 2019 and extended from time to time. The consent that had been set aside is reinstated.

23. Because of the undue delay in bringing the motion for consolidation and for the fact that it came after Civil Suit No. 1766 of 2000 had been compromised, the Motion is without merit. But I have to say that Elecon is not without remedy. It can still pursue damages for breach of contract. In not seeking consolidation promptly, Elecon made an election, perhaps without intention, that it would not press for specific performance but damages for breach of contract.

24. The Notice of Motion dated 21<sup>st</sup> January 2019 is dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 8<sup>th</sup> Day of November 2019

F. TUIYOTT

JUDGE

PRESENT:

Alutalala for the Plaintiff/Applicant

No appearance for Defendant

Court Assistant: Nixon