



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.383 OF 2010

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

LINEAR COACH CO. LTD.....1ST DEFENDANT

ALFRED MOFFART MICHIRA.....2ND DEFENDANT

DUNCAN MOGAKA MICHIRA.....3RD DEFENDANT

RULING

(1) Before this Court the Notice of Motion dated **6th May 2019**, by which **DUNCAN MOGAKA MICHIRA**, (the 3rd Defendant/Applicant) seeks for Orders that:-

“(1) The suit herein *FIDELITY COMMERCIAL BANK –VS- LINEAR COACH COMPANY LIMITED – CIVIL SUIT NO.383*, be consolidated with *DUNCAN M. MUCHIRA and 4 OTHERS VERSUS FIDELITY BANK-MILIMANI CIVIL SUIT NUMBER 654 OF 2007*, for hearing and determination.

(2) The costs of this application be provided for.”

(2) The application which was premised upon **Order 3 Rule 5** and **Orders 51 Rule 1** of the **Civil Procedure Rules** and **Section 1A, 1B, B and 3A** of the **Civil Procedure Act** and any other enabling provisions of the law was supported by the Affidavit of even date sworn by the 3rd Defendant/Applicant.

(3) The 2nd Defendant **ALFRED MOFFART MICHIRA** opposed the application by way of a Replying Affidavit dated **22nd July 2019**. The Court directed that the application be canvassed by way of written submissions. The 3rd Defendant/Applicant filed his written submissions on **7th August 2019**, whilst the 2nd Defendant filed his written submissions on **9th October 2019**.

BACKGROUND

(4) The 3rd Defendant/Applicant in this present suit is also one of the five Plaintiffs in **Milimani Civil Suit No.654 of 2007**. The genesis of the present suit is the financial accommodation in the form of two Hire Purchase facilities granted to the 1st Defendant by the Plaintiff Bank. The said financial accommodations to the 1st Defendant were guaranteed by the 2nd and 3rd Defendants. The Plaintiff claims that there was persistent default by the Defendants of the two respective Hire Purchase Agreements. The Plaintiffs therefore brought a claim against the 1st, 2nd and 3rd Defendants for the sum of **Kshs.14,689,093.80** in respect of monies due on the two Hire Purchase Agreements.

(5) On the other hand **Milimani Civil Case No.654 of 2007** is a suit in which the Plaintiff (who is the 3rd Defendant/Applicant in this suit and 4 others have sued **Fidelity Commercial Bank** (the Plaintiff herein) seeking judgment against the Defendant as follows:-

“(a) A permanent injunction restraining, the Defendant, his agents and/or authorized legal representatives from advertising, selling or transferring properties known as L.R.No.209/9648 (Lavington) and L.R No.12661/26 (Koitobus/Hardy Estate Karen).

(b) A declaration that the charge and further charge registered on 25th August 2004 and 29th August 2005 respectively over

L.R.No.209/9648 in favour of the Defendant is null and void.

(c) A declaration that the Variation of charge registered on the 25th of August 2004 over L.R NO.12661/26 is null and void.

(d) A declaration that the statutory notice issued 23rd May 2006 is null and void, as it does not comply with the provisions of Law.

(e) An order that the Defendant renders true accounts to the 5th Plaintiff.

(f) An order directing the registrar of titles to rectify the register for L.R No.209/9648 to remove and/or discharge the title.

(g) Costs of the suit

(h) Any other relief the honourable court may deem just to grant.”

ANALYSIS AND DETERMINATION

(6) I have carefully considered the written submissions of both Counsel as well as the relevant law. The 3rd Defendant/Applicant submits that the two suits in question involve the same subject matter being financial/loan facilities extended to the 1st Defendant comprising of two term loans amounting to **Kshs.10 Million** in the form of Hire Purchase Agreements. The 3rd Defendant/Applicant contends that the consolidation of the two suits would greatly expedite their hearing and disposal, cut on expenses and save judicial time.

(7) On his part the 2nd Defendant in opposing the application for consolidation submits that the two suits do not involve common issues or points of law and are essentially different. The 2nd Defendant further submits that there is no commonality in the subject matter of the two suits. That the rights claimed in each suit are different. Finally the 2nd Defendant submits that it would be undesirable to consolidate the two cases as this would only lead to delay in determining the two suits as each is at a different stage in the trial process.

(8) **Order 11 Rule 3(1)(h)** of the **Civil Procedure Rules 2010** provides for consolidation of suits in the following terms:-

“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 at which it shall:-

(a)

(b)

(c)

(d)

(e)

(f)

(g)

(h) Consider consolidation of suits...”

(9) In **R.M.G –VS- N.G & Another Nairobi HCCC No.29** of 2009 (OS) the Court stated as follows:-

“The principle is that consolidation of suits will be ordered where common questions of law or fact arise of such importance as to make it desirable that the whole of the matter be disposed of at the same time. This could mean that the suits are brought together with a view to disposing of them simultaneously, if the questions of law or fact to be answered in each of them are one or common, and they can conveniently be disposed of simultaneously.”[own emphasis]

(10) In **NYATI GUARDS & SECURITY LTD –VS- MOMBASA MUNICIPAL COUNCIL HCCC NO.992 OF 1994** the Court of Appeal observed as follows:-

“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 or 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 plain and different Defendant or between different plaintiffs and the same Defendants may be consolidated.”[own emphasis]

(11) The 3rd Defendant in urging the court to consolidate the two suits, submits that they involve the similar questions of law and fact. I have myself considered the two suits. In **HCCC NO.383 OF 2010** Fidelity Bank is the Plaintiff whilst in **HCCC NO.654 OF 2007** the Bank is the Defendant. Likewise in **HCCC NO.383 OF 2010 Duncan Mogaka** is the 3rd Defendant whilst in **HCCC NO.654 OF 2007**, he is the 1st Plaintiff. The only common issue between the two suits is that both involve facilities obtained from Fidelity Bank. However the reliefs claimed in the two suits are entirely different. In the **HCCC No.654 of 2007** the Plaintiffs are seeking a permanent injunction to restrain the bank from selling off the suit property as well as several other declaratory orders. On the other hand in the present suit the Plaintiff’s banks claim is for a liquidated sum of **Kshs.14,689.093.80**.

(12) In the **Nyati Security Guards case** [supra] it was recognized that there do exist situations where consolidation would be undesirable. In this situation where the Plaintiff in one suit is the Defendant in the other suit and where the reliefs claimed are different then in my view it would only serve to complicate matters by consolidating the two suits. In my view consolidation would only serve to cloud issues and to delay the expeditious disposal of the two suits. Accordingly I decline to grant this application for consolidation. Costs in the cause.

Dated in Nairobi this 13th day of December, 2019.

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Justice Maureen A. Odero