



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

HIGH COURT CIVIL CASE NO. E007 OF 2021

GLADYS NDUKU NTHUKI.....APPLICANT

VERSUS

LETSHEGO KENYA LIMITED.....DEFENDANT

AND

MUENI CHARLES MAINGI.....INTENDED PLAINTIFF

RULING

1. On 16th day of August, 2021, I dismissed the Motion dated 26th July, 2021, by which the Applicant was seeking an order that he be joined to this suit either as the Plaintiff or an intended Interested Party. In dismissing the said application this Court expressed itself as hereunder:

“In this case the application has been made by an intending party as either Plaintiff or Interested Party. Whereas there is nothing inherently objectionable in a person applying to be joined as an interested party in a pending suit, it is doubtful whether such a person joined as an interested party can transform the suit into one in which he becomes the principal claimant and seek substantive reliefs in the suit. In this case, it is clear that the Applicant intends to protect his rights in the suit property by contending that he was not served with the statutory notice. That in my view is a substantive claim that cannot be determined by the Applicant being joined as an interested party. As regards his joinder as a Plaintiff, as indicated above he may only be so joined by the court on own motion or by an application by *either party*. Nambuye, J (as she then was) in Kingori vs. Chege & 3 Others [2002] 2 KLR 243 held that:

“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed. Therefore in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) 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 being one without whom no decree can be made effectively and one whose presence is necessary for 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 which interest will be recognisable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.” [Emphasis added].

Similarly, in this case none of the parties to the suit has sought to have the Applicant joined as a party to the suit. Accordingly, the Applicant cannot seek that he be joined as a Plaintiff to these proceedings.”

2. By an application dated 4th October, 2021, the Plaintiff herein seeks an order joining the Intendent Plaintiff/Respondent in this suit as a 2nd Plaintiff and the Plaintiff /Applicant do amend the Plaint appropriately.

3. According to the Plaintiff/Applicant, on or about 10th June 2019, he received an offer for an agricultural asset finance facility for Kenya Shillings Two Million. Subsequently, the same was approved but the Defendant disbursed Kenya Shillings One Million, Eight Hundred and thirty Four and six hundred Shillings only to the Plaintiff. After the disbursement of the funds, the Plaintiff/Applicant pumped the sums into farming and poultry farming due to the lockdown imposed by government owing to the covid-19 pandemic and other prevention protocols, the farming collapsed as he could not access markets to sell the produce.

4. It was averred that during the months of April to August, the Defendant, in conformity with mutual agreement with other bankers and financiers in Kenya through the request of the government suspended payments of loans due to the challenges posed by the protocols and dangers of Covid-19. However, due to the sustained covid-19 protocols and reduced income as a result of the said protocols, the Applicant was unable to continue paying the monthly instalments of Kshs 81,650/=. In the same vein, his guarantor, **Pastor Philip Nthuki Peter** also lost his source of income after churches were closed in the entire territory of Kenya as part of Covid-19 protocols.

5. The Applicant deposed that he approached the Defendant to restructure the loan repayment plan and monthly instalments but no response was forthcoming despite the fact that Central Bank of Kenya, which regulates the Defendant herein had directed all lending institutions to restructure loan payment plans to enable borrowers meet their financial obligations.

6. According to the Applicant, sometimes in February 2021, he received an alleged statutory notice which was hand delivered to his work place by an employee of the Defendant which was however, backdated to February 2020. When he informed the Intended Plaintiff / Respondent, the registered owner of the Parcel of Land No. **Muputi/Kiima-Kimwe/1285**, that the Defendant wanted to sell her property, she filed an application to be joined in these proceedings which was struck out.

7. Consequently, the Defendant intended to exercise its Statutory Power of Sale by selling the above stated parcel of land to recover the outstanding balance yet the Defendant did not serve the Plaintiff and the Intendent Plaintiff / Respondent with the Statutory Notices as required by Sections 90 and 96 of the **Land Act, 2012** before deciding to exercise their Statutory Power of the Parcel of Land No. **Muputi/Kiima-Kimwe/2685**.

8. It was averred that that any Judgments, Orders, directions given by the Court in this matter or any sale by the Defendant regarding the Suit property will affect Intendent Plaintiff / Respondent as the registered owner of the Parcel of Land No. Muputi/Kiima-Kimwe/2685 thus a necessary party in these proceedings to enable the Court determine the issues herein conclusively. The deponent averred that should the Intended Plaintiff / Respondent file a separate suit against the Defendant, the issues of law and facts for determination would be the same since the Cause of action is the intended Advertisement and Sale of the Parcel of Land No. Muputi/Kiima-Kimwe/2685 hence the necessity for Intended Plaintiff / Respondent to be joined in this suit so that any issues of law or fact may arise are properly determined by the court between the Plaintiff, Defendant, and the Intended Plaintiff / Respondent. In the Applicant's view, should the Intended Plaintiff / Respondent file another case, it will waste Court's time as the Court will have to hear 2 cases and also avoid the possibly of giving 2 conflicting decisions hence it is in the interest of justice that the Application be allowed

9. It was submitted on behalf of the Applicant that Your lordship, the Plaintiff/Applicant herein pleaded and acknowledged that indeed she had obtained a loan facility from the Defendant and offered the Title Deed of the Parcel of Land No. Muputi/Kiima Kimwe/2685 as security for the said loan which Title was registered in the names of the Intended Plaintiff/Respondent herein. She further pleaded that the Defendant now wants to exercise its statutory power of sale by selling the above stated parcel of land to recover the outstanding balance yet the Defendant did not serve the Intended Plaintiff/Respondent with the statutory notices as required by Sections 90 & 96 of the **Land Act, 2012** before deciding to exercise their Statutory Power of Sale of the parcel of land no. Muputi/Kiima Kimwe/2685.

10. It was submitted that this Court has inherent jurisdiction to grant equitable reliefs such as the solitary prayer being sought by the Plaintiff/Applicant herein and therefore, where a court of equity has all the parties before it, it should adjudicate upon all of the rights of the parties connected with the subject matter of the action, so as to avoid a multiplicity of suits.

11. It was submitted that the operative words in Order 1 rule 10(2) of the **Civil Procedure Rules** are "either upon or without the application of either party" and that the use of the word "either party" denotes that the formal move has to be made by a party already participating in the proceedings and the Plaintiff/Applicant herein is a party who has robustly participated in these proceedings from the initiation up to date. Therefore, he is endowed with the requisite *locus standi* to bring the instant application for joinder of party in order for the court to effectively and completely adjudicate upon and settle all questions involved in the suit and avoid multiplicity of suits. In this case it was submitted that the Intended Plaintiff/Respondent has a stake in the suit property by virtue of being the duly registered owner of the Parcel of Land No. Muputi/Kiima Kimwe/2685 which is a charged property in favour of the Plaintiff/Applicant hence the Intended Plaintiff/Respondent is a necessary party who ought to be enjoined in these suit. The Applicant also relied on **Pravin Bowry vs. John Ward and Another [2015] eKLR in which** the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit and referred to the Ugandan case of **Deported Asians Custodian Board vs. Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)** as well as **Civicon Limited vs. Kivuwatt Limited and 2 Others [2015] eKLR** in which the court observed as follows:

"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."

12. As regards the alleged delay, reference was made to the case of **Sammy Kanyi Kareithi v Barclays Bank of Kenya & 2 others; Ross**

Xavier Whitley (Applicant) [2021] eKLR and Tang Gas Distributors Ltd vs. Said & Others [2014] EA 448.

13. According to the Applicant, in the case of Martin Kirima Baithambu vs. Jeremiah Miriti [2017] eKLR, the court, opined that Guarantor and principal debtor could be in one suit.

14. Drawing from the above standpoint, the Court was urged the court to consider the above precedents and statutory provisions and grant the orders sought herein as the enjoiner of the Intended Plaintiff/Respondent in these proceedings is necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit. According to the Applicant, the joinder of the Intended Plaintiff/Respondent in these proceedings will save on court's esteemed time, as opposed to the Defendant/Respondent's idea of filing separate suits whereas the subject matter is the same. Filing of multiple suits touching on the same subject matter, it was submitted, amounts to wastage of judicial resources and offends the mandatory provisions of Section 1B of the **Civil Procedure Act** that obligates courts to ensure efficient use of the available judicial and administrative resources.

15. It was submitted that the Defendant/Respondent has not pleaded how they will suffer irreconcilable prejudice or any item that cannot be adequately compensated by award of costs.

16. As regards the prayer for amendment it was submitted that the object of the same is to ensure that litigation between parties is conducted not on a false hypothesis of facts but on the basis of the true state of things as anchored under Order 8, rule 5 of the **Civil Procedure Rules**.

17. It was further submitted that Order 1 Rule 9 provides that a suit may not be dismissed for misjoinder or non-joinder of parties hence the rule protects the Plaintiff herein against dismissal for her misjoinder or non-joinder of the parties and urges this Honourable court to exercise its discretion to deal with the dispute between the parties. Reference was made to the case of Zephir Holdings Ltd vs. Mimosa Plantations Ltd, Jeremiah Maztagaro and Ezekiel Misango Mutisya (2014) eKLR, where he held that:

“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. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

18. Reliance was also sought the decision of the Court of Appeal in the case of William Kiprono Towett & 1597 Others vs. Farmland Aviation Ltd & 2 Others (2016) eKLR and Local Building and Construction Limited v Institute of the Blessed Virgin Mary Loreto Msongari & 2 others [2019] eKLR as regards misjoinder or non-joinder of parties. The Applicant also cited Article 159(2)(d) of the Constitution and it was submitted that a defect that can be cured by amendment subsequently cannot form a basis for raising a preliminary objection.

19. The Applicant therefore urged the Court to dismiss the Preliminary objection and allow the Application as prayed.

20. In response to the Application, the Defendant relied on a replying affidavit sworn by **Winnierohi Wafula**, a Legal Officer at Letshego Kenya Limited, in which it was averred that this court is already seized of a Notice of Preliminary Objection dated 16th June 2021 by the Defendant challenging the Plaintiff's suit as being incompetent for want of *locus standi* on her part. According to the deponent, the present application is therefore aimed at further extending the interim orders and defeating the merits of the Preliminary Objection.

21. It was further contended that the issue of joinder is *res judicata* as it ought to have been raised before determination of the application dated 26th July 2021 hence the present application is an attempt at litigating in instalments to the grave detriment of the Defendant.

22. It was contended that no prejudice will be occasioned to the Intended Plaintiff since he is still at liberty to file a proper independent suit where all parties will have the opportunity to broach evidence on contested issues such as whether or not the Statutory Notices were served. Conversely, admitting the Intended Plaintiff in this case would not only render the Defendant's Preliminary Objection moot in an abrupt manner, it will also open the window for additional evidence and the need for corresponding responses thereby stretching the interim orders all while the Plaintiff is admittedly in default of her loan repayment obligations without any efforts at repayment.

23. It was further deposed that the Defendant has thus far incurred a lot of expenses in engaging auctioneers as well as its Legal Counsel in the present suit and the convolution of the matter by the present application only goes to further raise these expenses. The Court was urged to frown upon the Applicant for being indolent for failing to commence a suit in good time.

24. It was therefore the Respondent's case that the present application is wholly bereft of merit should be dismissed costs to the Defendant.

25. In support of its case, the Respondent submitted that whereas joinder and amendment are generally uncontested issues where the aim is to enable the court determine the real dispute between the parties, the present application is made on an entirely different context which makes the application *mala fides* and of grave detriment to the Defendant hence the strenuous opposition to the application.

26. According to the Respondent, the present application appears to be an admission by the Plaintiff that she lacks *locus standi* to bring the present suit. It was submitted that if the Plaintiff lacks *locus standi* to commence the suit, she cannot have *locus* to file any application or take any action including filing this application. Put otherwise, the Plaintiff lacks *locus standi* to join any party to the suit without having first established his competence to file the suit in the first place. The Respondent relied on Julian Adoyo Ongunga & another -v- Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR, Daykio Plantations Limited vs National Bank of Kenya Limited & 2 others [2019] eKLR and Alice Nyakinyua Gathambo -v- Elizabeth

Muthoni Gacheche Jeane Wanjiku Gacheche Andrew Gathambo Gacheche (Sued as Administrators of the Estate of Gacheche Hosea (Deceased) & 2 others [2021] eKLR

27. It was clarified that the Defendant is not asking the court to strike out the suit for misjoinder of the Intended Plaintiff, rather that the suit was filed by a party without *locus standi* and is nullity ab initio.

28. As regards res judicata, it was submitted that the present application is *res judicata* as it ought to have been raised before determination of the application dated 26th July 2021 in which this court delivered its ruling on 16th August 2021 declining the prayer for joinder of the Intended Plaintiff herein hence the present application is an attempt at litigating in instalments to the grave detriment of the Defendant. According to the Respondent, litigants cannot evade the doctrine of *res judicata* by merely substituting or adding parties and reliance was placed on **Africa Oil Turkana Limited (previously known as Turkana Drilling Consortium Ltd) & 3 others -vs- Permanent Secretary, Ministry of Energy & 17 others [2016] eKLR.**

29. It was contended that instead of filing an independent suit, the Plaintiff and the Intended Plaintiff have resorted to crowding the present suit with multiple applications knowing fully well that the suit was incompetent *ab initio*. According to the Respondent, the Plaintiff would suffer no prejudice if the property is sold. Similarly, both the Plaintiff and the Intended Plaintiff will suffer no prejudice if the current application is dismissed because the Intended Plaintiff can still file an independent suit to assert his rights. On the other hand, admitting the Intended Plaintiff to this case would not only render the Defendant's Preliminary Objection moot in an abrupt manner, it will also open the window for additional evidence and the need for corresponding responses thereby stretching the interim orders all while the Plaintiff is admittedly in default of her loan repayment obligations without any efforts at repayment.

30. Additionally, the Defendant has thus far incurred a lot of expenses in engaging auctioneers as well as its Legal Counsel in the present suit and the convoluted nature of the matter by the present application only goes to further raise these expenses. The upshot of our submission is that the Plaintiff's application is wholly bereft of merit and should be dismissed with costs to the Defendant.

31. The Court was therefore urged to dismiss the application with costs.

Determination

32. I have considered this application.

33. It is urged on behalf of the Respondent that this matter is res judicata as the issues raised herein ought to have been raised in the application dated 26th July 2021 in which this court delivered its ruling on 16th August 2021 declining the prayer for joinder of the Intended Plaintiff herein hence the present application is an attempt at litigating in instalments to the grave detriment of the Defendant.

34. This brings us to what the doctrine of *res judicata* is all about.

35. Section 7 of the *Civil Procedure Act, 2010* provides as hereunder:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

36. It is now old hat that the said doctrine applies to both suits and applications as was held in **Abok James Odera vs. John Patrick Machira Civil Application No. Nai. 49 of 2001.** However, as was held in the said suit, to rely on the defence of res judicata there must be:

- (i). a previous suit in which the matter was in issue;
- (ii). the parties were the same or litigating under the same title;
- (iii). a competent court heard the matter in issue;
- (iv). the issue had been raised once again in a fresh suit.

37. As regards the rationale of the doctrine of *res judicata*, reliance was placed on the decision of the Court of Appeal in **Independent Electoral & Boundaries Commission -vs- Maina Kiai & 5 Others (2017) eKLR.**

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

38. In the **Maina Kiai** case (supra), the Court quoted with approval the Indian Supreme Court in the case of **Lal Chand vs. Radha Kishan**, AIR 1977 SC 789 where it was stated;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

39. In **Lotta vs. Tanaki** [2003] 2 EA 556 it was held as follows:

“The doctrine of *res judicata* is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”

40. In **Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958** the former East African Court of Appeal stated as follows:

“Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

41. In **Apondi vs. Canuald Metal Packaging** [2005] 1 EA 12 Waki, JA stated as follows:

“A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments.”

42. However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of *res judicata* inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit, the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the **Civil Procedure Act**, where persons litigate *bona fide* in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.

43. In the cases of **Mburu Kinyua vs. Gachini Tuti** [1978] KLR 69; [1976-80] 1 KLR 790 and **Churanji Lal & Co vs. Bhajjee** (1932) 14 KLR 28 it was held that:

“

However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of **Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960** [1961] EA 462 the then East African Court of Appeal stated as follows:

“The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show you that this is a fact which entirely

changes the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have been ascertained by me before...The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.”

44. In Nancy Mwangi T/A Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR the Court quoted the case of E.T vs. Attorney General & Another (2012) eKLR wherein the court noted thus:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

45. It is therefore clear that parties are not to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given to the former suit.

46. In this case, the application that was dismissed was made by the intended party and it was precisely because of that that the application was dismissed as the intended party could not make such an application. Accordingly, the Applicant in the earlier application was not the Plaintiff and the said application was not made at the behest of the Plaintiff. In other words, it cannot be said that both applications were made by the same parties, or between parties under whom they or any of them claim, litigating under the same title since the Plaintiff herein is the principal borrower which the intended party was the guarantor.

47. Accordingly, the plea of *res judicata* fails and is disallowed.

48. As regards the issue of locus, it was contended that since the Plaintiff has no *locus standi* to bring this suit, she cannot seek to have the intended party joined to this suit. It is contended that to allow this application would have the effect of denying the Respondent the opportunity to argue its preliminary objection. In my view, I am not certain whether the preliminary objection, were it to be successful would dispose of the main suit. While it may well amount to the Plaintiff’s claim for an injunction be disallowed, that is not the same thing as disallowing the whole suit, yet a preliminary objection strictly speaking ought to have the effect of determining the whose cause. In Garden Square Limited vs. Sammy Boit Kogo & Another Nairobi (Milimani) HCCC No. 1266 of 2003 [2003] KLR 20, the Court held a preliminary point of law is a pure point of law which if successfully taken, would have the effect of disposing the suit or application entirely.

49. In my view, the mere fact that the Plaintiff intends to amend his pleadings which amendment would have the effect of rendering a preliminary objection intended to be raised moot does not entitle the Court to decline to grant leave to amend the pleadings. As was held by the Court of Appeal in The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999:

“A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

50. That was the position adopted in Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 where the same court expressed itself thus:

“No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

51. Accordingly, where the Court is faced with two applications, one seeking amendment of the pleadings and one seeking to strike out the action, the Court ought to first dispose of the former before deciding whether or not to deal with the latter since the Court’s primary duty is to sustain suits and as much as possible determine them on merits rather than to prematurely bring them to an end. I am not alone in this opinion. In the case of Salesio M’aribu vs. Meru County Council Civil Appeal No. 183 of 2002 the Court of Appeal opined that:

“There was an application before the superior court seeking leave to amend the plaint which application was filed before the preliminary objection was filed. That application was seeking to inject some life into the suit. The learned Judge should have first heard and should have first determined that application before hearing the preliminary objection against the entire suit. That application was trying to bring on board matters that could have been relevant to the claim and was thus seeking to breathe life into the claim. The court in hearing the preliminary objection shut out the amended plaint which could have possibly revealed a different aspect of the case and in doing so, the court threw out the entire case without knowing what it was all about as it left the application seeking to amend the plaint unheard. Had that application been heard and determined before the objection was heard, the objection might have not been entertained in case that application was determined in favour of the appellant. In short, what might have appeared a weak pleading might have had some life injected into it through amendment. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it...The procedure where a court is faced with an application for summary dismissal or striking out a pleading or faced with a preliminary

objection to a pleading which seeks to dispose of that pleading, which the other party seeking to amend, is to have the application seeking leave to amend heard first and determined before hearing the application for summary dismissal or for striking out or an objection seeking disposal of the pleading. In that way, the court will ensure that all aspects of the matter are before it before the application for summary dismissal or striking out or the objection seeking to dispose of the pleading is heard and determined”.

52. A similar holding was made in the case of Nova Industries Limited & 2 Others vs. Fidelity Commercial Bank Limited Civil Application No. Nai. 315 of 1998 where the same court held that where, at the time of hearing an application for summary judgement, there is on record an application seeking to amend the defence and counterclaim the application for amendment ought to be heard before the application for summary judgement so that the triable issues raised in the amended defence can be heard. In my view, the same principles apply to applications for striking out.

53. Order 1 rule 1 of the **Civil Procedure Rules** under which the application is brought provides as hereunder:

All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.

54. Order 1 rule 10(2) of the said Rules 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.”

55. Although the parties herein could not resist the temptation to wade into the merits of the main application, the matter before me is simply whether to allow the application for the joinder of the interested party to these proceedings and whether the consequential order of amendment of the pleadings ought to be granted. The relevant tests for determination whether or not 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 the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

56. In Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55 it was held 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.”

57. In Civicon Limited vs. Kivuwatt Limited and 2 Others [2015] eKLR the court observed as follows:

“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.”

58. In this case, the intended party was the person whose property was used to guarantee the facility that was advanced to the Plaintiff by the Defendant. That property is at the risk of being sold in order to recover the amount owed by the Plaintiff to the Defendant. It is however alleged that the intended sale is premature as the statutory notice was not given. The only person who can clarify the issue whether or not the said notice was given would be the intended party since the notice ought to have been served on him. It is therefore clear that the intended party's presence in these proceedings is not only necessary in order to enable this court effectually and completely adjudicate upon and settle all the questions involve in this cause, but the orders that this Court may issue in this Cause are likely to affect the interest of the said intended party. Further, taking into account the relationship between the parties herein as well as the intended party to the transaction, the subject of this suit, I find that it is desirable, for avoidance of multiplicity of suits, to have the said person joined so that he can be bound by the decision of this Court. I rely on the case of **Martin Kirima Baithambu vs. Jeremiah Miriti [2017] eKLR**, where the court pronounced itself as hereunder:

“The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invoke the procedure provided under Order 1 Rule 15 of the Civil Procedure Rules. I say these things for the sake of jurisprudence.”

59. Regarding the alleged delay, I agree with view expressed in **Sammy Kanyi Kareithi vs. Barclays Bank of Kenya & 2 others; Ross Xavier Whitney (Applicant) [2021] eKLR** that:

“Firstly, the court is empowered to join a party to a suit at any stage of the proceedings with or without an application by any party. Secondly, the mere delay in filing an application for joinder is not fatal. The pending suit is yet to be heard and the Plaintiff has not demonstrated what prejudice it has suffered by the late filing of the application. In the case of Central Kenya Limited v Trust Bank Limited and 5 Others [2000] eKLR, the High Court had declined to grant leave to the Appellant to amend its plaint and to join additional Defendants to the suit. In allowing the appeal, the Court of Appeal held that mere delay was not sufficient ground for declining leave unless such delay was the kind which could prejudice the adverse party beyond compensation in costs.”

60. I also associate myself with the decision of the Court of Appeal in Tanzania in **Tang Gas Distributors Ltd vs. Said & Others [2014] EA 448** to the effect that:

“the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

61. Accordingly, I find merit in the application for joinder.

62. As regards the limb seeking amendment, Order 8, rule 5 of the ***Civil Procedure Rules*** stipulates as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

63. The principles guiding the grant of application to amend pleadings are now trite and the same can be summarized as follows:

1. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See **Tidelsay vs. Harpic [1878] 10 CH.D. 393 at 396**.

2. The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle. See **Eastern Bakery vs. Castellino [1958] EA 461**.

4. The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See **British India General Insurance Co. Ltd vs. G.M. Parmar [1966] EA 172**

4. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice caused if the other side can be compensated by costs. See **British India General Insurance Case** (Supra).

64. Having considered the issues raised by the parties herein, I find the application dated 4th October, 2021 merited and leave is hereby granted to the Plaintiff to join the Intended Plaintiff herein, **Muani Charles Maingi**, as the 2nd Plaintiff in this suit. Consequently, the

Plaintiffs shall amend their plaint within 7days from the date of this ruling with liberty to the Defendant to amend their defence within 7 days from the date of service of the amended plaint.

65. The Costs of this application are awarded to the Defendant.

66. It is so ordered.

READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 21ST DAY OF FEBRUARY, 2022

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Watta for MrNthiwa for the Plaintiff

CA Susan