

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]

M.A No. 1066 of 2020

[Arising out of Civil Suit No. 709 of 2019]

1. FOUNTAIN PUBLISHERS LTD
2. JAMES TUMUSIIME
3. LOY TUMUSIIME:APPLICANT


VERSUS

PRIME FINANCE CO. LTD.....:RESPONDENT

BEFORE: HON. JUSTICE DUNCAN GASWAGA

RULING

- [1] This is a ruling on an application brought under Order 11 rule 1&2, Order 52 rule 7 CPR and Section 98 CPA for orders that; Civil suits No. 709 of 2020 and 710 of 2020 currently pending before this court be consolidated; costs of the application be in the cause.
- [2] The grounds of this application were set out in the affidavit of **James Tumusiime** in support of this application and these were that; the applicants were jointly sued by the respondent herein in two separate cases i.e Civil Suit No.709 of 2020 and High Court Civil Suit No. 710 of 2020 and the claim from each of the said suits arises from alleged

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default in repayment of two separate friendly loans taken by the 1st applicant from the respondent herein; the applicants have filed joint written statements of defence in each of the respective suits, substantially similar in all respects; both suits are by the same plaintiff against the same defendants with the same cause of action and reliefs; similar questions of law arise in both suits; this would save courts time and a multiplicity of suits

[3] The respondent raised a preliminary objection to the effect that; the present application is incurably defective as a result of lacking an authoritative supporting document of the 3rd applicant on whose behalf the 2nd applicant purportedly deposed the supporting affidavit. That the 2nd applicant swore an affidavit on behalf of all the applicants without express authorization. That as such the affidavit is defective for want of authority. See **Taremwa K. Thomas Vs Attorney General & 2 Ors HMA 83/2012.** That the said affidavit is further in contravention of Order 1 rule 12(1) & (2) CPR. The respondent prayed that the affidavit be struck off for being defective with the legal result that the application being unsupported by a valid affidavit cannot stand and fails on the strength of this point of law.

[4] In reply thereof, it was submitted by the applicants that the 2nd applicant's authority to swear an affidavit stems from his position as managing director of the 1st applicant and in his personal capacity. That as such he was fully authorized and competent to swear the affidavit for the two parties. That the 2nd applicant did not swear an affidavit on behalf of the 3rd applicant who also is a director in the 1st applicant.

Resolution of Preliminary Point of Law



[5] Order 1 rule 12 states thus;

12. Appearance of one of several plaintiffs or defendants for others.

(1) *Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for that other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for that other in any proceeding.*

(2) *The authority shall be in writing signed by the party giving it and shall be filed in the case*

[6] It is important to note that that in the introductory paragraph of the affidavit in support of the application, the 2nd applicant states; “*I swear this affidavit in my capacity as director for the 1st applicant and 2nd applicant.....*” It is indeed clear from the face of it that the 2nd applicant did not swear an affidavit in support of the application on behalf of the 3rd applicant. Suffice to note, the 3rd applicant is a director in the 1st applicant and is therefore covered therein. This preliminary objection is hereby overruled.

Merits of the application.


[7] This application raises one issue to wit;

Whether the applicant has satisfied conditions for the consolidation of Civil Suit 709 of 2020 and Civil Suit 710 of 2020.

[8] It was submitted for the applicant that the 1st applicant was advanced two separate loans by the respondent and the respondent has filed Civil Suit No. 709 of 2020 against all three applicants herein jointly as defendants to the said suit in respect of the 1st loan taken on

02/07/2014 and also filed Civil Suit No. 710 of 2020 against all three applicants herein for the second loan taken on 29/07/2014. That the respondent's claim and cause of action in each of the two suits arises from alleged fraud and breach of contract by the applicant's default in repayment of the loans. That in the written statements of defence to both suits, the said issues of fact and law arise; *the borrower has repaid a sum of USD 420,000 in respect of each borrowing, making an aggregate repayment sum of USD 840,000 which is far in excess of the security cheques; that the borrower is fully discharged from liability by reason among others that no notice of dishonor was served upon the applicants or either of them as required by law, the interest as compounded by the respondent is arbitrary, excessive, harsh and unlawful and is therefore unenforceable and that the respondent engaged in fraudulent conduct by refusing to cash the security cheques in furtherance of its scheme designed for unjust enrichment by continuing to unilaterally levy compounded interest upon the applicants.* That as such the two suits are between the same parties, they arise from similar facts, the defences advanced in both suits are similar and the same or very similar questions of law would arise in both suits.

- [9] It was further submitted that the applicants had overwhelmingly demonstrated that the criteria set out in Order XI rule 1 CPR are existent in the present application such that the applicants have fully satisfied the requirements of the law. Counsel relied on the case of **Stumberg and Anor Vs Potgieter** quoted in **M.A No. 176 of 2017** where it was stated that; *"Where there are common questions of law or fact in actions having sufficient importance in proportion to the rest*

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of each action to render it desirable that the whole of the matter should be disposed at the same time, then consolidation should be ordered.”

The applicants prayed that this court finds that they have made out a proper and meritorious case for the grant of this application.

[10] In response thereof, it was submitted for the respondent that under paragraphs 3, 4 and 5 of the respondent’s affidavit in reply, it had been affirmed that Civil Suit No. 709 of 2020 and Civil Suit No. 710 of 2020 arose from two different transactions and have been treated differently by the parties from the date of entering the same and the times for payment towards the same vary. That as such it would be contrary to contract law for a party to seek a different result from that which was contracted at this stage as such it would be unjust. Further that there was no addendum to make the two loans into one. That M.A No. 176 of 2017 being relied on by the applicants is distinguishable from the facts at hand. That the provision to consolidate is not mandatory as the operating word therein is “*may*” and not “*shall*”. The respondent prayed that that the application be dismissed and the two suits be allowed to independently proceed and heard on the merits. The respondent further prayed that the application be dismissed with costs.

[11] In rejoinder thereof, it was submitted for the applicant that the reasons proffered by the respondent for denial of the application are not provided for in law. That the grounds to be considered by court as espoused in Order 1 rule 11 are that; *there are two or more pending suits in the same court between the same parties and that the said two or more suits the same of similar questions of law or fact are involved.* That a close perusal of both suits is indicative of the fact that the questions of law and fact are similar, identical, the same and

indistinguishable and the only difference is in the amounts. Further that the evidence to be called is similar and the same witnesses are to be called. Also that a court could grant consolidation on its own volition or a party can move court to have the consolidation done.

[12] **Order 11 rule 1 CPR** states thus;

Consolidation of suits.

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—

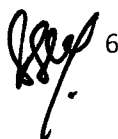
(a) order a consolidation of those suits; and

(b) direct that further proceedings in any of the suits be stayed until further order

[13] In **Stumberg and another v Potgeiter (1970) EA 323**, court held that;

“Consolidation of suits should be ordered where there are common questions of law or fact, consolidation of suits should not be ordered where there are deep differences between the claims and defence in each action.”

[14] In the circumstances before us, respondent herein sued the applicants vide Civil Suit No. 709 of 2020 and Civil Suit 710 of 2020. This was in respect to two loans acquired from the respondent. One in the sum of USD 420,000 acquired on 02/07/2014 and another also in the sum of USD 420,000 acquired on 29/07/2014. The cause of action in respect of the two said suits arises from breach of contract and alleged fraud in repayment of the loans by the applicants.

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[15] From the above discourse therefore, it is important to note that the subject matter and questions of law and fact in this application indeed conform to the requirements of Order 11 rule 1 and I find no reason as to why the two suits should not be consolidated. The consolidation of the two suits will in turn save this court's time and other resources and also ensure that the parties are given a speedy hearing. I believe none of the parties will be prejudiced or gain advantage over the other given that the end result shall be the same but achieved in a much lesser period of time and at half the effort and cost.


[16] Accordingly, I find this application meritorious and grant it with the following order;

(a) H.C.C.S No.709 of 2020 and H.C.C.S No. 710 of 2020 are hereby consolidated.

(b) Costs of the application shall be in the main cause.

I so order

Dated, signed and delivered this 24th day of January 2022



Duncan Gaswaga

JUDGE