



**NIC Bank Limited v Shah & 4 others (Civil Suit 124 of 2014)
[2024] KEHC 11267 (KLR) (25 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11267 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 124 OF 2014
JK NG'ARNG'AR, J
SEPTEMBER 25, 2024**

BETWEEN

NIC BANK LIMITED PLAINTIFF

AND

MAHENDRA CHANDULAL SHAH 1ST DEFENDANT

SAMIR MAHENDRA SHAH 2ND DEFENDANT

ANANT MODASIA 3RD DEFENDANT

KIRTI SHAH 4TH DEFENDANT

AND

KAVAMA GROUP COMPANY LTD INTENDED DEFENDANT

RULING

1. The Defendants/Applicants filed a Chamber Summons application dated 11th March 2024 pursuant to Section 1A & 3A of the Civil Procedure Act, Order 1 Rule 10 (2), (4) and (25) of the Civil Procedure Rules 2010 and all other enabling provisions of the law seeking leave to enjoin the names of Kavama Group Limited in the suit as the 5th Defendant. That in the alternative leave be granted to the Defendants to file a supplementary bundle of documents. That leave be granted to the Plaintiff to recall its witness who had already testified if need be, and that costs of the application be provided for.
2. The application is premised on grounds on its face and the Supporting Affidavit of Samir Mahendra Shah sworn on 11th March 2024 that the 5th Defendant is a proper party to the suit as it serviced the loan facility until 2011 as the majority shareholder managing the services of the Principal Debtor Company. That the Plaintiff consented to the sale of 60% of the Principal Debtor Company's shares to the 5th Defendant only to relieve the 5th Defendant from its obligation to the Principal Debtor while being well aware that the reason the Defendants passed the resolution to sell 60% stake in the Principal Debtor



was to guarantee more capital and secure a swift operation of its business which was facing financial difficulties by then and that the Defendants being the remaining minority shareholders neither had funds to purchase back the 60% held by the 5th Defendant nor run the company alone.

3. The Defendants/Applicants further stated that the averments in the Plaint and Defence would not be fully adjudicated upon without the presence of the 5th Defendant and thus the ends of justice would not be met. That no prejudice will be suffered by the Plaintiff if the orders sought herein are granted, and that it is only fair and in the interest of justice that the application is allowed as prayed.
4. The Plaintiff/Respondent opposed the application through their Replying Affidavit sworn on 22nd May 2024 that the intended 5th Respondent is not a necessary party to the suit as it was not privy to the lending agreement between the Plaintiff and the Principal debtor, Cables & Plastics Ltd. That the Plaintiff was also not privy to the negotiations between the Defendants and the intended 5th Defendant on the sale of the Principal Debtor's shares. That the 1st to 4th Defendants have been sued in their capacity as guarantors of the Principal Debtor, the intended 5th Defendant did not guarantee the loan granted by the Plaintiff to the Principal Debtor nor was the intended 5th Defendant under an obligation to repay the loan facilities advanced to the Principal Debtor.
5. The Plaintiff/Respondent pointed out that the introduction of a new party to the suit more than 10 years since the suit was filed only serves to unnecessarily convolute the issues for determination. That any claim against the intended 5th Defendant may have been caught up by limitation. That the Defendants have been indolent in the matter and that no explanation has been proffered by the Defendants for the inordinate delay in filing the supplementary documents or seeking the joinder of the intended 5th Defendant. That filing of additional documents and/or joinder of the intended 5th Defendant more than 5 years after the Plaintiff closed its case will not only delay conclusion of the suit but will also prejudice fair trial in the matter. The Plaintiff/Respondent prayed that the application be dismissed with costs.
6. The application was canvassed by way of written submissions. The 1st to 4th Defendants/Applicants in their submissions dated 2nd August 2024 argued that the intended 5th Defendant is a proper and necessary party to this suit. That the Plaintiff has not disputed that the intended 5th Defendant serviced the loan facility until 2011 as the majority shareholder managing the services of the Principal Debtor company. That the Plaintiff has not disputed that it consented to the sale of 60% of the Principal Debtor Company's shares to the intended 5th Defendant and relieved the 5th Defendant from its obligation to the Principal Debtor while being well aware that the resolution to sell the 60% stake in the Principal Debtor was to guarantee more capital and secure a swift operation of its business which was facing financial difficulties.
7. The Applicants submitted that the relief sought by the Plaintiff flows from the actions of the intended 5th Defendant and that the 1st to 4th Defendants cannot effectually set a defence unless the intended 5th Defendant is joined in the matter. The Applicants relied on Order 1 Rule 10 (2) of the [Civil Procedure Rules](#), 2010 which provides for joinder of parties to a suit and that it can be done at any time during trial as was held in the case of [Gladys Nduku Nthuki v Letshego Kenya Limited & Mueni Charles Maingi \(Intended Plaintiff\)](#) (2022) eKLR.
8. The Applicants submitted that no prejudice that is incapable of being compensated with costs will be suffered by the Plaintiff in the event the application is allowed. That as per the Exhibit 1 of the affidavit of the 2nd Defendant, the Plaintiff appreciated and recognized the coming in of the proposed 5th Defendant in joining the operation of the company in issue. That the Plaintiff subsequent to the said recognition acknowledged and received payments of the said facility from the 5th proposed Defendant.



The Applicants relied on the holding in the case of *Esther Mukulu Mutuku v Rabab M'Kiama & 2 Others* (2022) eKLR and Article 159 (2) (d) to urge the court to allow the application.

9. I have considered the application dated 11th March 2024, the Replying Affidavit sworn on 22nd May 2024 and the 1st to 4th Defendants/Applicants submissions dated 2nd August 2024. The issues for determination are whether the intended 5th Defendant may be allowed to participate in the proceedings, whether it is in order for the Defendants to file supplementary bundle of documents, whether leave may be granted to the Plaintiff to recall its witness who had already testified, and costs of this application.
10. On whether the intended 5th Defendant may be allowed to participate in the proceedings, the Applicants on the one hand argued that Kavama Group Limited ought to be enjoined in the suit as the 5th Defendant on the basis that the Respondent consented to the sale of 60% of the Principal Debtor's shares to the intended 5th Defendant who serviced the loan until 2011 as the majority shareholder managing the services of the Principal Debtor.
11. The Respondents on the other hand contend that the intended 5th Respondent was not privy to the lending agreement between the Plaintiff and the Principal debtor, Cables & Plastics Ltd, that the Plaintiff was also not privy to the negotiations between the Defendants and the intended 5th Defendant on the sale of the Principal Debtor's shares and that the 1st to 4th Defendants have been sued in their capacity as guarantors of the Principal Debtor. That introduction of a new party 10 years since the suit was filed and 5 years after the Plaintiff closed its case will convolute issues for determination, delay conclusion of the case and prejudice fair trial in the matter.
12. This court is guided Order 1 Rule 3 and Order 1 Rule 10(2) of the *Civil Procedure Rules* on the issue of joinder of the intended 5th Defendant to the suit as follows: -

Order 1 Rule 3 of the *Civil Procedure Rules* provides: -

All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Order 1 Rule 10(2) of the *Civil Procedure Rules* provides: -

The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

13. The parameters set out in the above provisions on joinder were clarified by Nyamweya, J. in *Lilian Wairimu Ngatho & Another v Moki Savings Co-Operative Society Limited & Another* (2014) eKLR that: -

“The provisions of Order 1 Rule 10(2) state that joinder of a party can be made ‘at any stage of the proceedings’. ‘Proceedings’ are defined in Black’s Law Dictionary Ninth Edition at page 1324 as ‘the regular and orderly progression of a lawsuit, including all acts and events



between the time of commencement and the entry of judgment'. A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit...

Similarly, the main purpose for joining a party as a Defendant under Order 1 Rule 3 of the Civil Procedure Rules is to claim some relief from the said party, and therefore such joinder can only be made during the pendency of a suit..."

14. The guiding principles on whether a party can be enjoined in a suit was set out in [*Joseph Njau Kingori v Robert Maina Chege & 3 Others*](#) (2002) eKLR as follows: -
 1. He must be a necessary party.
 2. He must be a proper party.
 3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.
 5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit."
15. This court finds that the Principal Debtor sold 60% of its shares to the intended 5th Defendant. This position has not been disputed by the Respondent. The fact that the intended 5th Defendant serviced the loan until 2011 as the majority shareholder managing the services of the Principal Debtor shows that the Respondent was privy to the arrangement between the Applicants and the intended 5th Defendant. This court therefore finds that the intended 5th Defendant has met the threshold set out in [*Joseph Njau Kingori v Robert Maina Chege & 3 Others*](#) (2002) eKLR above and it is for the interest of justice that the intended 5th Defendant is allowed to participate in the proceedings.
16. On whether it is in order for the Defendants to file supplementary bundle of documents and whether leave may be granted to the Plaintiff to recall its witness who had already testified, this court is called upon to exercise discretion and ensure dispensation of justice to all parties. If the Applicants/Defendants are barred from filing the supplementary bundle of documents, they shall have been denied production of evidence to tilt the case in their favour. For purposes of fair hearing and pursuant to Section 1A and 1B of the [*Civil Procedure Act*](#) and Article 159 (2)(d) of the [*Constitution*](#), I am inclined to grant the Applicants/Defendants leave to file supplementary list and bundle of documents. This gives the Respondent/Plaintiff the right to challenge the evidence.
17. In conclusion, the Chamber Summons application dated 11th March 2024 is allowed in the following terms: -
 - a. The Plaintiff shall within 14 days from the date hereof amend and serve the plaint to enjoin Kavama Group Limited as the 5th Defendant.
 - b. Upon service of the amended plaint, the Defendants shall within 14 days after service of the plaint amend and serve their defence to enjoin Kavama Group Limited as the 5th Defendant, among other amendments.
 - c. The Defendants are granted leave to file supplementary list and bundle of documents within 7 days after service of the amended defence.



- d. The Plaintiff is granted corresponding leave to file and serve any additional list and bundle of documents, if any, as well as additional list of witnesses and witness statements within 7 days after service of by the Defendants.
- e. The Plaintiff is also granted leave to recall its witnesses who had already testified.
- f. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 25TH DAY OF SEPTEMBER, 2024.

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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

Mburu Advocate for the Plaintiff/Respondent

Ochieng Advocate for the Defendants/Applicants

Court Assistant – Mr. Samuel Shitemi

