



**Vyas & another v Shah & 2 others (Civil Case E018 of 2023)
[2024] KEHC 15080 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15080 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E018 OF 2023
JRA WANANDA, J
NOVEMBER 29, 2024**

BETWEEN

BRAHMADUTT VYAS 1ST PLAINTIFF

LARA ELIZABETH BRAITSTEIN 2ND PLAINTIFF

AND

AJAY SOMCHAND SHAH 1ST DEFENDANT

LINA AJAY SHAH 2ND DEFENDANT

STANDARD CHARTERED BANK OF KENYA LTD 3RD DEFENDANT

RULING

1. The Application before Court is by the 3rd Defendant bank which is seeking orders to be removed from this suit and/or that its name be struck out therefrom. The ground advanced is that the 3rd Defendant has been improperly sued herein as a Defendant.
2. The background of this suit is that by the Plaint filed herein on 3/10/2023 through Messrs C.F. Otieno Advocates, the Plaintiffs instituted this suit in respect to matters relating to the estate of the late one Ashwani Kumar Jayantilal Vyas (hereinafter referred to as “the deceased”). The prayers sought in the Plaint are for orders freezing bank accounts held in the name of the deceased at the 3rd Defendant bank and/or stopping the Defendants from transferring, alienating or in other way adversely dealing with the bank accounts, including transferring the funds and stopping any withdrawal of funds therefrom.
3. The foundation of the suit is the allegations by the Plaintiffs that the deceased is said to have changed his Will on 4/05/2023, a day before he died on 5/05/2023, and which alleged change the Plaintiffs suspect to have been procured by impropriety and/or fraud. The Plaintiff’s point fingers at the 1st and 2nd Defendants as being behind the “suspicious” change of the Will and such “suspicion” seems to stem from the fact that the new Will is in favour of the 1st and 2nd Defendants in terms of appointment



- of trustees, executors and beneficiaries, contrary to the initial version of the Will which apparently favoured the Plaintiffs. A Will executed by the late spouse to the deceased, and who predeceased him, has also been mentioned in the suit.
4. In light of the matters recounted and the prayers sought in the Plaint, the first issue that would inevitably attract the attention of any discerning jurist is whether this suit is before the correct forum for determination. In other words, do the matters in issue properly belong to this civil Court or should the same have been filed before the Succession or Probate Court? I note that the 1st and 2nd Defendants have, through Messrs R.M. Mutiso & Co. Advocates already filed their joint Statement of Defence and in it, they have indeed raised this challenge on jurisdiction. Since however that issue is yet to be canvassed before me, I say no more about it. I however put the parties on notice that this issue of jurisdiction will have to be determined at the earliest opportunity as a Preliminary matter before I allow this suit to progress in any substantive manner.
 5. Be that as it may, as aforesaid, the Application for determination is the one filed by the 3rd Defendant and dated 13/03/2024. The same is filed through Messrs Kalya & Co. Advocates and seeks orders as follows:
 - i. That 3rd Defendant's name be struck out as a party in this suit for being enjoined wrongfully in these proceedings.
 - ii. Costs be awarded to the 3rd Defendant.
 6. The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by one Paul Koskei who described himself as the Priority Banking Client Service Manager with the 3rd Defendant's Eldoret Branch.
 7. In the Affidavit, the deponent stated that their Advocates have explained to him the import and tenor of Order 1 (Rule 2 of the *Civil Procedure Rules*, that the deceased, Ashwani Jayantilal Vyas, as at the date of his death, held several bank accounts with the 3rd Defendant, (which he listed) that the 3rd Defendant has no interest in the said accounts and that the 3rd Defendant is not a privy to the dealings between the Plaintiffs and the 1st and 2nd Defendants. He deponed further that there is need to save judicial time by striking out the 3rd Defendant's name from the suit since it has no interest in the determination in the validity of the Will in issue herein, that it is an abuse of the process of the Court to wrongfully join the 3rd Defendant to these proceedings when it is not a necessary party. According to him, unless the prayers sought herein are granted, the 3rd Defendant is likely to be prejudiced and stands to suffer irreparable damage and substantial loss.

Plaintiff's Replying Affidavit

8. The Application is opposed by the Plaintiffs vide the Replying Affidavit filed on 11/04/2024 and sworn by the 1st Plaintiff. The 2nd Plaintiff has also sworn her own separate Affidavit filed on the same date, supporting the averments made in the 1st Plaintiff's said Replying Affidavit.
9. In his said Replying Affidavit, the 1st Plaintiff deponed that they were fully aware of the grounds now raised by the 3rd Defendant at the time that they made the decision to file the suit, that this is clear even from the Plaint in which they have pleaded that the 3rd Defendant is only sued as a necessary and proper party and that all that was required of them was to preserve the accounts held by the deceased pending further directions of the Court. He deponed further that proper supervision of the accounts will only be possible when the 3rd Defendant is a party to the suit, that the 3rd Defendant has indeed in its Supporting Affidavit acknowledged existence of the said bank accounts and has revealed the balances



held in the accounts. He contended that the Plaintiffs know that the 3rd Defendant has no interest in the accounts but at the same time are alive to the fact that the 3rd Defendant has a duty to preserve the accounts pending further directions of the Court.

10. The 1st Plaintiff contended further that the Civil Procedure Rules provide that in all cases where the Plaintiff is unable to determine whether it will institute the suit in the name of the correct Defendant, the Plaintiff is at liberty to include other Defendants who may be connected with the claim, that the 3rd Defendant was connected, being the custodian of the subject bank accounts, that the case is the Plaintiffs' and not the 3rd Defendant's and it is the Plaintiffs who decided on whom to sue to avoid a scenario where one of the parties decides to throw the ball at another who is not a party with the hope of crippling the suit and that the fact that the 3rd Defendant has disclosed the subject account balances is a clear sign that they are indeed a necessary and property party. According to him, contrary to the 3rd Defendant's allegations, the Court process has not been abused and it has in fact, reduced the Plaintiffs' expenses as they will not be required to file a new suit.

Hearing of the Application

11. The Application was canvassed by way of written Submissions. The 3rd Defendant filed its Submissions on 18/06/2024 while the Plaintiffs filed on 17/06/2024, way out of time. On their part, Advocates for the 1st and 2nd Defendants opted not to participate in the Application.

3rd Defendant's Submissions

12. Counsel for the 3rd Defendant reiterated that the 3rd Defendant is not a necessary party to this suit and cited the case of Elisheba Muthoni Mbae v Nicholas Karani Gichobi & 2 Others [2014] eKLR in which, she submitted, the earlier case of Werrot Co. Ltd v Andrew Douglas Gregory & Others, Nairobi Milimani HCCC No. 2363 of 1998 was referred to. She submitted that the guiding principle in deciding whether to add a party is whether their presence is necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved. She submitted further that there are two tests to be applied, namely, (i) that there must be a right to some relief against the party sought to be added in respect to the matter involved in the proceedings, and (ii) that it should not be able to pass an effective decree in the absence of such party. She contended that the 3rd Defendant's inclusion in this matter is inconsequential to the adjudication and determination of the issue of fraud raised herein, that the 3rd Defendant was not privy to the dealings between the Plaintiff and the 1st and 2nd Defendants over the accounts and monies held therein and that the 3rd Defendant has absolutely no interest in the accounts the subject of this suit.
13. Counsel also cited the case of Trust Bank Kenya Limited vs Richard Mwangi Kamotho & 2 Others [2017] eKLR and submitted that no single allegation has been pleaded against the 3rd Defendant and that in fact, the Plaintiffs, in their Affidavit and Submissions, admit that they were aware that the 3rd Defendant was not a necessary party herein. She, too, cited Order 1 Rule 10(2) Civil Procedure Rules and also the case of Diamond Trust Bank Kenya Limited v Richard Mwangi Kamotho & 2 Others [2017] eKLR, and also the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) & 2 Others [2022] eKLR. She submitted that the Plaintiff has no claim against the 3rd Defendant, that the 3rd Defendant has no defence to raise as there is no claim raised against it and that the 3rd Defendant's presence will be merely ceremonial whilst incurring expenses and that it serves no purpose to sustain the 3rd Defendant in these proceedings.
14. Counsel then cited Articles 159 and 232 of the Constitution on the need to utilize the minimal judicial resources available and also Section 1B of the Civil Procedure Rules on the need for the Court to further



the overriding objectives of litigation as specified in Section 1B thereof. In conclusion, she cited the case of *Wanyama (suing on behalf of the estate of Henry Wanyama Khaemba (Decesaed) & Another v Mulaya & 2 Others* (Environment & Land Case 120 & 119 of 2014 (Consolidated) [2023] KEELC 22006 (KLR) (5 December 2023) (Judgment).

Plaintiffs' Submissions

15. On his part, Counsel for the Plaintiffs reiterated the Plaintiffs' acknowledgment of the 3rd Defendant's position but submitted that the Plaintiffs wanted "to avoid the back and forth and the blame games associated with failing to join a party from the very onset". According to him, the 3rd Defendant "cannot now decide to walk out after bringing the customer's tray to the arena, and that the 3rd Defendant must continue to hold it to the very end and abide by the directions of the Court in relation to those very accounts to which they are custodians". He then cited the cases of Nairobi Civil Appeal No. 70 of 2009 – *Pravin Bowry versus John Ward & Another*, the case of Mombasa Civil Appeal No. 45 of 2014 – *Civicon Limited versus Kivuwatt Limited & 2 Others* and the case of Nairobi HC Misc Civil Application No. 248 of 2012 (Commercial & Admiralty Division) – *Zephir Holdings Limited versus Mimosa Plantations Limited & 2 Others*.

Determination

16. The issue for determination herein is "whether the 3rd Defendant was improperly joined in this suit and therefore, whether its name should be struck out from the suit".
17. In respect to the issue of joinder of Defendants, the starting point is Order 1 Rule 3 of the *Civil Procedure Rules* which provides as hereunder:

"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."

18. It must however be noted, as observed by Gikonyo J in the case of *Lucy Nangari Ngigi & 128 Others v National Bank of Kenya Limited & Another* (2015) eKLR), that joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would therefore be whether a common question of fact or law would arise between the existing and the intended parties.
19. Order 1 Rule 10 (2) under which the instant Application has been brought then provides that:

"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 defendants, 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."



20. In analysing the import of the Order 1 Rule 10(2) above, Aburili J, in the case of *Honda Motorcycle Kenya Limited v Oloo & 2 others* (Civil Appeal E136 of 2021) [2023] KEHC 25502 (KLR) (17 November 2023) (Judgment), restated the following:

“ 22. A plain reading of the foregoing does not support the general assertion that the Rules anticipate in all cases that a full trial be held before a party may be found to be improperly joined. The rationale behind the provisions is not difficult to find; a party improperly enjoined in a suit does not have to endure the rigour of a full trial and thereby incur expenses before it can vindicate itself. Order 10 (2) of the Civil Procedure Rules allows parties to move the court to strike out the name of a Plaintiff or Defendant improperly joined or to have a necessary party added “in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.” In my view, a court of law can only effectually and completely adjudicate upon and settle all questions involved in a suit when the correct parties are before the court.”

21. The relevant tests for determination of whether to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori vs. Chege & 3 Others* [2002] 2 KLR 243 where she stated that the guiding principles when an intending party is to be joined are that: (i) he must be a necessary party, (ii) he must be a proper party, (ii) in the case of the defendant, there must be a relief flowing from that defendant to the plaintiff, (iii) the ultimate order or decree cannot be enforced without his presence in the matter, and that (iv) his presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

22. Similarly, a 3-Judge High Court bench in the case of *Meme v. Republic*, [2004] 1 EA 124, although a criminal matter, observed that a party could be joined in a matter for the reasons that; (i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings; (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law; and (iii) joinder to prevent a likely course of proliferated litigation.

23. I also refer to the case of *Zepbir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya* (2014) eKLR, where F. Gikonyo J held that:

“ 7. A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.”

24. Further, the Uganda Supreme Court, in case of *Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55, expressed itself as follows:

“ A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because



that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter ... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

25. There is also the Court of Appeal case of *Civicon Limited vs. Kivu Watt Limited and 2 Others* [2015] eKLR, where the following was observed:

"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."

26. The twin tests for determining the question of who is a necessary party in a suit were also explained by Ringera J (as he then was) in the case of *Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others* [1998] eKLR in the following manner:

"For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party."

27. Similarly, Mbaru J in the case of *Kizito M. Lubano v KEMRI Board of Management & 8 Others* [2015] eKLR held that:

"53. The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein..."

28. Applying the above principles to the facts of this case, I find that what is in contention in this suit is access to the funds held in the bank accounts mentioned and which are held in the name of the



- deceased. The “fight” is about access to the funds and such fight is between the Plaintiffs, on one side, and the 1st and 2nd Defendants, on the other. It has not been alleged that the 3rd Defendant is part of this fight. The 3rd Defendant’s link to this limb of the dispute is simply because it is the bank where the funds are held. Indeed, the Plaintiffs concede that the 3rd Defendant is not, and cannot even in law, claim ownership of the funds and that it is only a custodian of the funds.
29. Stretched wider, the genesis of the “fight” over access to the funds is the larger “fight” touching on the question whether the deceased lawfully and truly changed his initial Will before his death as claimed by the Plaintiffs, a view vehemently challenged by the 1st and 2nd Defendants. Stretched even wider, the dispute on whether the Will was changed is because, while the initial Will is said to have been in favour of the Plaintiffs, the changed version is said to have varied the beneficiaries of the estate and now favours the 1st and 2nd Defendants. It is therefore beyond peradventure that the main battle herein is about control of the estate of the deceased and more specifically, inheritance of the properties left behind by the deceased, including the funds held in the said bank accounts.
30. It is therefore evident that this suit is a stop-gap measure meant to preserve the estate before the main “war” to be waged elsewhere. I say so because, while a suit commenced by way of a Plaint should ordinarily lead to a Judgment that finally and conclusively determines the rights of the parties, in this case, the prayers sought in the Plaint, if granted, would be technically still in the nature of “interim” orders pending further directions of the Court, either in this suit or in another or separate litigation is yet to be commenced. To this extent, I have my reservations on the competency of the suit but would not say more about it lest I be accused of prejudging the case. However, the manner in which the prayers have been framed indicates that there is a bigger battle waiting to be commenced elsewhere. With this observation, can it really be said that the 3rd Defendant is a necessary party in this suit? My view is that it cannot.
31. Looking at the prayers in the Plaint, can it be said that the 3rd Defendant would be expected to raise a defence against any of prayers sought when the 3rd Defendant is not claiming any interest in the monies in the accounts? Looking at the body of the Plaint, can it be said that there is any allegation of wrongdoing pointed at the 3rd Defendant for which this Court would be called upon to issue a remedy? The clear answer to these questions is an emphatic no, there is none. Considering the millions of accounts held in banks, does it mean that every time a dispute arises between parties interested in the funds held in such accounts, and which ends up in litigation, then the banks will always have to be joined as parties in those suits? Answering this question in the affirmative would be absurd and would mean that banks would be paralyzed and overwhelmed as they will be faced with huge volume of litigation over disputes in which they have no stake at all. To even consider such scenario as a possibility would be absurd.
32. The Plaintiffs acknowledge that they are aware of the bank’s concerns and claim that they simply joined the bank because the Plaintiffs wanted to “avoid a scenario where one of the parties decides to throw the ball at another who is not a party with the hope of crippling the suit” and “to avoid the back and forth and the blame games associated with failing to join a party from the very onset”. The Plaintiffs do not however elaborate the nature of these alleged “blame games” which they are apprehensive that bank may engage in yet. What is this claim that the bank, on one hand, and the 1st and 2nd Defendant on the other may possibly attempt to shift to each other in the context of the facts of this matter? I do not see any at all. It is clear that the 3rd Defendant has no interest in the bank accounts and cannot also be said to be privy to the dealings between the Plaintiffs and the 1st and 2nd Defendants on matters regarding the estate of the deceased. Equally, the 3rd Defendant has no interest or stake of any kind in the determination of the validity of the Will said to have been executed by the deceased.



- 33. As aforesaid, a “necessary party” is one without whom no order can be made effectively in a suit. Is the 3rd Defendant such party in whose absence no effective order can be made in this suit? The 3rd Defendant is definitely not such party. None of the prayers made in the Plaint requires the presence of the 3rd Defendant at all in the suit. All that the Plaintiffs would need to do, should they obtain orders herein, is simply to extract the same and serve upon the 3rd Defendant for implementation. The 3rd Defendant would only therefore get involved at the stage of execution, should the suit be successful. Why then would the 3rd Defendant be made a party only for purposes of implementation of a Court order? To this extent, I agree that the 3rd Defendant has been dragged into this suit to only come in as a “ceremonial statue”
- 34. Although it is true that Order 1 Rule 3 of the Civil Procedure Rules allows a Plaintiff, when in doubt as to which one between multiple possible Defendants is liable for the claim, to then sue them all, in this case I do not see what doubts could arise in choosing whom to sue as between the 1st and 2nd Defendant, on one hand, and the 3rd Defendant on the other, when clearly no common issues for determination arise between them. In this case, Order 1 Rule 3 of the Civil Procedure Rules cannot be invoked since there is no right to relief in respect of or arising out of the same act or transaction between the 3rd Defendant, on one part, and the 1st and 2nd Defendants, on the other. There is also no common question of law or fact that arises as between the 3rd Defendant, on one part, and the 1st and 2nd Defendants, on the other.
- 35. The Plaintiffs seem to forget that suing a Defendant means that such Defendant has to inevitably incur hefty costs in legal fees payable to Advocates, spend much time in preparations, both for briefing Lawyers and for the trial itself, and also incur further costs in availing witnesses at the trial. Apart from the above, being sued also disrupts a Defendant’s operations at different levels. It is therefore quite annoying and punitive to find oneself being joined as a Defendant and dragged to Court for matters which one has totally and completely no stake or interest.
- 36. For the above reasons, I am satisfied that the Plaintiffs have failed to give any sane explanation on why they joined the 3rd Defendant into this suit. Clearly, the Plaint does not disclose any cause of action against the 3rd Defendant and consequently, I have no difficulty in reaching the finding that the 3rd Defendant was improperly sued herein.

Final Orders

- 37. In conclusion, I rule and/or order as follows:
 - i. The Notice of Motion dated 13/03/2023 filed by the 3rd Defendant is hereby allowed.
 - ii. Consequently, the 3rd Defendant’s name is struck out and/or removed from this suit.
 - iii. As costs follow the event, the 3rd Defendant is awarded costs of this suit, to be borne by the Plaintiffs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 29TH DAY OF NOVEMBER 2024

.....
WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:
 C.F. Otieno for Applicants

Ms. Odwa h/b for Mutiso for 1st and 2nd Defendants

Ms. Kesei for 3rd Defendant

Court Assistant: Brian Kimathi

