REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 206 OF 2012

BARCLAYS BANK OF KENYA LIMITED……..PLAINTIFF

Versus

ELIZABETH AGIDZA…….1st DEFENDANT

NATAHAN ONDEGO……..…..2ND DEFENDANT

ALFRED SAGWA MDEIZI…….....……3RD DEFENDANTS

RULING

Review

[1] The Motion before me is dated 15th November 2012 and is asking the Court to: a) to set aside its order of 28th September 2012 in which this suit was struck; and b) upon setting aside the said order, this suit to be consolidated with Kisumu High Court Civil Case 61 of 2012 for trial and determination in the High Court at Kisumu as agreed by the parties by way of a Consent letter dated 24th July 2012. The application is supported by the Affidavit of Greg Karungo. The major ground of the application is that: the suit was struck out on the basis that there was a similar suit existing in the Kisumu High Court being High Court Civil Case 61 of 2012. Yet, before the Ruling was delivered, the parties had already agreed to consolidate both matters and to have them heard in the Kisumu High Court. The parties executed a Consent dated 24th July 2012 to that effect which was filed on 24th July 2012. The effect of the consent was to compromise the Defendant's application to strike out the suit. This fact has not been denied by the Defendant's counsel. But, for reasons only known to the Defendant's Counsel, a copy of the filed Consent was not availed to the Plaintiff despite requests by the Plaintiff's counsel for a copy to be availed. This is evident from the letter dated 15th August 2012 annexed to the Supporting Affidavit. It is only after the Ruling of 28th September 2012 that the Defendant's counsel forwarded a scanned copy of the consent to the Plaintiff's counsel via email dated 18th October 2012. See page 15 of the exhibit in the Supporting Affidavit. The action by the Defendant's counsel is suspect especially that they voluntarily executed the consent letter filed in court. There is also no suggestion of fraud or collusion in the signing of the consent as all material facts were known to the parties, and they consented to compromise the application for dismissal of suit in terms which were so clear and unequivocal. In the premises, the Court should reject any attempt by the Respondents to denounce

the consent herein, and instead exercise its discretion in favour of the Applicant by setting aside the order of dismissal of suit; the Respondent cannot be allowed to benefit from the *male fides* conduct of their Advocates. In the case of ***Francis Kimani Kariuki V Hudson Wamambiri Kamulamba*** [2005] eKLR, the court held as follows:

> "***The said insurance company's conduct has been less than honest. It has acted mala fides in the conduct of this case. The defendant does not deserve the exercise of discretion in his favour by this court.***"

In ***Associated Electrical Industries Ltd v William Otieno [2004] eKLR***, it was held that Parties are bound by their pleadings.

[2] The Applicant urged the Court to hold that the consent is binding on the parties and that the Respondents' conduct is nothing but an attempt to arbitrarily withdraw from the compromise. They cited the case of ***Kenya Commercial Bank Ltd vs. Specialised Engineering Company Ltd* (1982) KLR 485**, *where it was held that;*

> ***"…a consent entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for reasons which would enable the court to set aside an agreement."***

The overriding objective of the Civil Procedure Act and the rules made thereunder to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act would be best served by the consolidation already agreed upon by the parties in the suit.

[3] The Applicant also addressed the power of the Court in ordering consolidation of suits and directing the suit to be heard in another place. They cited the case of ***Hangzhou Agrochemical Industries Ltd V Panda Flowers Limited [2012] eKLR,*** where it was held that:-

> ***"In the present case, it is not disputed that there are two cases revolving around similar issues. It is the defendant's position that the determination of the Nakuru Case is likely to dispose of the present suit hence the present suit ought to be stayed. What the defendant is not amenable to is the consolidation of this suit with the Nakuru suit since the two suits are at different stages of proceeding and a consolidation would have the result of derailing the Nakuru matter."***
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> The court went on to state:
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> ***"Bad faith or no bad faith the overriding objective aforesaid enjoins the Court to aim towards the efficient use of the available judicial and administrative resources. One cannot be said to be achieving this when cases which ought to be dealt with by one High Court registry are scattered all over the High Court registries. When confronted with such a scenario the Court would either stay some of the suits or "house" all the suits under one registry."***
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> ***"In my view therefore, the High Court is perfectly entitled, where it so deems appropriate, to direct that a matter filed in one place be heard by the same Court sitting at a different place. The mere fact that the change of venue may involve the change in the presiding officers concerned does not derogate from the fact that it is still the same High Court hearing the matter. A Judge of the High Court is a Judge wherever he is and carries with him the jurisdiction of that court and mere posting to different stations is, in my view, simply an administrative arrangement which does not deprive the Judge of his Constitutional mandate."***

[4] From the above, the Applicant submitted that *this Honourable Court has power to grant the orders sought. The dismissal of the suit at a time when parties had agreed to have the suit consolidated with* Kisumu High Court Civil Case 61 of 2012 and a consent filed to that effect was an error apparent on the face of record and also sufficient reason to warrant setting aside of the order of dismissal. And the Court should also that *this suit be consolidated with* Kisumu High Court Civil Case 61 of 2012 as agreed by the parties in the Consent letter dated 24th July 2012 and filed in this Court on the same day. Indeed, *Section 6 of the Civil Procedure Act that was relied on by this Honourable Court in dismissing the suit states that the remedy is to stay the suit, not dismiss as if the matter is res judicata, which is not the case.*

The Respondents opposed application

[5] The Respondents submitted that there is no error on the court record to warrant the orders sought as the consent letter herein cannot constitute such error. The consent letter was never recorded on the court file and so it was not validated into a court order. According to the Respondents, the consent letter just remained the mere intention of the parties to consolidate the suits herein. When the court pronounced itself on the 28th September, 2012, the court order effectively overtook the consent letter. The court ruling striking out this suit superseded the consent letter and rendered it useless, null, void and of no consequence. The mere intention of the parties to consolidate the suits herein cannot therefore vitiate a ruling of this honourable court pronounced on the merits of the case. The motive of the Applicant was to use the consent to consolidate this suit and forestall any order that may be made by court on the Respondent's application to strike out this suit on the grounds of being *subjudice* and an abuse of the due process of court.

[6] The Respondents went on to submit that the Applicant has also miserably failed to demonstrate how that error (if any) influenced the court into arriving at the wrong decision. The guidelines set by Court of Appeal on error on the face of the record in the case of ***Anthony Gachara Ayub vs. Francis Mahinda Thinwa*** have not been achieved**.** This Honourable found the conduct of the Applicant in instituting this suit was less than candid and an abuse of the court process. The Court should so find again about the Applicant and dismiss the application. The Respondents further submit that under section 6 of the Civil Procedure Act, chapter 21 laws of Kenya (herein after referred as 'the Act") the court is supposed to bar any further proceeding in a suit where there is another similar suit in existence. This is to avoid the mischief and embarrassment which may arise out the likelihood of two different court adjudicating over a similar matter, and arrive at different decisions. Section 6 of the Civil Procedure Act provides:-

> ***"No court shall proceed with the trail of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between parties under whom they or any of them claim, litigating under the same title where such suit or proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief sought"***

[7] By the virtue of the existence of the Kisumu HCCC No. 61 of 2012, the jurisdiction of the court was ousted. They cited the famous writing of Nyarangi J in LILIAN ''S'' Case that:-

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would no basis for continuation of proceedings pending other evidence. A court of Law down its tools in respect of the matter before it the moment it holds the opinion that it has no jurisdiction".***

The suit was struck out by court in exercise of powers conferred on it by virtue of section 1A and 1B of the Act giving effect to the overriding objective of the act on efficient disposal of business of the court, the efficient use of the available judicial and administrative resources and timely disposal of the proceedings. This finding of the court has not been challenged anywhere. The sole purpose of filing this application is to attempt to revive a suit that has already been struck out

for being a blatant abuse of the process of court and have it consolidated with Kisumu HCC NO.61 of 2012. The reason why this suit was struck out was because the issues raised in the suit were substantially the same as the issues raised in the Kisumu suit. The court found as fact that the suits were intertwined and the entire matter in issue was entirely covered in the Kisumu suit. A consolidation will not add any value to the Kisumu suit and is, therefore, an exercise in futility. The court should not act in vain. In any event, the court has no jurisdiction to consolidate a suit which has been struck out with another live one.

[8] Rule 7 of Order 12 of the Civil Procedure Rules quoted by the Applicant deals with setting a side of judgment that was entered in case for non- attendance. This suit was not struck out on that reason. The section is, therefore, inapplicable. Order 45 Rule 1 of the Civil Procedure Rules is the relevant one for an order of review to be issued. The cases cited by the Applicant do not apply in this case. The Applicant submitted that there is no mala fides on the part of the counsel for the Respondents in the filing of the consent. The Respondents are not denying that they entered into a consent with the Applicant to consolidate this case with the Kisumu case, only that the consent remained just an intention for it never received court's validation. Moreover, the consent has been overtaken by events with the ruling of this honourable court. It is useless, null, void and of no consequence and is no longer binding. The Applicant is undeserving of the discretion of the court and the application should be dismissed.

THE DETERMINATION

[9] Although the Applicant has mixed-up the remedies he is seeking from the court, from the nature of the arguments proffered it is clear the Applicant is asking the court to review its order of 28th September 2012 in which it struck out this suit. The relevant law on review is Order 45 rule 1 of the Civil Procedure Rules and is a strict one. Any person applying for review must bring himself under the purview of the said order and much judicial ink has been spilt on this subject in cases without number. I need not re-invent the wheel or pretend to be making any further elucidation of Order 45 Rule 1 except I am content to cite the following cases: ***Salama Mahmoud Saad versus Kikas Investments Limited & Another (2014) eKLR***, where the court stated that:

> ***"the jurisdiction of the Court under Order 45 of the Civil Procedure Rules is restricted to the grounds set out in the said Order which are:1) there has been the discovery of new and important matter of evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the Order made; or 2) on account of some mistake or error apparent on the face of the record; or 3) for any other sufficient reason". (Our emphasis)***

And the case of ***Nancy Wanjeri & 5 others versus Michael Mungai (2014) eKLR,*** which quoted the decision of the Court of Appeal in ***National Bank of Kenya Limited vs. Njau (1996) LLR 469 (CAK),*** where it stated that***:***

> ***"A review may be granted wherever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground of review that another judge could have taken a different view of the matter. Nor can it be a ground of review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law".***

[10] I will apply the legal test on the facts of this case. The Applicant says that there was an error apparent on the face of the record, and according to them, the error is in the fact that parties herein filed consent on 24th July 2012 to have this suit consolidated with KSM HCCC NO 62 of 2012. But, the Respondent's advocate did not avail the Applicant of the filed consent letter for action. The Applicant believes that the advocates for the Respondent deliberately kept the consent for reasons known to them. they read mischief and mala fides on the part of the said advocates in the way they handled the whole issue of the consent. The Applicant urged that the effect of the

consent was to compromise the application for striking out the suit which was pending ruling. They are convinced that had the consent been brought to the attention of the court, the ruling may have become unnecessary and the court may have recorded it as its order. Is this an error in the sense of Order 45 of the CPR?

[11] The Respondent says it is not because the consent was filed except it did not receive the superadded authority of the court for it to have the force of law. It is, therefore, useless, null, void and of no legal consequences. They call it mere intention to consolidate the suits herein. These are interesting submissions. But I should state here that the conduct of the advocates for the Respondent does not approval of the court. Having said that, consent filed in court in a judicial proceeding is an agreement between the parties and its reality is that it has effect on the legal relations of the parties. such consent is not, therefore, an intension to carry out the obligations set out in the consent as it has been argued by the Respondents. The Court only gives court's superadded authority to the consent for purposes of enforcement of the consent as an order of the court. The superadded authority of the court is given by formally endorsing the consent on the record. But endorsement of consent of parties by the court is invariable, an administrative act which has no time limitation. It can be done any time after filing. Thus, failure to so endorse does not reduce the letter of consent into a useless, null, void or something of no legal effect as submitted by the court. That is why the law say that such matters as duress, fraud or mistake in entering into consent are merely collateral operatives that co-exist with the expressions of consent and have to be proved in order to undo a consent. And the grounds of setting aside consent are like those of undoing a contract. Consent is not, I repeat mere intention to do something.

[12] Whether the judge would have arrived at a different conclusion had the consent been brought to his attention is a different matter altogether but it is not a consideration under order 45 of the CPR lest the court should be sitting on appeal over its judgment. But with the entry of the overriding objective and article 159 of the Constitution, courts are now obligated to have a much wider approach in applying the prescriptions of law including order 45 of the CPR. I will take that root and say that this is not an error in the sense of Order 45 of the CPR which would impel the court to review its own decision. The consent is about consolidation of the two suits. The decision here is a dismissal of the suit for reasons that it was an abuse of the court process. The consent will not cure that finding of the court. I should state also that where a suit has been struck out for being an abuse of the court, not even the consent of the parties can purge the abuse or restore the suit to life through review. Perhaps the only legal revival of such suit that has met its demise in the manner herein is an appeal against the dismissal order. And I doubt the prospects of such appeal given that the suit in Kisumu is similar to and sufficient to cover issues in controversy in this case. I also find nothing which is in the nature of *ex debito justitiae* in this matter as to cause a review or setting aside of the order of dismissal. In the circumstances of this suit, I refuse to review the order by Mabeya J. Instead, I dismiss this application. But, I do not condemn the Applicant to costs given the conduct of the Respondent's advocates. It is so ordered. In view of my order, I need not determine the application for consolidation and transfer of suit for hearing at Kisumu High Court for these orders are mere saddles upon the order for review; if it fails, they fall by the way side.

Dated, signed and delivered in court at Nairobi this 10TH day of February 2015

F. GIKONYO

JUDGE