



**REPUBLIC OF KENYA**

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

**ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION**

**CORAM: MUMBI NGUGI J**

**ACEC SUIT NO. 8 OF 2020**

**ETHICS & ANTI-CORRUPTION COMMISSION..... PLAINTIFF**

**VERSUS**

**CHARLES NDERITU MAITAI.....1<sup>ST</sup> DEFENDANT**

**CHARLES TANUL.....2<sup>ND</sup> DEFENDANT**

**CHARLES OUKO.....3<sup>RD</sup> DEFENDANT**

**FREDRICK OGENGA.....4<sup>TH</sup> DEFENDANT**

**EMILIO MWAI NDERITU.....5<sup>TH</sup> DEFENDANT**

**SAMSON ODOYO MIKWA.....6<sup>TH</sup> DEFENDANT**

**NICHOLAS GITOBU.....7<sup>TH</sup> DEFENDANT**

**PHILIP KIMELU.....8<sup>TH</sup> DEFENDANT**

**BRAMWEL WANYALIKA.....9<sup>TH</sup> DEFENDANT**

**FRANCIS MUTHAIGA MURAYA.....10<sup>TH</sup> DEFENDANT**

**PETER MACHUA.....11<sup>TH</sup> DEFENDANT**

**JANE NAKODONY.....12<sup>TH</sup> DEFENDANT**

**ALLIED INSPECTION & TESTING.....13<sup>TH</sup> DEFENDANT**

**AERO DISPENSER VALVES LIMITED.....14<sup>TH</sup> DEFENDANT**

**RULING**

1. The plaintiff, the Ethics and Anti-Corruption Commission (EACC) filed the present suit by its plaint 21<sup>st</sup> February 2020 seeking to recover the sum of USD 2, 546,076.31 (approximately Kshs 262,000,000) paid to the 14<sup>th</sup> defendant. The basis of its claim is that it had launched investigations into a fraudulent scheme by the defendants to acquire public funds through direct procurement of hydrant pit valves complete with isolation valves and two years' operating spares by the Kenya Pipeline Corporation (KPC) at a grossly exaggerated contract price of US \$6,409,491.89 (equivalent to approximately Kshs. 660 million) being 717% more than the price of acquiring the said items from the original parts manufacturer, which was the justification given by KPC for direct procurement of the said parts.

2. The plaintiff states that its investigations had established that the 1<sup>st</sup> to the 12<sup>th</sup> defendants, all of whom were employees of KPC, working in consonance with the 13<sup>th</sup> and 14<sup>th</sup> defendants as private suppliers, in abuse of their positions of trust and having special knowledge of the existing need for hydrant pit valves and spares, devised and executed a fraudulent scheme under which an award for the procurement of the said equipment was made to the 14<sup>th</sup> defendant at a grossly inflated value to the detriment of KPC, which is a public body. As a result of the fraudulent scheme by the defendants, a vast amount of public funds had been lost.

3. It is the case of EACC that in furtherance of the fraudulent scheme, the defendants caused a part payment of USD \$2,546,076.31 to be made to the 14<sup>th</sup> defendant. EACC had established that the goods supplied to KPC had been purchased from the original parts manufacturer. Had KPC purchased them directly from the manufacturer in accordance with the justification for direct procurement, the equipment could have been obtained for USD 577,017.04 (approximately Kshs. 59,432,755) as compared to the tender amount of US \$6,409,491.89 (approximately Kshs. 660 million). EACC therefore seeks to recover the public funds lost in the fraudulent procurement process. It asks the court to issue the following orders jointly and severally against the defendants:

- a) A Declaration that the award of Tender No. SU/QT/3264F/14 for USD \$6,409,491.89. (approximately Kshs. 660,000,000) to the 14th defendant as a purported agent of Cla-Val was fraudulent, illegal and void ab initio.*
- b) A declaration that the purported contract ensuing from Tender No. SU/QT/3264F/14 was predicated on an illegality and is therefore unenforceable.*
- c) Judgement be entered against the defendants jointly and severally for the sum of USD2, 546,076.31 (approximately Kshs. 252,000,000 paid to the 14th defendant pursuant to the impugned tender award.*
- d) In the alternative and without prejudice to the foregoing, a declaration that the only amount payable under the contract was a sum of USD 784,262.78 (Approx. Kshs80,779.*
- e) In the alternative and without prejudice to the foregoing judgement be entered against the defendants jointly and severally for overpayment of a sum USD. 1,761,813.53 (approximately Kshs. 182,000,000).*

4. On its part, the 14<sup>th</sup> defendant had filed a suit relating to the subject tender, number SU/QT/3264F/14 between it and KPC. The suit is **Milimani Commercial & Admiralty Division Commercial Case No. 224 of 2017-Aero Dispenser Valves Limited v Kenya Pipeline Company Limited** (hereafter 'Milimani Commercial Case No. 224 of 2017' or 'the commercial case' as appropriate). In its suit, the 14<sup>th</sup> defendant seeks payment of the balance of the contract price and specifically prays for, *inter alia*, the following orders against the KPC, the defendant in the suit:

- i. Judgement against Kenya Pipeline Company for USD 3,845,695.13 being the outstanding balance of the contract price.*
- ii. Simple interest on the outstanding balance of USD 3,845,695.13 from July,2015 till payment in full.*
- iii. Loss of investments and business opportunities assessed as at May 2017 in the sum of USD 2,035,102 on an increasing index until payment in full.*

5. The 9<sup>th</sup> and 14<sup>th</sup> defendants then filed applications dated 22<sup>nd</sup> and 23<sup>rd</sup> June 2020 respectively seeking orders of stay of the

present suit pending the hearing and determination of the 14<sup>th</sup> defendant's suit, Milimani Commercial Case No. 224 of 2017. On its part, EACC filed an application dated 13<sup>th</sup> August 2020 seeking consolidation of this suit and Milimani Commercial Case No. 224 of 2017. On 29<sup>th</sup> September 2020, the court directed that the three applications would be heard together. They were canvassed before me on 16<sup>th</sup> March 2021.

6. The applications by the 9<sup>th</sup> and 14<sup>th</sup> defendants dated 22<sup>nd</sup> and 23<sup>rd</sup> June 2020 are in essentially the same terms. Filed by way of Notice of Motion under the provisions of sections 3, 3A and 6 of the Civil Procedure Act and Articles 27(1), 48, 50 and 159 of the Constitution, the applications are supported by affidavits sworn by Bramwel Wanyalika and Beryl Aluoch Kasinah respectively. EACC's application dated 13<sup>th</sup> August 2020 seeking consolidation of this suit with Milimani Commercial Case No. 224 of 2017 is also brought by way of Notice of Motion and is supported by an affidavit sworn by Justus Wangia. The three applications are closely intertwined and I will therefore consider the pleadings and submissions in respect thereof together, beginning with the application for consolidation.

7. In its pleadings and submissions, EACC relies on Order 11 rule 3(h) of the CPC which provides that:

**3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleading convene a Case Conference in which it shall-**

**(h) Consider consolidation of suits**

8. The plaintiff cites several decisions in support of its application for consolidation. The case of **Stumberg and Another v Potgeter 1970 EA. 323** is cited for the holding that:

***"Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed of at the same time, consolidation should be ordered."***

9. The plaintiff also cites the Indian case of **BW Kishore v BR Singh & Others at the High Court of Punjab and Harana (L.R 5922 of 2013** in which the court quoted a passage from the decision of the Supreme Court in **Prem Lala Nahata & Another v Schand Prasad Sara, (2007) 2 Supreme Court Cases 551** that:

***"It cannot be disputed that the Court has power to consolidate suits in appropriate cases. Consolidation is a process by which two or more causes or matters are by order of the Court combined or united and treated as one cause or matter. The main purpose of consolidation is therefore to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The jurisdiction to consolidate arises where there are two or more matters or causes pending in the Court and it appears to the Court that some common questions of law or fact arises in both or all the suits or that the rights to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions- or that for some other reason it is desirable to make an order consolidating the suits".*** (Emphasis added)

10. The case of **Kinani Waweru & 28 others v Law Society of Kenya & 12 others [2014] eKLR** is also cited for the proposition that unlike the principles of *sub judice* and *res judicata*, consolidation of suits does not depend on the parties in the different suits being the same or litigating in the same capacity. It only requires that the same or similar questions of law and fact be present in the two or more suits to be consolidated.

11. Reference is also made to the decision in **Ngumbao v Mwatate & Others 1988 K.L.R 549** in which it was held that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the

12. The plaintiff identifies two main issues as arising for consideration in determining whether the orders that it seeks should be granted. The first is whether common questions of law or fact arise in both suits while the second is whether the right to relief claimed in the suits are in respect of or arise out of the same transaction or series of transactions.

13. It is its submission that it filed the present suit against the employees of KPC for the fraudulent award of Tender No. SU/QT/3264F/14 to the 14<sup>th</sup> defendant for the supply of hydrant pit valves leading to colossal loss of public funds. It notes that in Milimani Commercial Case No. 224 of 2017, the 14<sup>th</sup> defendant has sued KPC for alleged breach of contract arising from its failure to pay the balance of the contract price after the supply of hydrant pit valves. It argues therefore that the two suits arise from the same Tender No. SU/QT/3264F/14. It is its submission further that a determination in the present suit of the validity or otherwise of the tender award would affect the enforceability of the contract between KPC and the 14<sup>th</sup> defendant.

14. In its view, it would be prudent for the two suits to be consolidated to avoid the possibility of conflicting decisions being rendered by two courts of concurrent jurisdiction on the two causes which have inseparable issues of law and fact. Further, that a determination in this suit on the legality or otherwise of the award of Tender No. SU/QT/3264F/14 for USD \$6,409,491.89 to the 14<sup>th</sup> defendant will have an effect on the outcome of the 14<sup>th</sup> defendant's case. The plaintiff relies on the decision in **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa (2000) eKLR**, **Korean United Church of Kenya & 3 Others v Seng Ha Sang (2014) eKLR** and **P.P. Gupta vs East Asiatic Co. AIR 1960 184** on the principles that the court should consider in determining whether or not to make an order of consolidation.

15. On whether the rights to relief claimed in the two suits are in respect of or arise out of the same transaction or series of transactions, the plaintiff reiterates the reliefs that it is seeking in its suit and the reliefs sought by the 14<sup>th</sup> defendant in the commercial case. It submits that the two suits are dependent on the validity or otherwise of the award of Tender No. SU/QT/3264F/14 for the supply of hydrant pit valves and two years' operating spares and the rights to relief claimed in these suits are in respect of or arise out of the same transaction or series of transactions. It is its submission therefore that the two suits are suitable for consolidation.

16. The plaintiff notes that the defendants oppose the consolidation of the two suits on two main grounds. First, that the commercial case was filed three years ago and all pre-trial directions have been complied with by the parties. Secondly, that this suit is still at a preliminary stage and consolidation will only serve to delay the commercial suit further. It is its submission, however, that consolidation of the suits will facilitate efficient disposal of the two matters.

17. Further, that it will not be an efficient use of available judicial and administrative resources for the two matters to be dealt with by different courts. In its view, should the commercial court give a judgement in favour of the 14<sup>th</sup> defendant in Commercial Case No. 224 of 2017 and this court gives a judgement in its favour in this matter, none of the parties would be able to execute their decrees owing to the absurdity that would have resulted from the two decisions.

18. The plaintiff cites in support of its position the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others [2014] eKLR** in which the court held that:

*“It will not be an efficient use of available judicial and administrative resources for one Court to determine that issue differently in this case and another Court to determine it differently in the other case and with regard to the issue of how the parties will be designated upon consolidation, that is a matter on which directions can be taken by the trial Court once consolidation is done.”*

19. It is the plaintiff's submission further that the fact that the parties in the case before the commercial court have complied with pre-trial directions is not in itself a hindrance to consolidation. Support for this submission is sought in the case of **Benson G. Mutahi v Raphael Gichovi Munene Kabutu & 4 others** (supra) in which the court held:

*“That explanation sounds plausible and in any event, delay alone, if reasonably explained, cannot be a bar to the consolidation of suits in appropriate cases and especially when there is no evidence to suggest that any party will suffer prejudice. It is true that this case is part heard and the plaintiff has closed his case. Only the plaintiff testified in support of his case and no other witnesses were called and so there is no fear that the plaintiff cannot be recalled to testify afresh if need be. It is also clear from a reading of the Court of Appeal's decision in NGUMBAO VSMWA TA TL<sup>C</sup> & nvo OTHERS 1988 K.L.R 549 that a part heard case can still be consolidated with a fresh case and parties who had testified can be recalled or the case can continue from the evidence earlier recorded.”*

20. The plaintiff further cites the case of **Law Society of Kenya v The Centre for Human Rights and Democracy Supreme Court Petition No. 14 of 2013** in which the Court stated as follows with respect to consolidation of suits:

*" The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes".*

21. In response to a contention by the 4<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 11<sup>th</sup> defendants in this matter that their right to a fair hearing in Nairobi Anti-Corruption Case No. 50 of 2018 will be prejudiced if this court were to pronounce itself on the legality of Tender No. SU/QT/3264F/14, the plaintiff submits that what it seeks in this suit is the recovery of money lost through the fraudulent procurement process, not a determination on the guilt or innocence of the defendants.

22. As for the contention by the 14<sup>th</sup> defendant that the KPC is not a party to this suit and that it is represented by different advocates in the two suits, the plaintiff responds that consolidation of suits does not, unlike the principles of *sub judice* and *res judicata*, depend on the parties in the different suits being the same or litigating in the same capacity. It is its submission that consolidation only requires that the same or similar questions of law and fact be present in two or more suits in order for the suits to be consolidated, a principle that emerged from the decision in **Kimani Waweru & 28 others v Law Society of Kenya & 12 others** (supra).

23. Regarding the contention by the 14<sup>th</sup> defendant that a judge of one division has no power to order the consolidation of a suit filed in one division with another in a different division, the plaintiff submits that the **High Court (Organization and Administration) Act No. 27 of 2015** and the **Judicial Service Act** do not restrict inter-divisional transfer and or consolidation of cases. It submits that under Rule 23 of the High Court (Organization and Administration) Rules, a court is empowered, on its own motion after notifying the parties or in the course of hearing any application in a case, to review the progress of a case and make any order that it may consider necessary to ensure that proceedings are conducted in an expeditious manner such as in the present case.

24. It is its case that this court still retains residual inherent power to make an order to transfer Commercial Case No. 224 of 2017 from the Commercial and Admiralty Division to this Division in the interest of justice under section 3A of the CPC. This, according to the plaintiff, has been done previously without any prejudice to the parties, an illustration cited being the case of **Elizeba Mboci Titima v Stephen Njeru Titima [2019] eKLR** in which the court, in making an order for transfer and subsequent consolidation of a matter, stated:

*"The court is thus of the view that the two suits may conveniently be tried and determined together so that all the issues in controversy amongst the three siblings are determined once for all. The court is, however, of the opinion that it is not legally possible to consolidate two suits which are pending before two different courts. The suit pending before Siakago Law Courts would have to be transferred to the ELC before an order for consolidation can become tenable. The court notes that the Plaintiff did not pray for a transfer order in the application. The court does not consider such omission to be fatal to the entire application. The court still retains residual/ inherent power to make a transfer order for the ends of justice under section 34 of the Civil Procedure Act. The upshot of the foregoing is that the court finds merit in the Plaintiff's notice of motion dated 29/7 October 2018 and makes the following orders:*

*a) That Siakago PMCC No. 109 of 2018 — Stephen Njeru Titima V James Ngari Paul Titima be and is hereby transferred to this court for trial and disposal.*

*b) That upon such transfer that suit shall be consolidated with the instant suit for trial and disposal.*

## The Response

25. The defendants opposed the application for consolidation, and the 1<sup>st</sup>-8<sup>th</sup> and the 10<sup>th</sup>-12<sup>th</sup> defendants supported the applications for stay of this suit by the 9<sup>th</sup> and 14<sup>th</sup> defendants. The 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup> and 7<sup>th</sup> defendants filed affidavits in reply while the 9<sup>th</sup> defendant filed grounds of opposition to the application, a replying affidavit and a further replying affidavit. The 10<sup>th</sup> defendant also filed an affidavit in reply, as did the 12<sup>th</sup> defendant, who also filed grounds of opposition to the application. The 14<sup>th</sup> defendant filed an affidavit in reply, grounds of opposition and submissions. In the responses and submissions filed by the defendants, they

urge the court to dismiss the application for consolidation and allow the applications by the 9<sup>th</sup> and 14<sup>th</sup> defendants to stay or strike out the present suit.

26. In its written submissions, the 14<sup>th</sup> defendant reiterates the facts leading to the filing of its suit against the KPC. It submits that it fully discharged its contractual obligation, and on its part, KPC paid to it 40% of the LPO amount being USD 2,563,796.76. A balance of USD 3,845,695.13 was left, which is the subject of its claim against KPC.

27. The 14<sup>th</sup> defendant submits that the plaintiff in this matter has filed the present suit during the pendency of its suit. It asks the court to allow its application dated 23<sup>rd</sup> June 2020 seeking stay of the present suit. It notes that the matter in issue in its suit is also directly and substantially in issue in the present suit. Both suits are premised on the contract between it and KPC. It asks the court to determine the issue whether the present suit is *sub-judice* and an abuse of the court process. The 14<sup>th</sup> defendant cites the definition of the term in **Black's Law Dictionary, 9th Edition** and section 6 of the CPC and **Republic v the Registrar of Societies Kenya & 2 Others ex parte Moses Kirima & 2 Others [2017] eKLR** in which the court held that:

*"Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..."*

28. Reference is also made to the **Supreme Court Advisory Opinion Reference No. 1 of 2017 Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)** in which the court held that:

*"A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."*

29. It is the 14<sup>th</sup> defendant's submission that a reading of section 6 of the CPC and the decisions it has cited shows that the essential ingredients of the doctrine of *sub-judice* are that there has to be more than one suit over the same subject matter, both suits have to be pending before courts of competent jurisdiction, and the suits have to be between the same parties, their representatives or parties under whom they or any of them claim. It is its submission that there is more than one suit pending before the courts and the issues being canvassed are the same. The 14<sup>th</sup> defendant relies on the case of **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR** in which the court stated:

*"It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases. "*

30. It observes that courts have held that in cases where both suits may not be directly and substantially in issue but the resolution of one suit depends on the determination of the other, it is proper to determine the first one before determining the other. Support for this submission is sought in **Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR** in which the court held that:

*"...In this case whereas it may be true that the issues in both suits may not be directly and substantially in issue, it is however clear that no matter how one looks at the dispute, the resolution thereof will ultimately depend on the determination of the question of the leadership of the Africa Independent Pentecostal Church of Africa. Even if this Court was to find that the cancellation of the subject agreement and the reconciliation by the Registrar was improper, the issue as to the leadership of the Church would still remain at large pending the determination of the other suit, assuming this suit would be determined earlier. On the other hand, if that other suit were to be determined before these proceedings, the setting aside of the decision of the Registrar subsequent to the determination of the leadership of the Church would only cause confusion and chaos in a matter which is already riddled with a plethora of litigation..."*

31. The 14<sup>th</sup> defendant submits that the two suits at issue have been filed in different divisions of the High Court. That both divisions have the jurisdiction to grant the prayers sought in the respective pleadings before them, and the suits are therefore before

courts of competent jurisdiction. The suits are between the same parties in that the plaintiff in this suit has brought the suit on behalf of the KPC, the defendant in the commercial case. It submits that the explanatory notes to section 6 stipulate that where the test of *sub judice* is established, the latter suit will not be heard until the earlier suit is heard and determined.

32. It is its submission further that the present suit is an abuse of court process. It cites the case of **Kivanga Estates Limited v National Bank of Kenya Ltd (2017) eKLR** in which the court observed that the act of abandoning suits before determination while filing fresh ones is itself an abuse of the court process. It submits that the plaintiff in this matter is aware of the existence of its case, a fact that it has admitted in its pleadings. It asks the court to allow its application and stay the proceedings in this suit pending the hearing of its case in the commercial division.

33. In his submissions in opposition to the plaintiff's application for consolidation, the 9<sup>th</sup> defendant argues, first, that this court lacks the jurisdiction to entertain the application; that the application is an afterthought and an abuse of the court process; that hearing the application would contravene his right to a fair hearing guaranteed under Article 50; and that the application lacks merit and does not meet the threshold for grant of the prayers sought.

34. The 9<sup>th</sup> defendant also relies on an affidavit sworn on 30<sup>th</sup> October 2020. He avers that the plaintiff's application for consolidation is intended to forestall his application for stay of proceedings in this suit in favour of the case before the commercial division.

35. It is his submission that the present suit is time barred and the court lacks jurisdiction to hear and determine the matter as the question of limitation goes to jurisdiction. Reliance for this submission is placed on the decision in **Harrison Ndungu Mwai & 500 others v Hon. Attorney General [2018] e KLR** and **Bosit-e Ong'ero v Royal Media Services [2015] e KLR**. Further, that the courts lacks the supervisory jurisdiction under Article 165 of the Constitution to call for and make orders on a file that is before a judge of competent and concurrent jurisdiction.

36. The 9<sup>th</sup> defendant further argues that the application for consolidation is intended to sanctify an otherwise incompetent suit by way of judicial craftsmanship, which is an abuse of the court process. It is his submission further that hearing and determination of the present suit will be in breach of Article 25 and 50 of the Constitution on the right to fair hearing and limitation of such rights. This is on the basis that KPC is not a party to the present suit and has therefore not been afforded an opportunity to be heard before the orders sought are issued.

37. The 9<sup>th</sup> defendant further submits that the application for consolidation is not merited and does not meet the threshold set in **Nyati Security Guards & Services Limited v Municipal Council of Mombasa** (supra). It notes that the two files sought to be consolidated are not before the same court as they are before different divisions. Further, that there are no common questions of law as the legal questions in this suit are on breach of statutory duty under the Public Procurement and Asset Disposal Act (2005) and in furtherance of section 3 of the EACC Act while the commercial suit relates to the breach of contract. In his view, there are no common questions of fact to be determined, and it is therefore not desirable or practicable to make an order for consolidation. He submits therefore that it is preferable to stay the present suit.

38. The 9<sup>th</sup> defendant further submits that were the suits to be consolidated, it would be terribly inconvenient as the questions of representation would arise as the parties to this matter may be represented by a different law firm in the commercial case. He contends, on the authority of the **Nyati Security Guards & Services Ltd** case, that there are situations where consolidation is undesirable, such as where the plaintiffs in two or more actions are represented by different advocate as the hearing will be longer and the purpose of saving time will be defeated.

39. The 9<sup>th</sup> defendant further submits that as the KPC is not a party to this suit, in hearing and determining the application for consolidation, the court would be issuing orders that affect it without having heard it, which would contravene its rights under Article 50 as read with Article 25. Support for this submission is sought in the case of **Industrial Collaborative Limited v Kenya Anti- Corruption Commission [2017] eKLR**. He asks the court to dismiss the application for consolidation with costs.

40. The 4<sup>th</sup> and 6<sup>th</sup> defendants submit that the application for consolidation should be disallowed and this suit either stayed or struck out for being *sub judice*. These defendants agree with the submissions of the 14<sup>th</sup> defendant that this matter and the commercial matter have a common subject matter and arise from the same transaction. They also submit that both suits are between the same parties or parties litigating under the same title and are before the High Court but in different divisions. They submit that

the High Court, Commercial Division where the earlier suit is pending has jurisdiction to grant the relief sought in the instant suit. In their view, consolidation of the suits is sought to defeat the plea of *res judicata*.

41. While noting that this court doubtless has the power to consolidate suits in appropriate cases, it is their submission that this is not an appropriate suit for consolidation. They submit that the application for consolidation was filed on 13<sup>th</sup> August 2020 while they had filed their defence in which they had raised the defence of *res judicata* on 21<sup>st</sup> May 2020. The 4<sup>th</sup> and 6<sup>th</sup> defendants cite in support the case of **Republic v Paul Kihara Kariuki, Attorney General & 2 others ex parte Law Society of Kenya [2020] eKLR** in which the court declined to consolidate matters on the basis that consolidation would defeat the *sub judice* rule.

42. The 4<sup>th</sup> and 6<sup>th</sup> defendants further argue that if the court were to proceed with this case, it would be prejudicial to their right to a fair trial in Nairobi Anti-Corruption Case Number 50 of 2018. They contend that if the court pronounces itself on the legality or otherwise of the award of tender number SU/QT/3264F/14, it would be tantamount to litigating over the same issue in the High Court and in the Magistrate's Court.

43. The 2<sup>nd</sup> defendant also takes the same position as the other defendants in opposing the application for consolidation. It argues that this court cannot consolidate this suit with a matter that is not before it. Reliance is placed on the Supreme Court decision in **Michael Mungai v Housing Finance Co. (K) Ltd 5 Others (2017) eKLR** in which the Supreme Court stated that it could not consolidate matters that were not before it. The 2<sup>nd</sup> defendant submits that the parties in the two suits are not the same, the 14<sup>th</sup> defendant being the only party common to the two suits. It further submits that the court cannot consolidate actions which do not have common questions of law or fact, which the suits in this case do not have.

#### **Analysis and Determination**

44. I have considered the three applications before me and the respective submissions of the parties thereon. The core issue for determination is whether the court should consolidate this suit with Milimani Commercial Case No. 224 of 2017 as prayed by the plaintiff, or stay the suit to await the outcome of the 14<sup>th</sup> defendant's commercial case.

45. The parties hereto have submitted at length on the principles that a court has to consider in determining whether it should consolidate suits. They have also placed reliance on the same authorities in which the principles for consolidation have been enunciated. I believe that there is no dispute with respect to these principles. The parties have all cited the decision in **Nyati Security Guards & Services Ltd v Municipal Council of Mombasa** (supra) in which the court held that:

*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."*

46. The decision in **Korean United Church of Kenya & 3 Others v Seng Ha Sang (2014) eKLR** has also been cited. In this case, it was held that:

*"Consolidation of suits is done for the purposes of achieving the overriding objective of the Civil Procedure Act, that is, for expeditious and proportionate disposal of civil disputes. 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."*

47. In the Indian case of **P.P. Gupta vs East Asiatic Co.** (supra), the court stated as follows with respect to consolidation of

***“The very nature of the principle of consolidation implies that there is a similarity or identity of the matter in issue in different suits between the same parties which should be decided by the court once and for all. The object of consolidation is to avoid multiplicity of litigation between the same parties whenever the matter in issue is substantially and directly the same.”*** (Emphasis added)

48. From the submissions of the plaintiff as presented by Ms. Litoro and summarized above, the essence of the plaintiff’s argument is that consolidating the suits at issue will save on judicial time as the cases arise out of the same transaction and investigation. Such consolidation will also save the court from the absurdity that would be created if matters were heard in the two different courts where the matters are currently pending and the two courts were to make different findings on the validity of the subject tender.

49. While the defendants oppose the application for consolidation and ask the court to stay the present suit, they do not dispute that the two suits arise from the same transaction. The 14<sup>th</sup> defendant’s suit seeks enforcement of the contract between it and KPC arising from Tender Number SO/QT/3264F/14, and prays for enforcement of the contract and payment of the balance of the contract sum by KPC. The plaintiff in this suit seeks nullification of the contract on the basis that the 1<sup>st</sup>-12<sup>th</sup> defendants, all of whom were employees of the KPC, were involved in the fraudulent award of the tender to the 14<sup>th</sup> defendant.

50. It must be recognized that this suit and the three applications before me raise a question that has not, to my knowledge, hitherto been placed before and addressed by our courts. In asking that this suit be consolidated with the case pending before the Commercial and Admiralty Division of the High Court, the plaintiff is seeking to be accorded an opportunity to demonstrate that the tender pursuant to which a contract was entered into between the 14<sup>th</sup> defendant and KPC was fraudulent and in breach of procurement and anti-corruption legislation.

51. It has pleaded and submitted that the 1<sup>st</sup>-12<sup>th</sup> defendants, employees of KPC, have been charged with criminal offences relating to the award of the tender, the resulting contract and payment to the 14<sup>th</sup> defendant of 40% of the contract sum. The criminal cases are ongoing. On their part, the defendants would like to have the present matter stayed or struck out on the basis that it is *sub judice* as argued by the 9<sup>th</sup> and 14<sup>th</sup> defendants, or *res judicata* as argued by the 2<sup>nd</sup> defendant. My understanding of their position is that the contract between the 14<sup>th</sup> defendant and KPC should be treated as a purely commercial matter, and the questions raised in the present suit regarding the manner of procurement of the goods at issue and the role of the 1<sup>st</sup>-12<sup>th</sup> defendants in the procurement not considered.

52. It seems to me, however, that the legislative regime relating to public procurement and prevention of corruption and economic crimes relating to public entities may well require that contracts with public entities, involving use of public funds, should be examined through a different lens. If there is a basis for questioning the validity of a contract arising out of the procurement process leading to the award of the contract, such an issue, in my view, should be addressed first. To determine the contractual issues while disregarding the underlying tender process may work injustice to the taxpayer where questionable contracts with public entities may have been entered into fraudulently, with the attendant loss of public funds. To hold otherwise would, in my view, be contrary to the public interest in circumstances such as ours where corruption in public procurement is endemic.

53. The question, then, is how courts are to deal with the issues that matters such as the present suit and the suit pending before the commercial court raise. In my view, it is indisputable that the two suits arise from the same transaction; the parties to the suits are also essentially the same. The issues of fact and law to be considered are, in my view, common to both suits. The two suits are pending before the same court, the High Court, albeit in different divisions, and can be consolidated and heard together.

54. A second critical question, however, is whether this is the proper court to consolidate the matters. Two arguments made by the defendants militate against the consolidation of the matters in this division. First, the defendant in the commercial case, the KPC, is not a party to this suit. It was not joined as a party, nor was it served with the application for consolidation. It has not been heard on whether or not the matters should be consolidated.

55. Secondly, while the commercial case is pending before the High Court, it is pending before a different division, the Commercial and Admiralty Division. As again submitted by the defendants on the authority of the Supreme Court decision in **Michael Mungai v Housing Finance Co. (K) Ltd and 5 Others (supra)**, a court cannot consolidate a matter that is not before it:

***(15) Equally, it is very preposterous to ask the Supreme Court to consolidate matters not before it Consolidation is a legal process***

*done by a court of competent jurisdiction when it is seized of more than one matter, which matters spring from the same cause of action but filed by different parties or involves other parties too. The matters are consolidated and heard together so as to save judicial time and also avoid courts giving conflicting judgments in similar matters. A party cannot ask a court of law to consolidate matters not before it. "*

56. While both this court and the court in the Commercial and Admiralty Division of the High Court have the jurisdiction to hear and determine the matters that arise in the two suits, this court does not have the jurisdiction to call for the matter pending before another division of the court for purposes of consolidation. It should be noted that in **Elizeba Mboci Titima v Stephen Njeru Titima** (supra) cited by the plaintiff in support of its submission that this court can call for and consolidate this matter with the commercial matter, the matter at issue was before the Principal Magistrate's Court, a court subordinate to the Environment and Land Court that issued the orders for transfer and consolidation.

57. This court, however, does have the jurisdiction to transfer the present matter to another division. This will enable the court in the Commercial and Admiralty Division consider all the issues relating to the subject tender and the resulting contract. It will also enable the KPC, the defendant in the commercial case which is not a party to this suit, to be heard on all the issues that arise in this and the commercial matter.

58. In the circumstances, it is my finding and I so hold that the application for consolidation is merited. However, this court has no jurisdiction to call for the other matter for purposes of consolidation. It does, however, have the jurisdiction to transfer this matter.

59. I accordingly direct that this matter be transferred to the court seized of Milimani Commercial & Admiralty Division Commercial Case No. 224 of 2017-Aero Dispenser Valves Limited v Kenya Pipeline Company Limited with a view to the said court hearing and determining the issues raised in the two matters together. It may, in the alternative, give such directions with regard to consolidation, hearing and determination as it deems appropriate in the interests of justice and in the public interest.

60. In light of my findings above, I decline to issue the orders of stay sought by the 9<sup>th</sup> and 14<sup>th</sup> defendants in their respective applications.

61. Each party shall bear its own costs of the applications.

**Dated Signed and Delivered electronically this 26<sup>th</sup> day of May 2021**

**MUMBI NGUGI**

**JUDGE**



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