



Prudential Capital Partners Limited v Text Book Center Limited & 2 others (Civil Case 243 of 2019) [2022] KEHC 222 (KLR) (Commercial and Tax) (24 March 2022) (Ruling)

Neutral citation: [2022] KEHC 222 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 243 OF 2019
WA OKWANY, J
MARCH 24, 2022**

BETWEEN

PRUDENTIAL CAPITAL PARTNERS LIMITED PLAINTIFF

AND

TEXT BOOK CENTER LIMITED 1ST DEFENDANT

COOPERATIVE BANK OF KENYA LIMITED 2ND DEFENDANT

SIDIAN BANK LTD 3RD DEFENDANT

RULING

1. The 3rd defendant filed the application dated 10th June 2021 seeking the following orders: -
 1. THAT the Plaintiffs suit against the 3rd defendant be struck out.
 2. THAT the costs of the application and the suit be borne by the plaintiff.
2. The application is supported by the affidavit of 3rd defendants Legal Officer Ms Jackline Ndung'u and is based on the following grounds;
 1. THAT the 3rd defendant has been improperly joined as a party to this suit and is an unnecessary party to the same.
 2. THAT the dispute in the suit herein is purely between the plaintiff and the 1st defendant and emanates from the franchise Agreement dated 8th February 2019 which the 1st defendant had purported to terminate.
 3. THAT the 3rd defendant was not privy to the Franchise Agreement between the plaintiff and the 1st defendant. The 3rd defendant was merely a guarantor to the plaintiff having advanced a



guarantee Facility in the sum of Kshs 70,000,000 and their relationship is that of a guarantor and the Principal Debtor.

4. THAT pursuant to the conditions of the Franchise Agreement between the plaintiff and the 1st defendant, the 1st defendant insisted on the guarantee being issued by its own bankers the 2nd defendant herein and the 3rd defendant subsequently instructed the 2nd defendant to issue a guarantee in favour of the 1st defendant for a sum of Kshs 70,000,000 on its behalf and issued a counter guarantee to 2nd defendant.
 5. THAT on 27th December 2019, the plaintiff instituted the instant suit simultaneously with an injunction application dated 27th December 2019 seeking interlocutory injunctive orders restraining the 1st defendant from terminating the Franchise agreement and the 2nd and 3rd defendants from paying out any sums due under the guarantee. Further, on 27th December 2019 the 1st defendant wrote a demand to the 2nd defendant making a partial claim on the payment guarantee in the sum of Kshs 21,487,520 and the same was received by the 3rd defendant on 30th December 2019.
 6. THAT on 25th February 2020 the court delivered a ruling granting an interim injunction restraining the 1st defendant from terminating the Franchise Agreement and for the sum of Kshs 21,487,520 being the sum due under the Guarantee, to be deposited in court within 3 days.
 7. THAT thereafter on 27th February 2020 the court order of 25th February 2020 was varied pursuant to a consent entered into by the plaintiff and the 1st defendant pursuant to which the 2nd and 3rd defendants deposited the demanded sum of Kshs 21,487,520 in a joint interest Earning Account in the name of the plaintiff and the 1st defendant's advocate.
 8. THAT accordingly upon the deposit of the aforesaid sum, the 3rd defendant Bank role as the Guarantor to the plaintiff was discharged and dispensed with in both the plaintiff's interlocutory application dated 27th December 2019 and the entire suit herein.
 9. THAT consequently, the plaintiff's suit discloses no cause of action against the 3rd defendant.
 10. THAT the plaintiff despite being advised of the foregoing has declined to accede to the withdrawal of the suit against the 3rd defendant hence necessitating the filing of the application.
 11. THAT no prejudice will be occasioned to the parties herein if the orders sought are granted.
 12. THAT the interests of justice dictate the orders sought be granted.
3. The plaintiff opposed the application through grounds of objection filed on 20th September 2021 wherein it states: -
 1. The application is frivolous, misconceived, vexatious an abuse of the court process.
 2. There is a valid and reasonable cause of action against the 3rd defendant as borne out in the amended plaint.
 4. The application was canvassed by way of written submissions. I find that the main issue for determination is whether the applicant is entitled to the orders sought.
 5. The applicant's case is that the plaintiff's suit against it should be struck out since the dispute is purely between the plaintiff and the 1st defendant over an alleged breach of the franchise agreement.



The applicant argued that it was not privy to the Franchise agreement between the plaintiff and the 3rd defendant.

6. On its part, the plaintiff maintained that it will be greatly prejudiced if the 3rd defendant is removed from the case as the bank guarantee will be at risk of being called by the 1st defendant. It stated that the securities will also be at risk of being realized for the recovery of Kshs 100,000,000.

7. Order 1 Rule 10 of the *Civil Procedure Rules* provides as follows: -

“(2) 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”

8. The question before this court is whether the 3rd defendant is a necessary party to the suit and whether the plaintiff has disclosed cause of action against the 3rd defendant.

9. Madan. J.A. in the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1982) KLR 1 stated that: -

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

10. In the case of *Amon vs Raphael Tuck & Sons Ltd* (1956) 1 All ER 273, cited in *Pizza Harvest Limited vs Felix Midigo* [2013] eKLR the issue of who a necessary party is was discussed as follows: -

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

11. A perusal of the plaint reveals that the dispute is in respect to the franchise agreement dated 8th February 2019 between the plaintiff and the 1st defendant. The plaintiff seeks orders for a permanent injunction to restrain the 2nd and 3rd defendants from paying out the sums of Kshs 70,000,000 to the 1st defendant. From the said prayers, it is clear that should the plaintiff prove its case, certain action will be expected from the 3rd defendant. I also note that the guarantor and principal debtor relationship was formed as a result of the same transaction.



12. I find that in the circumstances of this case, it will be premature to strike out the 3rd defendant from the case as the best approach should be to allow the plaintiff to establish its claim against all the defendants. Should this court, upon hearing the case on its merits eventually hold that the plaintiff indeed had no cause of action against the 3rd defendant, then the said defendant may be compensated in damages.
13. In the premises, I find that the application is not merited and I therefore dismiss it with orders that costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF MARCH 2022.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Njengo for Plaintiff/Respondent.

Mr. Kibara for 3rd Defendant.

Mr. Ndungu for Kuyo for 1st Defendant.

Court Assistant: Abdi

