



**Sidian Bank Limited v Afrikon Limited & another (Commercial Case E239 of 2019)
[2023] KEHC 4047 (KLR) (Commercial and Tax) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 4047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E239 OF 2019**

A MSHILA, J

APRIL 28, 2023

BETWEEN

SIDIAN BANK LIMITED PLAINTIFF

AND

AFRIKON LIMITED 1ST DEFENDANT

WOOSUN JUNG 2ND DEFENDANT

RULING

Background.

1. The Notice of Motion dated October 21, 2022 was brought pursuant to sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Order 1 Rule 10(2) and Order 18 Rule 10 of the [Civil Procedure Rules](#) for the following orders;
 - a. The Judgment date set for 28th of October 2022 in relation to this matter be set aside.
 - b. The 2nd Defendant is struck out from being a party in this suit.
 - c. In the alternative to order (3) above, leave is granted to the 2nd Defendant to recall and cross-examine the Plaintiff's witnesses.
 - d. Leave be granted to the 2nd Defendant to testify in his defence in this case.
2. The Application was supported by the sworn affidavit of Woosun Jung and the grounds on the face of it.
3. In response the Plaintiff filed Grounds of Opposition dated October 28, 2022 on the following grounds;



- a. The 2nd defendant is bound by its pleadings. He admitted to being a director of the 1st defendant.
- b. The 2nd defendant's has been sued as a guarantor to the 1st defendant and not as a director. He has completely misunderstood the cause of action against him.
- c. The 2nd defendant has not justified his non-attendance in court.
- d. There exist legal avenues to challenge the judgment if at all it is against him.
- e. There must be an end to litigation.
- f. The Application is otherwise an abuse of process. Reasons wherefore the application should be dismissed with costs.

Applicant's Case

4. It was the applicant's case that the 2nd defendant was wrongfully joined as a party in this suit, under the mistaken belief that he was/is a Director of the 1st defendant which is not the case.
5. The 1st defendant, which is a corporate legal entity, is capable of suing and being sued in its own name and in the event that the 2nd defendant is not struck out as a party from this suit he is desirous to defend himself in this suit fully.
6. The applicant averred that he only recently came to his knowledge that his former Advocates filed an application to cease from acting, which was allowed by the court. Since then he was not able to participate in this case since he could not file anything or follow up on the case activities as he was not only not mapped on the e-filing portal, but was also not included as a party in this case in the e-filing portal
7. Further, the situation was exacerbated by the fact that he was not in Kenya at the time hence unable to follow up on the issue physically at the court premises.
8. It is only after he appointed his current Advocates herein that they were able to follow up with the Judiciary ICT personnel to have him mapped and included as a party in this case as well as finding out what the position in this matter.
9. It is trite law that a party to a suit should not be condemned unheard and it is therefore in the interest of justice that the 2nd defendant is heard before the court can determine this matter conclusively.
10. Further, the plaintiff will not be prejudiced in any manner whatsoever, since judgment has not yet been entered.

Respondent's Case

11. In response, the Respondent argued that the defendants were represented by an advocate when the matter was in court on August 31, 2022. The advocate did not give any indication that he intended to file an application to allow the 2nd defendant to testify or to recall the plaintiff's witness or to even file submissions yet the Advocate had already filed the Notice of Appointment dated August 30, 2022.
12. The application having been filed on October 23, 2022 and served on October 25, 2022, a few days to the judgment date, can only be deemed for purposes of delaying the conclusion of the matter.



13. Further, the respondent pointed out that the 2nd defendant had already filed a witness statement dated March 8, 2021 and a joint statement of defence dated June 29, 2020 through the 1st defendant which has at all times been mapped on the e-filing system.
14. The 2nd defendant was at all material times a director of the company. He conveniently procured a late in the day CR12 in an attempt to mislead the court and failed to disclose the following material facts, which emanate from him as follows;
 - a. At the time of opening the account with the plaintiff, the 2nd defendant signed the account opening forms as a director.
 - b. The 1st defendant forwarded a Directors Resolution for the account opening in which the 2nd defendant signed as the director.
 - c. The 1st defendant executed a Guarantee Application form in which he signed as the authorized signatory.
 - d. In the letter of offer for the Advance Payment Guarantee, the 1st Defendant executed the same as a director of the 1st defendant.
 - e. The CR12 dated July 5, 2016 clearly shows that the 2nd defendant is the sole director of the 1st defendant.
 - f. In his witness statement dated March 8, 2021, he confirmed that he was a director of the 1st defendant.
 - g. In the application to cease acting by his previous advocates dated February 11, 2022, his advocate deponed or the affidavit dated February 11, 2022 that the 2nd defendant was a director of the 1st defendant.
15. The respondent reiterated that the claim against the 2nd defendant is not as a director but as a guarantor. In the defendants joint statement of defence dated June 29, 2020, the defendants admitted that the 2nd defendant was a director of the 1st defendant and they also admitted that the 2nd defendant executed the Deed of Guarantee.
16. The 2nd defendant has not denied that he was served with the hearing notices or that he was unaware of the hearing date or the directions made by the court.
17. The fair thing to do would be to deliver the judgment then have the 2nd defendant file his application to set aside or appeal the judgment thereafter, if it will be against the Defendants.

Issues For Determination

18. Having considered the Application, the court frames only one issue for determination;
 - a. Whether the 2nd defendant should be struck out from being a party in this suit?
 - b. Whether in the alternative leave be granted to the 2nd defendant to recall and cross-examine the plaintiff's witnesses?
 - c. Whether leave be granted to the 2nd defendant to testify in his defence in this case?
 - d. Whether the Judgment date set for October 28, 2022 in relation to this matter be set aside?



ANALYSIS

Whether the 2nd Defendant should be struck out from being a party in this suit?

19. It was the applicant's contention that the 2nd defendant was wrongfully joined as a party in this suit, under the mistaken belief that he was/is a Director of the 1st defendant which is not the case. On the other hand, the Respondent stated that the 2nd defendant's has been sued as a guarantor to the 1st defendant and not as a director.
20. From the pleadings filed by the plaintiff it is evident that the 2nd defendant was sued in the capacity of a guarantor and not a director. The 2nd defendant approached the plaintiff for purposes of issuance of an advance payment Guarantee for the benefit of the 1st defendant pursuant to Clause 5.9 of the parties' contract for the construction of tower foundations.

Whether in the alternative, leave be granted to the 2nd Defendant to recall and cross-examine the Plaintiff's witness Qesses? Whether leave be granted to the 2nd Defendant to testify in his defence in this case?

21. Order 18 Rule 10 of the [Civil Procedure Rules](#) provides as follows: -

“The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”
22. Further, section 146(4) of the [Evidence Act](#) provides: -

“(4) The court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”
23. The court held in the case of [Odoyo Osodo v Rael Obara Ojuok & 4 others](#) [2017] eKLR

“the court's discretion in deciding whether or not to re-open a case which the applicant had previously closed cannot be exercised arbitrarily or whimsically but should be exercised judiciously and in favour of an applicant who had established sufficient cause to warrant the orders sought.”
24. It is common ground that hearing of the plaintiff's case closed and that what is pending is judgment. The applicant herein seeks to testify on his defence as well as for leave to recall and to cross examine the plaintiff's witness. It was the applicant's case that he only recently came to the knowledge that his former Advocates filed an application to cease from acting, which was allowed by the court. There has also been no inordinate delay by the applicant in filing the present Application.
25. The decision whether or not to re-open an on-going case is purely left to the realm of judicial discretion and ought to be exercised judiciously and in the interest of justice.
26. Taking into consideration the reasons advanced by the applicant for failing to participate in the hearing of the suit; it is the court's considered view that it is in the interest of justice that the defendant be allowed to testify and equally be given leave to cross- examine the plaintiff's witness. It is notable that



the applicant has not sought leave to introduce any new evidence and is thus expected to rely on the evidence already on the court record and within the respondent's knowledge.

27. Judgment is yet to be rendered in this suit and the respondents have also not demonstrated any prejudice that they are likely to suffer and that cannot be ameliorated by an award of costs if the application was allowed.
28. This court is satisfied that it is therefore in the interest of justice that the Application be allowed granting leave to the 2nd defendant to testify as well as recall and cross – examine the plaintiff's witnesses.

Findings And Determination

29. In the light of the forgoing this court makes the following findings and determinations;
 - i. The application is found to have merit and it is hereby allowed as follows;
 - ii. The Judgment date set for 28th of October 2022 in relation to this matter has been overtaken by events but nevertheless it is hereby set aside pending the hearing and determination of this suit.
 - iii. The 2nd defendant shall remain as a party to the suit and is hereby granted leave to recall and cross-examine the plaintiff's witnesses and;
 - iv. The 2nd defendant is hereby granted leave to testify in his defence in this case.
 - v. The applicant shall bear the costs of this application.
 - vi. Mention on 9/05/2023 before the Deputy Registrar for fixing further hearing date
- 30 Orders Accordingly.

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 28TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE

In the presence of;

Munayi for the Plaintiff

No appearance by the Defendant

Sarah.....court Assistant

