THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO.1758 of 2021

(ARISING OUT OF HCCS NO. 928 OF 2020 AND HCCS NO 556 OF 2020)

SANJAY DATTA :: APPLICANT

VERSUS

1. **BANK OF INDIA**
2. **SALEEM SHABUDDIN BHAI**
3. **NAUSHAD THARANI**
4. **KARIM NISAR ALI ::: RESPONDENTS**

BEFORE HON. JUSTICE JEANNE RWAKAKOOKO

RULING

Introduction

The Applicant brought this application by way of Chamber Summons under section 33 of the Judicature Act, Cap 13, section 98 of the Civil Procedure Act, Cap 71 (CPA) and order 11 rules 1 and 2 of the Civil Procedure Rules SI 71-1 (CPR) seeking orders that:

1. HCCS No.928 of 2020; Sanjay Datta v Bank of India and HCCS No.556 of 2020; Saleem Shabuddin Bhai, Naushad Tharani, and Karim Nisar Ali v Sanjay Datta be consolidated and heard together;
2. The separate proceedings in HCCS No.298 of 2020; Sanjay Datta v Bank of India and HCCS No.556 of 2020; Saleem Shabuddin Bhai, Naushad Tharani and Karim Nisar Ali v Sanjay Datta be stayed pending their consolidation and joint hearing.
3. The costs of this Application be in the consolidated cause.

Background

The Applicant has applied for the consolidation of two suits; HCCS No. 928 of 2020; Sanjay Datta v Bank of India and HCCS No. 556 of 2020; Saleem Shabuddin Bhai, Naushad Tharani, and Karim Nisar v Sanjay Datta. The

Applicant is the Plaintiff in HCCS No.928 of 2020 and the Defendant in HCCS No.556 of 2020.

The 1st Respondent opposes the consolidation however 2nd, 3rd, and 4th Respondents herein do not oppose this application and, to this effect, a partial consent order was filed with this court on 23rd May 2022.

This application is supported by an affidavit deponed by the Applicant, Mr Sanjay Datta in summary the grounds of this application are;

1. The two suits are pending before the same court,
2. Both suits involve the same and/ or similar questions of law and fact.
3. The claims for relief in both suits stem from the same transactions or series of transactions,
4. Consolidation of both suits is necessary to avoid a multiplicity of suits,
5. Both suits are still in the early stages of being adjudicated upon,
6. An order of consolidation will not prejudice any of the parties,
7. It is desirable, just, and equitable that this application be allowed and that both suits, therefore, be consolidated.

In **paragraph 2** of his affidavit, the Applicant avers that both suits involve the same or similar questions of law and fact because they all relate to the same Memorandum of Understanding (hereinafter referred to as the "**MOU**") dated 5th September 2016 and a subsequent mortgage created over the Applicant's property in favour of the 1st Respondent for monies advanced to a company in which the 2nd, 3rd and 4th Respondents are directors. He further avers that the claims for relief in both suits stem from the same transactions or series of transactions being the MOU and the subsequent loan agreements and mortgage created over the Applicants property in favour of the 1st Respondent.

In **paragraph 5** of his affidavit in support the Applicant avers that in September 2016, Royal Pharma 2011 Ltd, acting through the 2nd – 4th Respondents who are its directors, obtained two term loans, two overdrafts and a letter of credit from the 1st Respondent collectively worth **UGX 1,600,000,000/= (One Billion Six Hundred Million Uganda Shillings)** and **USD 1,115,000 (One Million One Hundred and Fifteen Thousand United States Dollars)** using the Applicant's property comprised in LRV 4257 Folio 1 Plot 36 Naguru East Road, Kampala (hereinafter referred to as "the suit property") as security for the loan.

In **paragraph 6** of his Affidavit the applicant claims that once the 2nd – 4th Respondents and Royal Pharma 2011 Ltd failed to service the loan granted by the 1st Respondent, the 1st Respondent threatened to sell the Applicant's property through a demand dated 6th February 2020 and newspaper advertisements for sale dated 29th October 2020. The Applicant has since obtained an injunction stopping these sales vide HCCS 928 of 2020 which he

instituted against the 1st Respondent claiming, among other things, breach of care on the 1st Respondent's part and seeking declarations that the mortgages and guarantees executed with respect to the suit property were void and unenforceable. In obtaining the injunction the Applicant was required to deposit 30% of the sum outstanding and owed to the 1st Respondent being **USD 247,000 (Two Hundred and Forty Seven Thousand United States Dollars)**.

The Applicant then explained in **paragraph 7** of his affidavit that in HCCS No.556 of 2020 the 2nd – 4th Respondents sued him for recovery of **UGX 148,829,750/=** and **USD 445,469** as money they claim were loaned to him together with accrued interest thereon arising their agreement in the MOU and the subsequent loan and mortgage agreements executed with the 1st Respondent.

In **paragraph 11** of his affidavit, the Applicant argues that both suits involve similar questions of law and fact being;

a) Whether the Applicant is indebted to the 1st Respondent as a result of the Memorandum of Understanding he executed with the 2nd – 4th Respondents dated 5th September 2016 and the subsequent loan and mortgage agreements flowing therefrom.
b) Whether the 2nd – 4th Respondents have failed to service their loan obligations to the 1st Respondent in relation to the debt owed by Royal Pharma 2011 Ltd.
c) Whether the 2nd – 4th Respondent advanced any monies to the Applicant pursuant to the Memorandum of Understanding dated 5th September 2016 and from monies loaned to Royal Pharma 2011 Ltd by the 1st Respondent.
d) Whether the Applicant is indebted to the 2nd – 4th Respondents at all.

The 1st Respondent opposed this application by filing an affidavit in reply deponed by **Mr Francis Dudley Kyaligonza**, the 1st Respondent's Credit Manager.

In **paragraph 3** of his affidavit, the 1st Respondent's deponent avers that he has been advised that the application to consolidate the two suits is gravely misconceived because the 1st Respondent was not privy to the Memorandum of Understanding between the Applicant and the 2nd, 3rd, and 4th Respondents. He further avers that the 1st Respondent was not aware of the Memorandum of Understanding and it was not a condition precedent to the disbursement of the loan but that due diligence was carried out as per the Central Bank Guidelines. Further, in **paragraph 5** he argues that the parties are now trying to sneak in the Memorandum to delay payment of the outstanding money.

In **paragraph 7** the 1st Respondent's deponent states that the application for consolidation cannot hold because the two suits are founded on different issues to wit: foreclosure owing to default to pay regulated by the Mortgage Act on the one hand and a Memorandum of Understanding regulated by the Contract Act 2010 on the other.

In **paragraphs 8** and **9** he emphasised again that the Memorandum of Understanding between the Applicant and the 2nd – 4th Respondents doesn't bind the 1st Respondent and further that the 1st Respondent's interest in Civil Suit No.928 of 2020 is that of a secured creditor. In **paragraph 10** he argues that consolidating the two suits will occasion a grave injustice to the 1st Respondent whose loan interest remains outstanding to date.

Representation at Hearing

At the hearing on 28th April 2022, the Applicant was represented by Moses J. Adriko (Senior Counsel) together with James Bwogi, the 1st Respondent was represented by Lillian Kiiza, and the 2nd, 3rd, and 4th Respondents were represented by Stephen Asiimwe.

At the hearing counsel for the 2nd – 4th Respondent explained that they did not wish to oppose this application, the court thus directed that the parties file a consent with the Applicant which consent was duly filed on 23rd May 2022. The Applicant and 1st Respondent were directed to file their submissions, which were filed and have been considered in making this Ruling.

Issues for Determination

This court shall address the following issues for determination;

1. Whether HCCS No.928 of 2020 and HCCS No.556 of 2020 should be consolidated?
2. What are the remedies available in these circumstances?

Resolution

Issue 1: Whether HCCS No.928 of 2020 and HCCS No.556 of 2020 should be consolidated?

The rules governing consolidation of civil suits are founded in **order 11 rule 1** of the CPR which provides as follows;

"Where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may, either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit –

a) Order a consolidation of those suits; and

b) Direct that further proceedings in any of the suits be stayed until further order."

Consolidation is therefore a process by which the court combines separate lawsuits which arise out of the same transaction or series of transactions that have common questions of law and fact. As was explained in ***Yowana Akirod v Filipo Malinga [1992-93] HCB 91*** two or more actions may be consolidated where;

i. A common question of law or fact arises in the different actions,
ii. The rights to relief arise in respect of the same transaction or series of transactions.
iii. It is otherwise desirable to approve the consolidation.

The court in ***Stumberg & Anor v Potgieter [1970] EA 323*** stated that consolidation of suits should be ordered where there are common questions of law or fact but that consolidation should not be ordered where there are deep differences between the claims and differences in each action.

Arguments for consolidation presented by the Applicant:

In this case, the Applicant argued that the two suits should be consolidated firstly because the same or similar questions of law and fact arise in both suits and secondly because the claims for relief stem from the same transactions or series of transactions. To this end, it was argued on page 3 of the Applicant's written submissions that both suits arise from and were originated by the same MOU executed between the Applicant and the 2nd – 4th Respondents; which MOU resulted in the mortgage transaction with the 1st Respondent causing the Applicant's property being mortgaged.

The Applicant's counsel further argued that the MOU is also at the root of the dispute as to who is indebted to whom and who is ultimately responsible for settling any outstanding debts due to the 1st Respondent. It was further argued that the MOU and the borrowing that it facilitated are at the heart of both suits, factually and legally and therefore, on this basis, that both suits should be consolidated.

Arguments against consolidation presented by the 1st Respondent:

In opposing this application the 1st Respondent's counsel essentially argued in the written submissions that the two suits should not be consolidated

because there are deep differences between them, he relied on ***Stumberg & Anor v Potgenter (supra)*** where it was stated that "*consolidation of suits should not be ordered where there are deep differences between the claims and defence in each action.*" On page 2 of the 1st Respondent's written submissions it was argued that the two suits contain deep differences because (*paraphrased*);

a) The offer letter dated 16/09/2018 makes no mention of the MOU being a condition precedent to the disbursement of funds. That the Applicant cannot now purport to state that the MOU was the basis of the borrowing when it was never brought to the attention of the 1st Respondent until the parties started defaulting. That the parties are bound, being the Applicant and 2nd – 4th Respondents who are guarantors, principal debtors, and mortgagor with respect to the loan agreements and that the intention is now to delay payment.

b) That the MOU is premised on the recovery of sums of money whereas Civil Suit No.928 of 2020 is purely a foreclosure issue in which the 1st Respondent seeks to foreclose on the mortgaged property and recover the outstanding money which continues to accumulate interest. That foreclosure proceedings cannot in any way be on the same footing as money had and received.

c) That Civil Suit No. 928 of 2020 is purely governed by the Mortgage Act and Regulations thereunder whereas the MOU falls within the ambit of the Contracts Act, 2010. That the 1st Respondent seeks to foreclose and sell the mortgaged property by exercising its right of sale as per the Mortgage Act and Regulations to enable it to recover the outstanding amount. That the two causes are distinct without any nexus.

d) That clause 7 of the MOU only binds the parties, assignees, and successors excluding the 1st Respondent. That extending the application of an unregistered document to third parties would be unfortunate.

e) That the 1st Respondent's interest in Civil Suit No.928 of 2020 is that of a secured creditor and not one who is unsecured without a registerable interest.

Counsel for the 1st Respondent further argued that to drag the Bank into the private undertakings of individuals would make a bad precedent, that this application is simply a delaying tactic, that given the fact that the 1st Respondent is only interested in foreclosure of the mortgaged property there are no similar questions of law raised, and that an order for consolidation

would prejudice the 1st Respondent's right to foreclose even when the parties have not denied borrowing the monies and defaulting on their payment obligation. Ultimately it was argued that the two suits have distinct backgrounds and hence they cannot be determined as a single suit.

Court analysis:

In deciding this issue I have considered the pleadings in both suits and carefully perused through the MOU dated 25th September 2016 between the Applicant and the 2nd – 4th Respondents and the offer letters executed between Royal Pharma 2011 Ltd and the 1st Respondent to which the Applicant together with the 2nd – 4th Respondents were signatories in their capacities as directors of the company (2nd – 4th Respondents), guarantors (the Applicant and 2nd – 4th Respondents) and mortgagor (the Applicant).

As a starting point, I note that the security for the loans is listed in the offer letters as follows;

(a) Demand Promissory Note
(b) Legal mortgage on property situated at LRV 4257 Fol.1, Plot 36, Naguru East Road, Kampala District measuring approx.. 0.285 Ha. Registered to Sanjay Datta.
(c) Debenture fixed and floating on all current and non-current assets of the company.
(d) Lien on Fixed Deposit of USD 200,000
(e) Personal guarantee of:
Mr. Saleem Shabuddin – Director
Mr. Naushad Tharani – Director
Mr. Karim Nisar Ali – Director
Mr. Sanjay Datta - Mortgagor

I have also perused through the MOU which was executed between Naushad Tharani, Sleem Shabuddin Bhai, and Karim Nisar Ali as the 1st Parties and Sanjay Datta as the 2nd Party. In the MOU it mentions that the 2nd Party (Applicant herein) was desirous of obtaining a credit facility from the 1st Parties (2nd, 3rd, and 4th Respondents herein) and that the 1st Parties agreed to advance him a credit facility of **USD 350,000 (Three hundred and fifty thousand United States Dollars)** and **UGX 100,000,000/= (One Hundred Million Uganda Shillings)** on condition that, among other things, he deposited his certificate of title to property comprised in LRV 4257 Folio 1 Plot 36 Naguru East Road and pledge it as security to the Bank of India (Uganda) Limited (the 1st Respondent herein) to secure funds. This is stipulated under **clause 2** in the MOU.

The MOU further states under **clauses 3** and **4** that it was agreed that the Applicant would pay the 2nd – 4th Respondents the money advanced to him

within a period of two (2) years or such further period as the parties may agree and that upon repayment of the sums advanced including all charges and interest that the bank vide loan offer dated 16th September 2016 shall levy on the 1st Parties, the title deed would be returned to the 2nd Party. From this arrangement we should note the following;

a) The loan granted to the Applicant by the 2nd – 4th Respondents was on the condition that he provided his land as collateral to the loan transaction between the 2nd – 4th Respondents' company and the 1st Respondent.

b) That the repayment of the money advanced to the Applicant by the 2nd – 4th Respondents (including the interest and charges levied by the 1st Respondent) would occur within a period of 2 years unless otherwise extended by the Parties.

c) That it is only upon repayment of the sums advanced together with interest and charges arising from the loan with the 1st Respondent that the Applicant would have the certificate of title in the suit land returned to him.

These points are important to note because we can see, on reading the MOU, that the two transactions (that between the Applicant and the 2nd – 4th Respondents and the loan transactions executed with the 1st Respondent) are greatly interlinked to the extent that the Applicant made legal undertakings in the MOU which undertakings bound him to the loan obligations undertaken on Royal Pharma 2011 Ltd's behalf. It is through both the MOU and the loan agreements that the 1st Respondent may be able to lay claim to the Applicant's land, hence both transactions despite being separate, are closely related.

Returning back to the Loan Offer letters, I note that all 4 parties, that being the Applicant together with the 2nd – 4th Respondents appended their signatures to the letters with a statement at the end of the letters stating

> *"We, Mr. Saleem Shabuddin, Mr. Naushad Tharani, and Mr. Karim Nisar Ali, all of P.O. Box 7458 Kampala and Mr. Sanjay Datta of P.O. Box 24187 – guarantors in the proposed credit facilities to M/S Royal Pharma 2011 Limited have read, understood and agree to the terms and conditions of the offer letter and agree to extend personal guarantee securing the facility sanctioned to M/S Royal Pharma 2011 Limited."*

I highlight all of this because it is important to note that the Applicant was as much bound by and a party to the transaction between the 1st Respondent and Royal Pharma 2011 Limited as the 2nd – 4th Respondents were.

I, therefore, disagree with the 1st Respondent's attempt to completely disassociate the MOU and what was agreed therein with the subsequent loan agreements. I do, however, agree that the 1st Respondent is not a party to, and therefore not bound by, the MOU. However, the agreements that were undertaken in the MOU certainly have an impact on the 1st Respondent's rights under the loan agreement, to the extent that these rights technically originate from and are fortified by the MOU. In my view, this is a classic case of a series of transactions which are so related and interlinked that completely disassociating them from each other and viewing them in isolation would be impractical.

To further and conclusively assess whether this is an appropriate case for consolidation, it is important to consider the substance of both civil suits and the context in which they were instituted.

a) *HCCS No.556 of 2020 – Saleem Shabuddin Bhai, Naushad Tharani and Karim Nisar Ali v Sanjay Datta*

In HCCS No.556 of 2020, the 2nd – 4th Respondents (the Plaintiffs therein) have sued the Applicant (the Defendant therein) seeking the recovery of **UGX 148,829,750** and **USD 445,469** claiming breach of the MOU that was executed between the parties on 5th September 2016.

In paragraph 4(b) of the Plaint, the Plaintiffs claim that the Defendant willingly and expressly agreed to deposit his land title with them as security for the repayment of his loan and further that he expressly instructed and authorized them to mortgage his land to the Bank of India to secure a credit facility in favour of M/S Royal Pharma 2011 Ltd to which the Plaintiffs/ 2nd – 4th Respondents are directors. The Plaintiffs further claim in paragraph 4(c) that it was mutually understood that it was the company (Royal Pharma 2011 Ltd) that had the capacity to secure a sizable loan amount from the Bank of India and that it was therefore agreed that part of the amount on the loan secured from the bank would be defrayed off as that advanced to the Defendant.

In other words, I understand this to mean that part of the sums secured by the loan transactions with the 1st Respondent were directly advanced to the Applicant in line with the MOU he executed with the 2nd – 4th Respondents.

In paragraph 4(d) of the Plaint, the Plaintiffs claim that because the Defendant chose to secure the loan he took from the Plaintiffs as he wanted through the company instead of securing it directly from the bank under his names, he (the Applicant/ Defendant) additionally undertook to pay all the bank interest, charges, penalties, and costs himself that the bank levied on the mortgage on top of the principal sum advanced to him by the 2nd – 4th Respondents.

In paragraph 4(e) of the Plaint, the Plaintiffs further claim that it was agreed between them and the Defendant that it is only upon the payment of all the sums advanced to the Defendant together with all the charges and interest levied by the bank that his title deed would be returned to him. In paragraph 4(g) the Plaintiffs claim that the Applicant has to date failed to pay the amounts owed to them which they claim total **UGX 148,829,750** and **USD 445,469** inclusive of the accrued and accumulated bank interest.

In his amended Written Statement of Defence (WSD) and counterclaim, the Defendant denies the allegations being put forward by the Plaintiffs. He argues in paragraph 5(iii) that it is the Plaintiffs who pledged the suit property to the Bank of India initially to borrow UGX 1,600,000,000/= (One Billion Six Hundred Million Uganda Shillings) and USD 1,115,000/= (One Million One Hundred and Fifteen Thousand United States Dollars and later UGX 1,400,000,000/= (One Billion Four Hundred Million Uganda Shillings), letter of credit and overdraft limit of UGX 900,000,000 (Nine Hundred Million Uganda Shillings) and USD 1,000,000,000 (One Million United States Dollars), which subsequent loans weren't part of the initial agreement.

In paragraph 5(v) the Defendant/ Applicant herein further alleges that it was agreed between himself and the Plaintiffs that the payment of all the advanced sums inclusive of all the charges and interest under the mortgage vide the offer letter dated 16th September 2016 would levy onto the Plaintiffs and the Certificate of Title to the property would be returned to the Defendant. Further that the Defendant was mandated with paying the bank interest in line with the loan offer letter as would be mutually agreed by the parties, which mutual agreement (he claims) was never reached.

In paragraph 5(vii) the Defendant avers that contrary to what was agreed, the Plaintiffs failed to meet their obligations under the loan facilities resulting in a default position under the loan facilities. In paragraph 5(iii) the Defendant concedes to executing the Mortgage Deeds and Guarantees to secure the Plaintiffs' borrowings but he further argues in paragraph 5(ix) that his obligation to pay the bank interest was to be mutually agreed by the parties and that to his knowledge no such agreement was reached as to the interest payable by him.

In paragraph 5(xi) he avers that it is the Plaintiff's failure to settle their obligations with the Bank of India and resultant default that caused the 1st Respondent to issue a notice to sell the Defendant's property and recover all outstanding dues under the loan facility. That it is as a consequence of this threat of sale by the 1st Respondent that the Defendant/ Applicant herein instituted HCCS No.928 of 2020 where he sought to prevent any efforts by the 1st Respondent to realise the security by selling his property.

The Defendant then counterclaimed against the Plaintiffs arguing they were in breach of the MOU firstly because of their alleged failure to cause the settlement of the amounts advanced by the bank and secondly because of their failure to return his certificate of title after the 2 year period stipulated under the MOU had expired.

b) HCCS No.928 of 2020 – Sanjay Datta v Bank of India

In HCCS No.928 of 2020, the Applicant (Plaintiff therein) has sued the 1st Respondent (Defendant therein) claiming misrepresentation, breach of guarantee agreement, and breach of an implied duty of care at the hands of the Defendant. In his plaint, the Applicant makes reference to the 2nd – 4th Respondents who he refers to as "the Co-guarantors" and the MOU they signed.

In arguing that there was a breach of duty of care, the Applicant argues in paragraph 9 of his plaint that the 1st Respondent colluded with the 2nd – 4th Respondents and kept the inability of Royal Pharma 2011 Ltd to discharge its obligations and continued default to themselves and that this was contrary to the implied terms of the guarantee document which (allegedly) required the Defendant (1st Respondent) to inform the Applicant of any material difficulties or adverse circumstances that may prevent the principal debtor (Royal Phrama 2011 Ltd) from honouring its obligations.

In paragraph 10 the Applicant argues that in further breach of its implied duty of care, and in full knowledge of the principal debtor's inability to fulfil its obligations under the facilities advanced, the 1st Respondent made a further offer of enhanced facilities to the principal debtor by way of an offer letter dated 6th October 2018. In paragraph 11 he further argues that the 1st Respondent signed off on the second offer letter on the premise that the principal debtor had fulfilled its prior obligations and was not in default under the previous facilities advanced (which was not the case) and that the 1st Respondent, contrary to the common law duties implied in the banker-customer relationship colluded in ensuring that the true status of the principal debtor's default was not disclosed to the Applicant.

All in all the Applicant is seeking inter alia a declaration that the guarantees and mortgages executed with the 1st Respondent are invalid and unenforceable or should be set aside due to the alleged breaches and misrepresentations by the 1st Respondent.

The 1st Respondent filed a WSD denying the allegations put forward by the Applicant. In the WSD the 1st Respondent contends firstly that it was not a party to the Memorandum of Understanding that was executed between the Applicant and 2nd – 4th Respondents and that the said MOU was in no way a

condition precedent to grant of the credit facility it advanced to Royal Pharma 2011 Ltd.

The 1st Respondent further argues in paragraph 2(f) of the WSD that the Applicant was fully aware of the prior credit facilities when he proceeded to create two subsequent charges on the suit property for the additional facilities with his knowledge and consent. Further that it is the Applicant and the co-guarantors together with the principal debtor (Royal Pharma 2011 Ltd) that approached the bank seeking a renewal of the existing credit facilities. That the Plaintiff (Applicant herein) freely and willingly executed further mortgages and guarantees with full knowledge of the outstanding balances of UGX 900,000,000 and USD 1,000,000,000 from the prior facilities as of 4/10/2018.

In paragraph 2(n) of the WSD, the 1st Respondent further contends that the Applicant was fully aware of the outstanding amounts due and owing by Royal Pharma 2011 Ltd given the communications that were made to him personally and through his lawyers and that the 1st Respondent furnished details of the outstanding balances to the Applicant's attorneys, these correspondences are attached to the 1st Respondent's WSD as Annexure "E".

Resolution of issue

Having outlined the two cases above and the facts on which they are premised, it is very apparent in my view that whilst we are dealing with two separate legal transactions the transactions, in this case, are so intertwined that the two cases and the facts which link them cannot be viewed as separate and distinct. The facts and evidence from one case shall be considered in the other because of how closely related the series of transactions are that led to both civil suits. I am therefore inclined to agree more with the Applicant than the 1st Respondent that the suits touch on the same questions of law and facts, namely the legality of both transactions and the rights and liabilities owed to the 1st Respondent as a consequence and by whom.

The 1st Respondent's counsel in written submissions attempted to completely disassociate the 1st Respondent from the MOU transaction and therefore argue that there are two different transactions guided by two different laws however I do not agree with the argument that this (on its own) certifies that there are deep differences between the two suits. I note that the 1st Respondent itself refers to the MOU in paragraphs 2(b), (c), (e), and (i) of its WSD; and whilst it isn't disputed that the 1st Respondent wasn't a party to the MOU, the MOU is still relevant to the 1st Respondent's dispute with the Applicant because that MOU and the dispute that arises from it vide HCCS No.556 of 2020 concern who (between the Applicant and the 2nd – 4th

Respondents) actually owes the 1st Respondent money and to what extent, the Applicant seeks to completely alleviate himself of liability, whilst the 1st Respondent together with the 2nd – 4th Respondents shall seek to argue that he is liable by virtue a) of being a mortgagor to the 1st Respondent and b) of being a borrower to the 2nd – 4th Respondents.

I also note that whilst the credit facility letters made no reference to the MOU, the MOU itself refers to the 1st Respondent in **clause 2**. Further, **clause 4** in the said MOU provides a condition that upon payment of all the advanced sums inclusive of charges and interest, the title deed shall be returned to the Applicant.

It would therefore be dishonest and factually unsound to completely divorce the MOU, its validity and implications, from that of the mortgage transactions that were undertaken with the 1st Respondent.

Having said all of this, I am cognizant of the fact that typically the consolidation of suits is not ordered where a party is a Plaintiff in one suit and a Defendant in the other, this is for obvious/ logistical reasons, namely if consolidation were to be ordered in such a case and it would result in the Plaintiff in one case becoming the defendant in the consolidation action then that party would lose their advantages as a Plaintiff.

In this case, the Applicant is the Plaintiff in one suit and the Defendant in the other I, therefore, cannot consolidate the suits to make the Applicant the Plaintiff against both the 1st Respondent and the 2nd – 4th Respondents since it is the 2nd – 4th Respondents who have sued the Applicant in HCCS No.556 of 2020. I also cannot make all the Respondents joint Plaintiffs against the Applicant because in HCCS No. 928 of 2020 it is the Applicant who has sued the 1st Respondent and would thereby lose the privileges he may otherwise enjoy as Plaintiff.

This is therefore not a case for total consolidation, not because of any deep differences between the suits, but for practical reasons. Thus, taking into account the related nature of the transactions in this cause it is most prudent in my view that the actions run and be heard concurrently. In ***Topista Kyebitama v Damyano Batuma [1976] HCB 276*** it was established that where two or more suits are filed involving the same parties and arising from the same cause of action they should either be consolidated for the purpose of determining liability or (where that is not possible) only one of them, first in point of time heard first.

I, therefore, resolve this issue with a finding that the circumstances do not permit complete consolidation for practical reasons but that the matters ought to be heard concurrently with the trial of one immediately following the other which I shall detail further below.

Issue 2: What are the remedies available in these circumstances?

In making an order for consolidation, the court has wide discretion but in exercising this discretion the court must assess all the relevant factors and consider any prejudice which may accrue to all parties involved in the granting or denial of an order to consolidate. Some of these factors may include;

i. Will the order sought have the effect of saving time on pre-trial procedures?
ii. Will there be a reduction in the number of days required to complete the trials if they are heard at the same time?
iii. What is the potential for a party to be seriously inconvenienced by having to attend a trial in which it may have a marginal interest?
iv. Will there be a saving in experts' time and costs of having experts attend trial?
v. At what point in the proceedings is the application being made and how far advanced are each of the proceedings?
vi. What is the manner of trial selected in each of the proceedings?

In my view, as has already been explained under the first issue full consolidation is not practical in these circumstances but hearing the cases concurrently will save time and resources because witnesses will not have to be called twice to attest to the same facts or series of fact pertaining to the related transactions.

Where the actions are not consolidated but are heard together with the trial of one immediately following the other, any party in the following action, who is not a party in the earlier action (i.e. the 1st Respondent in this case) can be permitted to attend and take part in the earlier trial and cross examine the witnesses and the evidence in the earlier action may be used in considering and determining the subsequent decision. There is also no overt prejudice or inconvenience to the 1st Respondent in this case because the suit to which it is a party was, in any event, instituted later hearing the two suits concurrently could therefore speed up the resolution of HCCS No. 928 of 2020 which may have otherwise had to have been put on hold with HCCS No.556 of 2020 determined first.

In addressing applications for consolidation, the court may make the following orders;

a) That the actions be consolidated into one action and continue as such with possibly a common counsel, one set of pleadings, single discovery, judgement and a bill of costs.

b) That the actions should not be consolidated but be heard together with the trial of one immediately following the other, with separate pleadings, discoveries, and judgements.
c) That one action will be heard with the remaining actions stayed, and the decision on the first case governing the others or with any later case being subsequently heard. (These are commonly referred to as test suits).

In these circumstances, having resolved the first issue as I have, I am inclined to make the second order (b) above and see that the two suits should not be consolidated but should be heard together with the trial of HCCS 556 of 2020 first and HCCS No. 928 of 2020 following immediately after.

The 1st Respondent is allowed to attend and be involved in the earlier trial and it is likely/ probable that some of the evidence and witnesses in the first trial will be used in the second trial but, because of the complexity of these cases, and considering the fact that the Applicant is a Plaintiff in one suit and a Defendant in the other, the cases should proceed with separate pleadings, discoveries, and judgements albeit moving concurrently.

I thus resolve this issue with a finding that the actions should be heard together though not consolidated, with separate pleadings, trials and subsequent judgements. Trial for HCCS 556 of 2020 shall occur first and trial for HCCS No. 928 of 2020 shall follow immediately after, All 4 Respondents are free to attend and participate in the proceedings but judgement shall be issued separately following the trials.

Decision

In light of the above, I find that the Applicant/ Counterclaimant's application fails in part. With regards to the first issue, HCCS 556 of 2020 and HCCS 928 of 2020 shall not be consolidated but shall run concurrently and be heard together with the trial for HCCS 556 of 2020 happening first and that for HCCS 928 of 2020 happening immediately after.

As such the following orders and directions are made;

a) HCCS 556 of 2020 and HCCS 928 of 2020 shall not be consolidated but shall run concurrently.
b) The trial of HCCS 928 of 2020 shall immediately follow the trial of HCCS 556 of 2020.
c) The pleadings for both cases shall be as they stand and separately considered in each civil suit.
d) Any applications arising in the civil suits leading up to trial should be treated as running concurrently, that is to say, all parties being the

Applicant and the 1st – 4th Respondents should be served with and informed of any pending applications.

e) Judgement in both cases shall be issued separately but simultaneously following the trial of both suits.

f) The costs of this application shall abide the results of the suits.

It is so ordered.

Jeanne Rwakakooko
JUDGE
29/07/2022

This Ruling was delivered on the 29th day of July, 2022