



**TRV Towers Limited v NCBA Bank Kenya PLC & another (Commercial Case E541 of 2023)
[2024] KEHC 15487 (KLR) (Commercial and Tax) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15487 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E541 OF 2023
MN MWANGI, J
NOVEMBER 29, 2024**

BETWEEN

TRV TOWERS LIMITED PLAINTIFF

AND

NCBA BANK KENYA PLC RESPONDENT

AND

TRIBHOVAN LALJI CHAVDA INTENDED DEFENDANT

RULING

1. The intended 2nd defendant/applicant filed a Notice of Motion application dated 30th January 2024 pursuant to the provisions of Article 40 of *the Constitution* of Kenya, 2010, Section 3A of the *Civil Procedure Act*, Order 1 Rules 3 & 10(2) of the Civil Procedure Rules, 2010, and all other enabling provisions of the law. The applicant seeks orders that he be joined to these proceedings either as the 2nd defendant or as an interested/necessary party.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Tribhovan Lalji Chavda, the applicant herein. The applicant’s case is that the plaintiff company was incorporated in the year 2013, with him holding a 30% shareholding and serving as the Managing Director until the year 2016, whereas his Co-Director, Mr. Virji Meghji Patel, acted as the company’s contractor and participated in company meetings. Mr. Chavda averred that the plaintiff company received a loan from the defendant, personally guaranteed by him, for a commercial project. That the project was completed, and some of the units were successfully sold during his tenure as the plaintiff’s Managing Director.



3. It was stated by Mr. Chavda that sometime in July 2013, he was unlawfully removed as a Director of the plaintiff company by Messrs Virji Patel, Purshottam Vera, and Vinod Lathia, who thereafter took over the plaintiff's running of Board of Directors. The applicant averred that they then made unauthorized demands for bank information, filed unsanctioned lawsuits, and conducted a forensic audit without Shareholder or Board approval. The applicant contended that the aforementioned three individuals have since mismanaged company funds, filed misleading suits, and attempted to shift the blame for financial losses onto the him and the defendant.
4. Mr. Chavda asserted that he fears personal financial loss due to his guarantee on the loan advanced to the plaintiff company by the defendant. He now seeks to defend his interests in view of the alleged fraudulent and unlawful actions by the plaintiff company's three Directors. He argued that the plaintiff is fully capable of repaying the loans advanced to it, in the event its mismanagement is addressed. He stated that he intends to file a counter-claim to consolidate disputes and prevent conflicting judgments.
5. In opposition to the application, the plaintiff filed a replying affidavit sworn on 15th February 2024 by Mr. Purshottam Premji Vera, a Director of the plaintiff/respondent. He averred that the applicant is no longer a Director of the plaintiff company, neither does he have any rights or interests in the reliefs sought by the plaintiff against the defendant, to warrant the making of the instant application. Mr. Premji further averred that the applicant does not meet the legal threshold for joinder to these proceedings as he has failed to demonstrate what identifiable legal stake or interest he has in these proceedings, a connection between his claims and the subject matter of this suit, and how his participation would add value to these proceedings. Mr. Premji contended that allegations of mismanagement and misappropriation of the plaintiff company's finances by the plaintiff's Directors should be addressed in other existing cases between the parties, and not in this suit.
6. The foregoing notwithstanding, Mr. Premji denied that the plaintiff company's Directors have intimidated bankers or mismanaged the plaintiff company's finances, and accused the applicant of mismanagement of the plaintiff company's finances during his tenure, which issue is being litigated in HCCOMM No. E619 of 2023 -TRV Towers Limited v Tribhovan Lalji Chavda. He averred that the issues raised by the applicant herein are the subject of other cases being HCCOMM No. E443 of 2023 -TRV Towers Ltd v Bank of Baroda, Misc. Appl. No. 921-TRV Towers v NCBA Bank Kenya PLC, and HCCOMM No E819- Virji M. Patel v Tribhovan Chavda. Mr. Premji deposed that it is appropriate for the said matters to be resolved separately. The plaintiff urged this Court to dismiss the instant application asserting that inclusion of the applicant to these proceedings would unnecessarily complicate the proceedings without contributing to resolving the real issues at hand.
7. In a rejoinder, the applicant filed a further affidavit sworn on 11th April 2024 by Mr. Tribhovan Lalji Chavda, the applicant herein. He contended that as a 30% Shareholder of the plaintiff company, he has the right to question unauthorized actions taken on behalf of the company without requisite resolutions. He averred that he may be directly affected by the orders that may be issued in this suit due to his personal guarantee and indemnity for Kshs.1,100,000,000/= dated 23rd March 2015, executed in favour of the defendant for the plaintiff's loan facility. He averred that the said facility is the subject matter of the case herein, and it has led to a 40-day Statutory Notice of sale dated 20th September, 2023 being issued to him and the plaintiff.
8. The applicant asserted that as a Guarantor, the defendant holds a lien over his securities in case of the plaintiff company's default. He claimed that the plaintiff company indirectly implicated him in the alleged mismanagement of the loan facility which he oversaw as its Managing Director. He emphasized his ability to provide critical facts for effective adjudication of the dispute herein. The applicant mentioned the existence of HCCOMM No. E619 of 2023 and E541 of 2023 and stated



that they involve the same loan facility and issues, constituting forum shopping and abuse of processes, leading to unnecessary duplication and complexity.

9. The application herein was canvassed by way of written submissions. The applicant's submissions were filed on 11th April 2024 by the law firm of V. H. Awuor & Company Advocates, whereas the respondent's submissions were filed by the law firm of Tito & Associates Advocates on 7th June 2024.
10. Mr. Awuor, learned Counsel for the applicant referred to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010. He relied on the case of *Meme v Republic* [2004]1 124, cited by the Court in *Eunice Wangui Mbogo & another v Margaret Mbuca Mathuri (Sued as Administrator of Adriano Mathuri Ngondi) & 2 others* [2022] eKLR, to support his argument that the applicant herein has made out a case to warrant this Court to exercise its discretion in his favour and join him to these proceedings as the 2nd defendant. Counsel further relied on the Supreme Court case of *Francis Kariuki Muruatetu & another v Republic & 5 others* (SCK Petition No 15 of 2015 as consolidated with Petition No 16 of 2015, cited by the Court in *Ethics and Anti-Corruption Commission v Hartland Enterprises Limited & 4 others* [2023] KEHC 22510 (KLR), and submitted that the applicant has established the basis, and has met the requisite threshold to be joined to these proceedings as an interested/necessary party.
11. Mr. Ogendo, learned Counsel for the respondent also referred to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010, and submitted that the dispute herein is strictly between the plaintiff and the defendant regarding the defendant's alleged negligence in fulfilling its obligations, and as such, the said dispute can be resolved without the applicant's participation in this suit, as there are no reliefs sought against him. Counsel argued that the issue of the applicant's personal guarantee is unrelated and seeks to introduce a new, irrelevant cause of action, thus altering the nature of the suit herein. Counsel contended that an application for joinder must be made by an existing party to the suit, and since the applicant is not a party, he lacks the requisite locus standi to file the instant application.
12. Mr. Ogendo cited the case of *Omboko v Speaker & Chairperson of Busia County Assembly Service Board & 6 others (Petition E005 OF 2020)* [2022] KEELRC 14695 (KLR), and the Court of Appeal case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR, and emphasized that the dispute herein is strictly between the plaintiff, a body corporate separate and distinct from its Shareholders, and the defendant. He submitted that the outcome of the suit between the plaintiff and the defendant herein, will not affect the applicant in any way. Additionally, Counsel referred to the case of *John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties)* [2021] eKLR, in asserting that the applicant has not met the threshold for joinder as an interested/necessary party.

Analysis And Determination.

13. I have considered the instant application, and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiff and the written submissions by Counsel for the parties. The issue that arises for determination is whether the applicant should be joined to this suit.
14. Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 provides for joinder of parties in the following terms -

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.



15. The plaintiff submitted that the use of the words “either upon” or “without the application of either party” in Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 suggests that it is only an existing party to the suit that can make an application for joinder of a party to proceedings either as a defendant or an interested party. Upon my reading of the said provisions, it is clear that it states that the Court may at any stage of the proceedings “either upon or without the application of either party to the suit.” The import of the foregoing is that even in the absence of an application by either party to the suit, the Court may still make an order for any party to be joined to the suit either suo moto or when moved by a party who is not already a party to the suit. As a result, this Court does not agree with the plaintiff’s Advocate’s assertion as it is not legally correct. I hold that the applicant has the requisite locus standi to file the instant application. He however has to satisfy the pre-requisites for joinder of party to a suit.
16. In the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243, Nambuye, J., (as she then was) stated that the guiding principles when an intending party is to be joined to proceedings are -
- i. He must be a necessary party;
 - ii. He must be a proper party;
 - iii. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff;
 - iv. The ultimate order or decree cannot be enforced without his presence in the matter; and
 - v. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
17. In *Civicon Limited v Kivuwatt Limited & 2 others* (supra), the Court when dealing with an application similar to the instant one made the following observation -
- Again, the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined... from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.
18. Upon perusal of the plaintiff’s plaint dated 6th November 2023, it is evident that the plaintiff seeks judgment against the defendant for losses incurred, declarations of the defendant’s negligence in its statutory, contractual, and professional banking duties, and the management of the plaintiff’s mortgage, along with costs of the suit. From the foregoing, it is clear that there is no relief flowing from the applicant to the plaintiff, hence there is no justification for the applicant to be joined to these proceedings as the 2nd defendant.
19. It is not disputed that at the time the defendant advanced the mortgage which forms the subject of this suit to the plaintiff company, the applicant was its Managing Director. It is however not in contest



that sometime in July 2013, the applicant was removed as a Director of the plaintiff company. From a perusal of the plaint, that the plaintiff's claims center on the defendant's alleged mismanagement of its loan account and proceeds from the sale of commercial units funded by the mortgage. The plaintiff accuses the defendant of opening unauthorized accounts, allowing irregular payments, and breaching statutory, contractual, and professional obligations, which led to losses and loan accrual. Consequently, the plaintiff challenges the defendant's right to exercise its statutory power of sale.

20. It is evident from the above summation that the applicant is not implicated in any way in the plaintiff's grievances against the defendant. However, the applicant's contestation is that he is directly affected by the orders sought in this suit due to his personal guarantee and indemnity for Kshs.1,100,000,000/= dated 23rd March 2015, executed in favour of the defendant for the plaintiff's loan facility. He stated that the said facility which is the subject matter of the case herein, has led to a 40-day Statutory Notice of Sale dated 20th September, 2023 being issued to him and the plaintiff. It is not disputed that the Statutory Notice of Sale issued to the plaintiff and the applicant by the defendant is with respect to the suit property which is charged to the defendant, and not the personal guarantee executed by the applicant.
21. On perusal of the plaint, this Court is of the considered view that the plaintiff company's case is that it has been unable to repay the financial facility advanced to it by the defendant as a result of losses it has suffered. The said losses have been attributed to the defendant's breach of its statutory, contractual, and professional obligations to the plaintiff. The plaintiff as such asserts that the defendant has no right to call up the loan and exercise its statutory power of sale over the charged property. Given the said allegation in the suit, the issue for determination between the plaintiff and the defendant is whether the defendant breached its statutory, contractual, and professional obligations to the plaintiff, thereby causing the plaintiff to suffer losses.
22. This Court is inclined to agree with the plaintiff's position that the dispute herein is between the defendant, and the plaintiff which is a body corporate, separate and distinct from its Shareholders. Therefore, the applicant does not need to be a party to these proceedings for the Court to be able to determine the dispute herein. Further, the applicant's allegations that the plaintiff company's Directors mismanaged the company's finances and are now shifting the blame to the defendant and the applicant cannot be determined in this matter. In the event that the applicant is keen on pursuing this cause of action, he ought to follow the correct legal procedure provided for in the Company's Act.
23. In view of the foregoing, I am not persuaded that the applicant is a necessary party to these proceedings since his presence is not necessary for the Court to effectively and completely adjudicate upon and settle all questions in controversy in this suit. Further, there are no reliefs flowing from the applicant to the plaintiff in this suit, and the ultimate order or decree that may ultimately be issued by this Court can be enforced without the presence of the applicant in this suit.
24. In the end, this Court finds that the applicant has not made out a case to warrant this Court to exercise its discretion in his favour by joining him to this suit.
25. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI



JUDGE

In the presence of:

Mr. Ngigi h/b for Mr. Awour for the 2nd defendant/applicant

Mr. Ogendo for the plaintiff/respondent

Mr. Gregory Otieno h/b for Ms Otieno for the defendant/respondent

Ms B. Wokabi – Court Assistant

