



**Bai v Explico Insurance Company Limited (Civil Case E901 of 2021)
[2022] KEHC 310 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E901 OF 2021
WA OKWANY, J
APRIL 28, 2022**

**IN THE MATTER OF PRESERVATION OF STATUTORY FUNDS
HELD IN VARIOUS BANK ACCOUNTS IN THE INTEREST OF THE
SHAREHOLDERS OF EXPLICO INSURANCE COMPANY LIMITED**

BETWEEN

SAHI RAJESHWAR HARBANS BAI APPLICANT

AND

EXPLICO INSURANCE COMPANY LIMITED RESPONDENT

RULING

1. This ruling settles three similar applications. The first application dated 5th November 2021 is filed by 5 interested parties who seek the following orders: -
 1. That the applicants herein, Michael Ndungu Murigi, Catherine Wanza Mutuku, James Kimanthi Njagi & Titus Kamau Gachanga be enjoined in this suit as interested parties and henceforth be allowed to participate in the suit as proposed.
 2. That the costs of this application be provided for.
2. The application is supported by the affidavit sworn by Paul Maingi Musyimi and is based on the following grounds: -
 1. That the proposed interested parties have crystallized and ascertainable legal interests in the funds held by M-Oriental Bank Limited in the name of Xplico Insurance Company Limited under A/C No. 1007212000648.



2. That pursuant to the decrees issued in Milimani CMCC NO 172 OF 2020 ON 14TH June 2021 CMCC No 7750 OF 2019 on 27th January 2021 and CMCC No E4292 OF 2020 on 13th October 2021 respectively the defendant is indebted to the Interested parties to the tune of Kshs 4,764579.93/= which sum remains due and owing.
 3. That in the aforesaid suits and due to the defendants dereliction of its statutory obligation to settle claims under the *Insurance Act* [Cap 487] the court on 3rd November 2021 issued Garnishee Orders Nisi against A/C 1007212000648 held at M-Oriental Bank Limited.
 4. That the suits before the court are borne of mischief and seek to perpetuate a collateral objective of circumventing the Garnishee orders issued by the Court.
 5. That in view of the foregoing, and since the suit affects the rights of a litigant to pursue the available modes of execution, it is in the interest of justice that the applicants be enjoined as interested parties.
 6. That guided by the Turquand rule in Company Law, the interested parties should not be unduly inconvenienced due to Internal wrangling in the Company.
 7. That no prejudice will be occasioned to any of the parties herein should the applicants joinder be allowed.
 8. That it is in the interest of justice that the application herein be granted.
3. The second application dated 8th November 2021 is filed by 51 applicants who seek the following orders: -
- a. Spent.
 - b. That Lydia Mwikali & 50 Others as per the attached schedule herein be enjoined herein as interested parties.
 - c. That pending the hearing of this application, the court orders dated 4th November 2021 be set aside and/or be varied to allow M-oriental Bank Limited to satisfy the Interested parties Garnishee Orders from the defendants Account No. 1007212000648.
 - d. That the plaintiff's application dated 4th November 2021 be dismissed with costs.
 - e. That costs be provided for.
4. The application is supported by the affidavit of Lydia Mwikali and is based on the following grounds: -
- i. That the interested parties are successful litigants/claimants holding court judgments and Garnishee orders against the defendant Account No. 1007212000648 held at M-oriental Bank Limited.
 - ii. That in view of the court orders dated 4th November 2021, the above said claimant's judgments and/or garnishee orders cannot be effected by M-oriental Bank Limited.
 - iii. That the court orders herein must be varied to allow M-oriental Bank Limited to satisfy the interested parties Garnishee orders against the defendant.
 - iv. That the Primary duty of the defendant is to settle claims and/or judgments obtained by the Interested Parties yet the court orders dated 4th November 2021 herein are subject of abuse by the plaintiff and the cited banks. They have cited the same as a reason not to settle valid judgments/ garnishee orders in favour of the interested parties.



- v. That the plaintiff's suit and application is a clear abuse of the court process because a similar action had been filed at Kiambu Chief Magistrate Miscellaneous Criminal Application No. 375 of 2014 and the same was dismissed on the 26th June 2015.
 - vi. That clearly this current action by the plaintiff who was the complainant in Kiambu Chief Magistrate Miscellaneous Criminal Application No 375 of 2014 is resjudicata.
 - vii. That it is in the interest of justice.
5. The third application dated 5th November 2021 is filed by Jacob Otieno Genga who seeks the following orders: -
- 1. That the applicant herein Jacob Otieno Genga be joined in this suit as an interested party and henceforth be allowed to participate as proposed.
 - 2. That the costs of this application be provided for.
6. The application is supported by the affidavit of Jacob Otieno Genga and is premised on the following grounds: -
- 1. That the proposed interested party has a crystallized and ascertainable legal interest legal interest in the funds held by M-oriental Bank Limited in the name of Xplicoo Insurance company Limited under AC 1007212000648
 - 2. That pursuant to a decree issued in Milimani CMCC No 3173 of 2017 on 11th December 2019, the defendant is indebted to the interested party to the tune of Kshs 3,500,000 which sum remains due and owing.
 - 3. That in the aforesaid suit and due to the defendants dereliction of its statutory obligation to settle claims under the *Insurance Act* [Cap 487] the court on 27th October 2021 issued a garnishee order nisi against A/C 1007212000648 held at M-Oriental Bank Limited.
 - 4. That the suit before the court is borne of mischief and seeks to perpetuate a collateral objective in circumventing the Garnishee orders issued by the court.
 - 5. That in view of the foregoing and since the suit affects the rights of a litigant to pursue the available modes of execution, it is in the interest of justice that the applicant be joined as an interested party
 - 6. That guided by the Turquand rule in Company law, the interested parties should be unduly inconvenienced due to the internal wrangling in the company.
 - 7. That no prejudice would be occasioned to any of the parties herein should the applicant's joinder be allowed.
 - 8. That it is in the interest of justice that the application herein be granted.
7. The applicant/respondent herein opposed the application through Grounds of Opposition dated 14th November 2021 citing the following grounds: -
- 1. The proposed interested parties have no direct stake in the subject matter of the suit and if at all they have, the same is merely peripheral and not proximate to the subject matter of the suit for reasons inter alia:
 - a. The subject suit is between a shareholder and his/its company and the proposed interested parties are neither directors nor shareholders of the company.



- b. The decrees mentioned to be held by the proposed interested parties are against the 1st defendant and have nothing to do with the plaintiff. The proposed interested parties have disclosed that the said decrees are subject of various ongoing court cases and such their interest is already taken care of in the highlighted ongoing litigations.
 - c. The intended interested parties have not demonstrated the exceptional circumstances that would warrant their joinder to the case and the mere fact that they hold decrees against the defendant does not give the applicants the automatic right to be enjoined in this case.
 - d. The subject suit does not in any way seek to stop enforcement of the said decrees, the only interest that the plaintiff seeks to protect in the suit is to ensure that the 2 statutory accounts of the defendant are protected for purposes of ensuring that the 2n statutory accounts of the defendant are protected for purposes of ensuring that he defendant business does not go under for breach of regulatory requirements under the *insurance Act*.
2. The proposed interested parties joinder applications have not demonstrated the role that the proposed interested parties will play in the subject suit if at all they are enjoined in the suit. There are no foreseeable legal issues in the suit that can be brought out or are apt for determination by this court emanating from the interested parties.
 3. The proposed Interested parties notice of motion are incurably defective as they rise substantive matter that can only be addressed substantively once the court determines the said motions on joinder and it if at all allows the proposed interested parties to be enjoined. The applicant also seeks premature prayers which can only be made after the parties are enjoined.
 4. The joinder applications have not demonstrated the prejudice to be suffered by the proposed interested parties in case of non joinder. It is trite that the same must be clearly outlined and not something remote.
 - a. The orders issued by this court are of a preservative nature and the proposed interested parties peripheral interest in the matter is protected and
 - b. The defendant has various other accounts (apart from the statutory accounts) and assets that the interested parties have an option of executing their judgment against.
 5. The condition precedent for enjoining a party in a suit is that the court must be satisfied that the presence of the party to be added would be necessary in order to enable the court to effectively and competently adjudicate upon and settle all questions involved in the suit. The proposed interested parties applications have not demonstrated this aspect and the applications must fail.
 6. The applications seek to enjoin too many interested parties particularly the application dated 8th November 2021 which seeks to enjoin over 50 interested parties. The test on joinder of parties entails looking at inter alia, whether such joinder will protract the case, cause inconvenience, lead into practical problems of handling the existing cause of action together with one of the parties being joined, is unnecessary or will just occasion unnecessary delay or costs on the parties in the suit. The joinder applications will not assist in the quick determination of the matter but delay the fair hearing of the dispute and they ought to be dismissed.
 7. If allowed, the applications will cause extreme prejudice to the applicant.



8. In the upshot, the applications are frivolous, vexatious and lack merit and ought to be dismissed. The same are an abuse of the precious judicial time and it is in the interests of justice and fairness that they be dismissed with costs.
8. The respondent similarly filed Grounds of Opposition dated 14th November 2021 in opposition to the three applications wherein he lists the following grounds: -
1. The proposed interested parties have no locus before the court and their applications should be dismissed immediately
 2. That there are ongoing litigations emanating from enforcement of some of the decrees held by the proposed interested parties and as such the same are res subjudice and will only lead to multiple suits.
 3. The proposed parties have other avenues to enforce their judgment/decrees independent of this suit and their enjoinder to this suit will only cloud issues and drag the respondent to unending litigation.
 4. The instant applications woefully fail to meet the strict standard set out in law for joinder of parties considering they want to enjoin too many interested parties particularly. The application dated 8th November 2021 which seeks to enjoin over 50 interested parties. Having over 50 interested parties is unnecessary and will just occasion unnecessary delay or costs in the parties in the suit and as such the application should be dismissed.
 5. In the upshot, the respondent has a strong defence against the main suit filed by the applicant and will seek orders to set aside or vary the preservation orders issued by this court. It is thus only proper then that the instant joinder applications filed by the proposed interested parties be dismissed to allow the respondent to the main suit herein without any further delays.
9. Parties canvassed the applications by way of written submissions. I find that the main issue for determination is whether the Interested Parties have made out a case for their joinder in these proceedings.
10. Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) provides for substitution and addition of parties to proceedings 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”
11. The *Black’s Law Dictionary, 9th Edition* at page 1232 defines an interested party as;
- “A party who has a recognizable stake (and therefore standing) in the matter”
12. The Interested Parties’ contend that on 4th November 2021, this court issued conservatory orders with regard to the funds held by the respondent at M-Oriental Bank. The proposed interested parties state that they have ascertainable interest in the said funds held and that they should therefore be joined as parties to the suit in order to protect their stake in the said funds.



13. The applicant and respondent opposed the application while arguing that the interested parties do not have a stake in the subject matter of the suit.
14. Rule 2 of *The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 ('the Mutunga Rules') defines an 'interested party' to mean: -
 - 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;
15. In *Trusted Society of Human Rights v Mumo Matemu & 5 others* [2014] eKLR the Supreme Court observed as follows: -
 - ... an interested party is one who has a stake in the proceedings though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause".
16. In *Francis Kariuki Muruatetu & Another vs Republic & 5 others* Petition 15 as consolidated with 16 of 2013 [2016] eKLR the Supreme Court identified the applicable conditions for joinder, and, stated as follows: -"One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:-
 - (i) The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
 - (ii) The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
 - (iii) Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."
17. Further, in *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, Mativo. J. explained when an interested party ought to be enjoined in a proceeding thus: -
 - "A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty".
18. From the foregoing decided cases, it is clear that an interested party must demonstrate that he has a stake in the proceedings and has a legal right that can be prejudiced by the proceedings.



19. I have perused the documents presented by the interested parties who aver that pursuant to the decrees and garnishee orders issued in their favour in Milimani CMCC NO 172 OF 2020, CMCC No. 3173 OF 2017, CMCC NO. 7750 OF 2019 and CMCC NO E4292 OF 2020 the respondent/Company is indebted to them. According to the interested parties, the orders made by the Lower Court therefore connote that the conservatory orders issued in this matter directly affect them.
20. My finding is that the interested parties have demonstrated that they have a legal interest in the funds held in the bank account A/C 1007212000648 held at M-Oriental Bank Limited. In the circumstances of this case, I find that it will be in the interest of justice to allow the interested parties to participate in the proceedings.
21. Consequently, I find that the applications are merited and therefore allow them, but only to the extent of admitting the applicants to the case as interested parties. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Leibor for Kiprop for M-Oriental Bank.

Mr. Kulecho for proposed Interested Parties.

Court Assistant- Sylvia.

