



REPUBLIC OF KENYA



**Bai v Xplico Insurance Co. Limited; Kihang'a & Company Advocates (Judgment
Creditor); Njagi & 55 others (Interested Parties) (Civil Suit E901 of 2021)
[2023] KEHC 24614 (KLR) (Commercial and Tax) (31 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 24614 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E901 OF 2021
MN MWANGI, J
JULY 31, 2023**

BETWEEN

SAHI RAJESHWAR HARBANS BAI PLAINTIFF

AND

XPLICCO INSURANCE CO. LIMITED DEFENDANT

AND

KIHANG'A & COMPANY ADVOCATES JUDGMENT CREDITOR

AND

JAMES KIMANTHI NJAGI INTERESTED PARTY

MICHAEL NDUNGU MURIGI INTERESTED PARTY

CATHERINE WANZA MUTUKU INTERESTED PARTY

TITUS KAMAU GACHANGA INTERESTED PARTY

JACOB OTIENO GENGA INTERESTED PARTY

LYDIA MWIKALI & 50 OTHERS INTERESTED PARTY

RULING

1. The application before this Court is a Notice of Motion dated 13th June, 2022 brought under the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 2 Rules 15(1)(a), (b), (c) & (d)



and Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provisions of the law. The 1st – 5th interested parties/applicants seek the following orders -

- i. That the Court be pleased to strike out the plaintiff's pleadings along with application dated 4th November, 2021 and/or in the alternative;
 - ii. The Honourable Court be pleased to dismiss the suit and the interlocutory application dated 4th November, 2021; and
 - iii. That the costs of the suit be borne by the plaintiff.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 13th June, 2022, by Jacob Otieno Genga, the 5th interested party herein, on his own behalf and on behalf of the 1st to 4th interested parties. In support thereto, the judgment creditor filed a replying affidavit sworn on 24th October, 2022, by Kihang'a Mwangi, an Advocate of the High Court of Kenya practicing in the name and style of Kihang'a & Co Advocates, the judgment creditor herein.
3. In opposition to the instant application, the defendant filed a replying affidavit sworn on 9th November, 2022, by Viola Odipo, the Legal Manager of the defendant herein, whereas the plaintiff filed a replying affidavit sworn on 10th November, 2022, by Sahi Rajeshwar Harbans Bai, the plaintiff herein.
4. The application was canvassed by way of written submissions. The judgment creditor's submissions were filed by the law firm of Mwangi & Kihang'a Advocates on 24th October, 2022. The defendant's submissions were filed on 11th November, 2022 by the law firm of SOW Advocates LLP, and the plaintiff's submissions were filed on 8th December, 2022 by the law firm of Omingo & Associates Advocates. On 12th April, 2023, learned Counsel for the interested parties indicated that they would rely on the judgment creditor's submissions.
5. Mr. Kihang'a, learned Counsel for the judgment creditor submitted that the plaintiff does not have locus standi to institute the instant suit as against the defendant for he has not adduced any evidence to prove that he is either a director and/or shareholder in the defendant company. He cited the provisions of Sections 109 and 112 of the *Evidence Act* and submitted that the evidentiary burden of proving the existence of a fact lies with the person who wishes the Court to believe in its existence, therefore the plaintiff bears the burden of proving that he is indeed a director and/or shareholder of the defendant company, which burden he has not discharged.
6. Counsel further submitted that the judgment creditor has demonstrated that the plaintiff is neither a director nor a shareholder in the defendant company, as can be seen clearly from the defendant's CR-12 annexed to the judgment creditor's replying affidavit. He relied on the case of *Melickzedek Shem Kamau v Beatrice Waithera Maina & 2 others* [2020] eKLR and stated that the question of locus standi of a party in bringing a suit runs to the heart of the case and constitutes a preliminary issue similar to the question of the jurisdiction of a Court to determine a suit.
7. In submitting that derivative suits are not available to non-shareholders, Mr. Kihang'a cited the case of *Tatu City Limited & 3 Others v Stephen Jennings & 6 others* [2015] eKLR. He also cited the case of *Ghelani Metals Limited & 3 others v Elesh Ghelani Natwarlal & another* [2017] eKLR and contended that the nature of the claim herein takes the form of an alleged shareholder bringing an action against the company and/or officials of the company for alleged breach of fiduciary duties by directors against shareholders of the company and as such, the suit herein is derivative in nature.
8. Mr. Kihang'a referred to the case of *Mohamedin Mohamed & another v Ibrahim Ismail Isaak & another* [2021] eKLR and stated that seeking leave of the Court before filing a derivative suit is meant to act



as a shield against institution of frivolous suits by shareholders. He contended that the suit herein is fatally defective for want of leave to institute a derivative claim as provided for under Section 239 of the *Companies Act*, No. 17 of 2015.

9. Mr. Kihang'a stated that the plaintiff failed to plead his claim with such particularity as to disclose a cause of action against the defendant and/or its directors. He submitted that the plaintiff failed to specify particulars of collusion, and/or improper conduct against the co-directors, and also failed to lay out particulars of fraud in his pleadings. He relied on the case of *Said Hemed Shamsi v Mustafa Mohamed Athumani Mjahi & 2 others* [2014] eKLR and submitted that parties are bound by their pleadings and it is not the duty of the Court to entertain a fishing expedition where a party fails to establish a cause of action from its own pleading.
10. He contended that that the plaintiff has only filed the suit herein to delay the attachment of funds in the impugned accounts pending resolution of internal quibbles (if any), thus delaying the interested parties and judgment creditor herein from enjoying the fruits of their judgment. He relied on the case of *Salomon v Salomon* [1897] AC 78 and stated that any funds held by the defendant belong to the defendant as a separate legal entity.
11. It was stated by Mr. Kihang'a that the suit herein is frivolous and an abuse of the Court process for reasons that it was filed barely a week after issuance of various Garnishee Orders Nisi in favour of various interested parties in this suit. He indicated that despite having knowledge of the existence of various outstanding decrees and/or Garnishee Orders against the impugned accounts, the plaintiff and/or the defendant failed to disclose this information at the point of filing the application and suit herein.
12. Mr. Wafula, learned Counsel for the defendant cited the case of *SOCAF & Company Limited v John Maina Njoroge & 5 Others; Francis Ngau Musyoki (Interested Party)* [2022] eKLR and submitted that the role of the interested parties herein is to ensure that their stake is protected but they cannot be directly involved in prosecuting the matter by framing new issues or seeking to end the suit thereby denying the plaintiff and the defendant the chance to ventilate their case at a full hearing.
13. In submitting that the interested parties herein cannot dictate at what point the suit should come to an end, Counsel relied on the Supreme Court decision in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, cited with authority in the case of *Communications Commission of Kenya & 3 others v Royal Media Services Limited & 7 others* [2014] eKLR, where the Supreme Court held that where a person not initially a party to a suit is joined as an interested party, the new party cannot be heard to seek to strike out the suit on the grounds of defective pleadings.
14. Mr. Wafula contended that the defendant has been sued in its capacity as a company because of the alleged erroneous allocation of shares and withdrawing of monies from various accounts held by it, thus risking it to be depleted of monies and exposed to losing its insurance license. He stated that since the plaintiff is the one who filed the instant case, he is the one to determine under which regime of the law to bring the case but the interested parties cannot purport to decide whether the plaintiff should have filed a derivative suit or not. He added that derivative actions are filed by minority shareholders against majority shareholders for failure to undertake a particular duty or for committing wrongs against a company, as the company is not in a position to sue on its behalf. He indicated that in this case, the plaintiff is not a minority shareholder and no case has been laid against majority shareholders or directors, therefore the suit herein does not amount to a derivative suit. He submitted that the defendant denies that the plaintiff is a shareholder in the company hence the plaintiff has to adduce evidence at the hearing of the main suit to prove that he is one.



15. He stated that there is no form of collusion between the plaintiff and the defendant to defeat the ends of justice, and for the said reason, the instant application ought to be dismissed for being speculative and scandalous against the defendant since no evidence has been tendered by the interested parties to show that the defendant is colluding with the plaintiff.
16. Mr. Wafula relied on the holding in the case of Gladys Jepkosgei Boss v Star Publication Limited [2021] eKLR, where it was held that striking out a pleading is a drastic remedy that should only be resorted to where a pleading is a complete sham. He stated that in instances where the plaintiff or defence raises a single issue, the same ought to be allowed to proceed to its logical conclusion. He stated that in this case, the plaintiff has alleged that due to withdrawals of monies from the defendant's various accounts, it may make it impossible for the defendant to continue operation as its insurance license may be revoked. He expressed the view that the said allegation amounts to a triable issue to be determined by the Court since it has been denied by the defendant.
17. Mr. Omingo, learned Counsel for the plaintiff cited *the Constitution* of Kenya (Protection of Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, which define an interested party and contended that the interested parties herein lack the locus standi to bring the instant application as they were only admitted to the suit herein as interested parties to protect their stake in the matter, thus they cannot be directly involved in the proceedings as parties to the suit. He relied on the case of Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others (supra) and submitted that the instant application is bad in law as it falls outside the parameters of the definition of an interested party, who is not a primary party to the suit, as the instant application seeks to alter the course of the main suit. In submitting that it is only the primary parties to a suit who can control the course and issues for determination in a suit, Counsel referred to the decision of the Supreme Court in the case of Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR.
18. Mr. Omingo, learned Counsel for the plaintiff contended that the instant application does not meet the threshold for striking out pleadings as provided for in law, since it is based on wild allegations which have not been demonstrated by way of evidence. He cited the case of Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR and stated that a suit cannot be struck out on speculative and unsubstantiated allegations, as there is need for clear, indubitable and cogent reasons in order for such prayers to be granted. He also stated that on perusal of the plaintiff's pleadings, it is clear that the suit herein is based on a substantial cause of action with a strong factual basis that raises triable issues, hence it ought to be allowed to proceed for hearing and determination.
19. In submitting that the suit herein is not scandalous, frivolous and vexatious, Mr. Omingo cited the case of Madison Insurance Company Limited v Augustine Kamanda Gitau (supra). He stated that the plaintiff's pleadings do not show any malice or materials which seek to injure or scandalize another party, including the interested parties herein. He opined that to the contrary, it is the interested parties who have made scandalous remarks against the primary parties herein by alleging that they have colluded to defeat the course of justice. He contended that it can be concluded that the application herein has been made in bad faith and is meant to scandalize the plaintiff and the defendant.
20. Counsel for the plaintiff stated that the suit between the primary parties is not a derivative action, but it is a normal civil suit between parties who seek to enforce their rights against each other, and in any event, the interested parties only claim that the suit herein is in the nature of a derivative action but they have not demonstrated why they state so. He referred to the case of Ghelani Metals Ltd & 3 Others v Elesh Ghelani Natwarlal [2017] eKLR and stated that a derivative action is a remedy provided for minority shareholders and/or directors of a company to bring an action on behalf of the



company against its majority shareholders/directors and/or third parties, whose actions have injured the company, since the company is not capable of bringing an action against itself through its directors.

21. He cited the case of *Samson Mukeku Mutuku v David Kioko Musau* [2020] eKLR and asserted that a derivative action is to be exercised by minority shareholders/directors who have limited powers over the daily affairs of the company, when the majority shareholders/directors who possess major powers have wronged the company and have refused or neglected to act on behalf of the company. He explained that in this case, the suit has not been brought by a minority shareholder to protect the defendant company but rather, it has been brought against the company as an entity. Further, that the plaintiff is not a minority shareholder in the defendant company and as such, the instant suit is not a derivative action.
22. It was submitted by Mr. Omingo that where it is clear that there is a wrong being committed against a company and it is not yet clear who is committing the wrong, the right party to join the suit will be the company itself. He stated that the plaintiff has pleaded that there is a dispute in the company regarding shares which were issued/allocated erroneously to some shareholders, and stated that allocation of shares in a company is done by the company itself, because it is a separate legal entity from its shareholders and directors. He contended that when an issue on allocation of shares arises, the party to join to a suit as a defendant is the company itself.

Analysis And Determination.

23. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavits filed, as well as the written submissions filed by Counsel for the parties. The issue that arises for determination is-
 - i. Whether the interested parties have the requisite locus standi to file the instant application;
24. The interested parties in their supporting affidavit deposed that they obtained decrees against the defendant from the Milimani Magistrate's Court following a suit in respect to a road traffic accident, pursuant to the reliefs contemplated under the Insurance (Motor Vehicle Third Party Risks) Act, Cap. 405 Laws of Kenya, but to date, they have never been compensated by the defendant. They averred that they filed garnishee proceedings in execution of the said decrees and they were issued with Garnishee Orders Nisi against M Oriental Bank Limited.
25. It was stated by the interested parties that the suit herein is untenable as it is aimed at circumventing the orders given by the Magistrate's Court. They further stated that justice imposes a duty on Courts to jealously safeguard the rule of law.
26. The judgment creditor in its replying affidavit deposed that pursuant to the orders issued by Justice Chacha Mwita on 6th June, 2022 and 11th October, 2022, the learned Judge called for the consolidation of HCCC E091 of 2021 with Insolvency Cause No. E030 of 2020 - Kihang'a & Company Advocates v Xplico Insurance Co. Ltd & another, on account of similar garnishee applications against the defendant, to which the Court directed that the same be heard together. The judgment creditor stated that it participates in these proceedings in the said capacity, by virtue of the said consolidation. It further averred that it enjoys Garnishee Orders Nisi against the accounts forming the subject matter of this suit.
27. It was stated by the judgment creditor that vide a ruling dated 28th April, 2020, the interested parties herein were joined as parties to the instant suit by virtue of them being judgment creditors with Garnishee Orders against the defendant in the impugned accounts forming the subject matter of this suit.



28. The judgment creditor contended that the plaintiff has no locus standi to institute the suit herein being a non-shareholder and/or non-director of the defendant company, and the suit herein is fatally defective for failing to adhere to the mandatory statutory procedure for derivative suits, as set out under Section 238 of the *Companies Act*, 2015. The judgment creditor stated that the plaintiff's suit does not disclose any cause of action for failure to specify particulars of collusion and/or improper conduct against co-directors.
29. The defendant in its replying affidavit deposed that the application and suit herein are well grounded in law, they are based on a substantial cause of action with a solid factual basis raising triable issues hence it ought to be heard and determined on its merits. It averred that the suit herein is a normal commercial suit between two parties seeking to ventilate their issues before a Court of law. It disputed that the suit between the primary parties is a derivative action as alleged by the interested parties. The defendant further averred that striking out of suits is a draconian measure, which ought to be exercised sparingly where there are clear and obvious reasons.
30. It was stated by the defendant that the interested parties' participation in the suit is limited to protecting their interests and/or stake and not to seek to exterminate the suit as sought in the instant application. It averred that it is in the interest of justice that the application herein be dismissed and the plaintiff and defendant be allowed to ventilate their case at a full trial.
31. In his replying affidavit, the plaintiff deposed that the application herein offends the principles under which the interested parties were joined to the suit since it introduces a whole new trajectory and new issues to be determined by the Court, other than those to be framed by the primary parties herein. It averred that the instant application is bad in law for reasons that it is scandalous, vexatious, devoid of any merit, and it is only meant to delay the plaintiff's case and in the process, waste the Court's precious time.
32. It was stated by the plaintiff that the suit herein was filed in good faith and is founded on a strong, legal and factual basis with a good cause of action that raises triable issues, thus it is properly before the Court for determination. He further stated that the suit herein does not fall within class suits, such as a derivative action brought about to protect an individual person (company), as it is a normal civil and/or commercial suit as provided for, under the *Civil Procedure Act*, Cap 21 Laws of Kenya and the various rules of procedure. The plaintiff contended that he did not require leave of the Court so as to file the said suit.
33. The plaintiff deposed that in the event the instant application is allowed, he will be greatly prejudiced as his right of access to justice before this Court will be curtailed by the interested parties who are not primary parties to the suit. He also deposed that it is in the interest of the interested parties herein for the funds in the impugned accounts to be preserved so that they can be paid later. The plaintiff deposed that the interest of justice demands that once a party has filed his or her case which demonstrates a substantive cause of action with triable issues, he or she ought to be allowed to proceed to full hearing, for his case to be heard and determined on merit.

Whether the interested parties have the requisite locus standi to file the instant application;

34. The instant application has been brought under the provisions of Order 2 Rule 15(1) of Civil Procedure Rules, 2010. It seeks to have the application and suit herein struck out and/or dismissed with costs to be borne by the plaintiff. It is not disputed that the interested parties herein were joined to the instant suit vide a ruling dated 28th April, 2020. The plaintiff and the defendant contended that since the interested parties are not primary parties to the suit herein, their role in these proceedings is limited to ensuring that their stake is protected and they cannot be directly involved in prosecuting the



matter by framing new issues or seeking to end the suit thereby denying the plaintiff and the defendant the chance to ventilate their case at a full hearing.

35. An interested party is defined in the Mutunga Rules as hereunder-

“a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. (emphasis added).

36. Further, in *Judicial Service Commission v Speaker of the National Assembly and Attorney General* [2013] eKLR, Odunga J., (as he then was) held as follows-

“*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as ‘a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation’. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings.”

37. In view of the foregoing, it is evident that an interested party is not a primary party to a suit in the strict sense of the word, but is a person with an identifiable stake or legal interest in the proceedings before the Court although it/he/she may not be directly involved in the proceedings. In this case, it is not disputed that the judgment creditor and the interested parties all have Garnishee Orders Nisi against the accounts that form the subject matter of the suit between the primary parties herein, therefore, they have an identifiable stake and/or legal interest in the instant suit.

38. The Supreme Court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, when dismissing an application by the Law Society of Kenya to be joined as an interested party held the following-

“A suit in Court is a ‘solemn’ process, “owned” solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

39. Further, the role of an interested party was discussed by the Supreme Court in the case of *Francis Kariuki Muruatetu & another v. Republic & 5 others* [2016] eKLR as hereunder –

“...Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the



Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court”

40. Similarly, the Supreme Court in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 3 others* [2017] eKLR in considering an attempt to introduce new issues held that -

“The applicant, in essence is introducing new facts and issues that were not before Court. It follows that he is not in a position to advance any submission that will be helpful to the Court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application.”

41. In light of the facts advanced in this application, the applicable law and judicial precedents referred to in this decision, it is my finding that the 1st to 5th interested parties are attempting to frame their own issue and/or introduce a new issue for determination by this Court, which issue has not been presented by the principal parties or framed by the Court from the pleadings and submissions of the principal parties.

42. In the premise, this Court finds that the 1st to 5th interested parties do not have the requisite locus standi to file the instant application as it amounts to introducing a new issue for determination, which is outside the scope of their role as interested parties to the suit. For the said reason, the instant application cannot be sustained by this Court.

43. The upshot is that the application dated 13th June, 2022 is devoid of merit and the same is dismissed with costs to be borne by the 1st to 5th interested parties.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31ST DAY OF JULY, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

