



**Essoa v Four Sight Capital Limited & 6 others (Civil Appeal
E179 of 2022) [2023] KEHC 21702 (KLR) (Civ) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21702 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E179 OF 2022

AN ONGERI, J

AUGUST 4, 2023

BETWEEN

NKOY KELVIS ESSOA APPELLANT

AND

FOUR SIGHT CAPITAL LIMITED 1ST RESPONDENT

DANIEL SHAMOLA SHITAGWA 2ND RESPONDENT

DCIO CENTRAL POLICE STATION 3RD RESPONDENT

EVANS OMAI 4TH RESPONDENT

MWANANCHI CREDIT LIMITED 5TH RESPONDENT

DENNIS MWANGEKA MOMBO 6TH RESPONDENT

NANCY CHAO MOMBO 7TH RESPONDENT

RULING

1. The 5th, 6th and 7th respondents filed a preliminary objection to the application dated November 24, 2022 in the following terms;
 - a. That the Appellant has irregularly and unlawfully joined the 3rd to 7th Respondents to the instant appeal devoid of any valid court orders(s) to that effect;
 - b. That the 3rd to 7th Respondents were not parties at both the trial and the Appellate courts;
 - c. That the joinder and/or joinder to suits is not as of right, but it is at the discretion of the Court only exercised upon sufficient grounds being laid before the Courts.



- d. That the Application as framed, offends the Provisions of Order 42 of the *Civil Procedure Rules, 2010*.
 - e. That the 3rd to 7th Respondents can only be enjoined by Court order.
 - f. That the application dated November 24, 2022 is thus fatally defective and should be dismissed.
2. The parties filed written submissions in the preliminary objection as follows:
 3. The 5th, 6th and 7th Respondents submitted that since the 3rd to the 7th Respondents were not included in the Lower Court suit or when the Appellant filed this instant appeal, and that joinder of parties is a prerogative of the Court. They relied on Order 1 rule 10 (2) which 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 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.

4. The 1st and 2nd Respondent, in support of the Preliminary objection submitted that the Appellant had either to bring a proper application to enjoin the 3rd to 7th Respondents into this Appeal or have them struck out for improper procedure as contemplated by Order 1 Rule 10 (2) of the *Civil Procedure Rules*, noting that the Court has power to add parties to a suit at any stage of the proceedings.
5. The Appellant submitted that the Preliminary Objection does not raise pure points of law and the grounds raised by the Respondents would call upon the court to examine pleadings to ascertain whether the 3rd to 7th Respondents were party to the lower court suit and appeal which is inquiring and seeking further evidence to be able to come to a sound conclusion.
6. The Appellant also submitted that the additional Respondents are crucial to the final determination of the matter, as the suit Motor vehicle was confiscated by the 3rd to the 7th Respondents in contempt of Court orders and their enjoinder provides the court with an opportunity to adjudicate the matter to its finality. He relied on the decision in *King'ori v Chege & 3 others* where the court was guided by the Code of Civil Procedure page 1016 which states that:

“... parties cannot be added so as to introduce quite a new cause of action”... “parties cannot be added so as to alter the nature of the suit”... “necessary parties who ought to have been joined that is parties necessary to the *Constitution* of the suit without whom no decree at all can be passed”... in the case of a defendant two conditions must be met:

1. There must be a right to some relief against him respect of the matter involved in the suit.
2. That his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit ... was one without whom no decree can be made effectively. A proper party was one without whom no decree can be made effectively. A proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the questions involved in the proceedings. . . a proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation. An interest which will



be cognizable in the Court of law. That is an interest which the law recognizes and in which the Court will enforce. . . . a person may be added as a defendant to a suit though no relief may be claimed against him provided his presence for a complete and final decision of the question involved in the suit. Such a person is called or proper party as distinguished from a necessary party”.

7. The Appellant also submitted that the power of Court to strike out pleadings is discretionary which should be exercised with utmost care. Therefore, striking out the application because the Appellant did not seek leave to enjoin the 3rd to the 7th Respondents is draconian and shall amount to injustice to the Appellant. The application raises triable issues against all the Respondents and the Appellant should be allowed to adjudicate the matter to finality. He urged the Court to dismiss the Preliminary Objection with costs.
8. The issues for determination are as follows;
 - i. Whether the preliminary objection raised by the 5th, 6th and 7th respondents is competent.
 - ii. Whether there was a formal application to enjoin the 3rd and 7th respondents as parties to this appeal.
9. On the issue as to whether this preliminary objection is competent, the definition of a preliminary objection is as follows;

“A formal step by which a Respondent raises a question which it contends should be dealt with separately, before any other issue in the proceedings is examined.”
10. In the case of *Mukbisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd.* [1969] E.A. 696 – the Court of Appeal said:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirm the issues. This improper practice must stop.”
11. Upon perusing the preliminary objection filed by the 5th, 6th and 7th respondents, I find that the issues raised require to be canvassed by adducing evidence before the same can be determined.
12. The said issues cannot be dealt with conclusively at this stagesince there are facts to be ascertained and further, I find that the issue of joinder of parties requires the exercise of judicial discretion.
13. I find that in the circumstances, the notice of preliminary objection dated November 24, 2022 is not competent.
14. On the issue as to whether there was a formal application to enjoin the 3rd and 7th respondents as parties to this appeal, I find that the party that wishes to have them enjoined is at liberty to file an application for joinder.
15. The reason being 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 be justorder joinder of a party 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.

16. The preliminary objection lacks in merit and the same is dismissed.

17. The parties are directed to file written submission in the application dated November 24, 2022.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

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A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant

.....for the 1st & 2nd Respondents

.....for the 3rd Respondent

.....for the 4th Respondent

.....for the 5th, 6th & 7th Respondent

