



**Ogwedhi Properties Limited & another v Ollerai Investments Limited & 3 others (Cause 20 of 2021) [2022] KEHC 10382 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10382 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU**

**CAUSE 20 OF 2021**

**JN KAMAU, J**

**JULY 28, 2022**

**BETWEEN**

**OGWEDHI PROPERTIES LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**KISUMU PARKVIEW RESORTS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**OLLERAI INVESTMENTS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**OLTEPESI PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**IMTIAZ KHAN ..... 3<sup>RD</sup> DEFENDANT**

**PRINCIPAL AUCTIONEERS ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. In his Notice of Motion dated 21<sup>st</sup> December 2021 and filed on 24<sup>th</sup> December 2021, the 3<sup>rd</sup> Defendant herein sought for prayers that he be struck out as a party in this suit.
2. In support of his said application, he swore an affidavit on 21<sup>st</sup> December 2021. He averred that in seeking injunctive reliefs pending an intended arbitration on alleged disputes between the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, the Plaintiffs had in their Originating Summons dated 15<sup>th</sup> October 2015 made several claims against him regarding his control and ownership of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, fraud and ultra vires acts in his capacity as a director of the 2<sup>nd</sup> Defendant warranting the lifting of the corporate veil. He was categorical that the Plaintiffs had not provided any iota of proof of fraud or ultra vires acts in his capacity as a director warranting the lifting of the corporate veil.
3. He contended that the said allegations were not only vague, malicious and unsubstantiated but also extraneous and irrelevant and that the proceedings did not require his presence in the suit.



4. He further contended that the 1<sup>st</sup> Plaintiff took out a loan facility from HFCK to fund the project but the HFCK stopped disbursing the loan facility while the development of the property was underway whereupon the project stalled. He added that to complete the development of the subject property, the 1<sup>st</sup> Plaintiff asked the 1<sup>st</sup> Defendant to take over the facility from HFCK, which it did, relaxed disbursement requirements and restructured the loan tenure to more favourable terms.
5. He pointed out that the 2<sup>nd</sup> Plaintiff and the 2<sup>nd</sup> Defendant entered into a Joint Venture for the investment and development of the Property known as Title No Kisumu Municipality/Block 12/182 (hereinafter referred to as the “subject property”) and that a special purpose vehicle known as Ogwedhi Properties, the 1<sup>st</sup> Plaintiff herein, was incorporated in order to accommodate the Joint Venture partners’ interest in the Project.
6. He averred further that the 1<sup>st</sup> Plaintiff subsequently defaulted on the terms of the facility and it was pursuant to the Charge over the subject property that the said property was advertised for auction by the 1<sup>st</sup> Defendant in exercise of its statutory power of sale.
7. He was emphatic that he was not a party to the Charge, Joint Venture Agreement, Shareholder Agreement, Loan Facility or any other agreement between the Plaintiffs and the Defendants that would be the subject of the Originating Summons herein and therefore on that ground alone, he ought not be a party to the suit.
8. He added that he was only a Director of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and that the management and operations of the 1<sup>st</sup> Plaintiff had at all material times been under the control of its board of directors and as such, he had no human control over the 1<sup>st</sup> Plaintiff.
9. He further stated that no cause of action could exist or be sustained against him in his personal capacity regarding any cause of action between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendants because the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were body corporates under the laws of the Republic of Mauritius and Republic of Kenya respectively and being persona juridica, they enjoyed separate legal personality distinct from him as either a shareholder, director or agent.
10. It was his further contention that in any event, he had always acted under the directions of the board and the Company’s Articles of Association in his capacity as a director of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and the Plaintiffs had not demonstrated otherwise.
11. He contended that he had no connection with the reliefs the Plaintiffs had sought in the suit herein and hence there was no legal or factual basis for his inclusion in this suit as the determination of this matter could still be achieved without his inclusion. He was emphatic that this was a clear case of misjoinder and urged this court to strike him out as a party to this suit and that the Plaintiffs to bear his costs of the application.
12. The Plaintiffs did not file a response to the present application. They, however, filed Written Submissions dated 28<sup>th</sup> February 2022. The 3<sup>rd</sup> Defendant’s Written Submissions were dated 28<sup>th</sup> January 2022 and filed on 1<sup>st</sup> February 2022. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant did not file any submissions herein.
13. This Ruling is therefore based on the said Written Submissions which parties relied upon in their entirety.



## Legal Analysis

14. He placed reliance on Order 1 Rule 10(2) of the *Civil Procedure Rules* and the case of *Pizza Harvest Limited vs Felix Midigo* [2013] eKLR which cited the case of *Amon vs Raphael Tuck & Sons* 1956 1 ALL ER 273 where it had been held that it was only necessary to make a person a party to an action so that he should be bound by the result of the action.
15. He pointed out that in Sarkar's Law of Civil Procedure, Vol 1 at p. 531-532 the two (2) tests in the application of this principle were that there had to be a right to some relief against the party sought to be added in the proceedings in question and that it should not be possible to pass an affective decree in the absence of such a party.
16. He further submitted that a contract could not confer rights or impose obligations on persons who are not party to it. He was categorical that he was not a party to the Charge, Joint Venture Agreement or the Loan Note Instrument and was therefore not a party to their respective arbitration agreements.
17. In this regard, he relied on the case of *Afroplast Industries Limited vs Saniam Insurance Co Ltd & Another* [2021] eKLR where the court declined to enjoin a defendant as there was no cause of action against it. He also referred this court to the case of *Agriculture Finance Corporation vs Lengetia* (1982-88) 1 KAR 772 where the Court of Appeal held that as a general rule, a contract affects only the parties to it.
18. He was categorical that he was a separate legal entity from the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and did not carry personal liability for their actions. In this regard, he placed reliance on the case of *Victor Mabachi & Another vs Nurture Bates Ltd* [2013] eKLR where the court held that where the principal was disclosed, the agent could not to be sued. He also relied on the case of *Charles Ray Makuto vs Almakony Limited & Another* [2016] eKLR where the court held that a company was a body corporate, separate and distinct from its shareholders, directors and agents unless there were factors warranting lifting of the veil.
19. He invoked the definition of beneficial ownership in the *Companies Act*, Number 17 of 2015 (Laws of Kenya) and argued that the Plaintiffs had failed to produce any documentation evidencing his beneficial ownership of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or that he was their controller or beneficial owner. He asserted that he only held a mere seven point five (7.5%) per cent of the shareholding in the 1<sup>st</sup> Defendant and denied being a director or shareholder in Alliance Capital Partners.
20. He relied on Section 125 (1) of the *Companies Act*, Number 17 of 2015 (Laws of Kenya) and Section 2(1) of the *Income Tax Act* (Cap 470) Laws of Kenya and argued that because his shareholding in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was less than twenty percent (20%), he did not meet the criteria of their control or beneficial ownership.
21. He pointed out that the Plaintiffs' allegations that 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Alliance One Capital were one and the same thing were baseless and had not been substantiated by any evidence. In this regard, he placed reliance on the case of *Lucy Mukembure Kimani vs Nzuri Feeds Suppliers Ltd* [2021] eKLR where in a similar case, the court held that the applicant had not demonstrated that the respondent was a director or sole director of the company.
22. He added that the Plaintiffs' allegations of conflict of interest were also unsubstantiated and remained mere allegations which the court ought not to entertain. To buttress his argument, he relied on the case of *Tatu City Limited & 3 Others vs Stephen Jennings & 6 Others* [2015] eKLR where it was held that allegations of conflict of interest must be supported with evidence and mere suspicion and unfounded fears cannot suffice.



23. He also argued that the Plaintiff's allegations of fraud against him were unsubstantiated. In this regard, he placed reliance on several cases among them the case of *Sinohydro Corporation Limited vs GC Retail Limited & Another* [2016] eKLR where the court held that the mere assertion or allegation of fraud would not be adequate
24. He also referred this court to the cases of *Mart Networks Kenya Limited vs Horizon Media Solutions Kenya Limited* [2021] eKLR, *Martin Njuguna Ngugi vs Ahmed Noor Sheikh & Another* [2018] eKLR, *Scales and Software Limited vs Web Commercial Systems Limited & Another* [2021] eKLR where the common thread was that the court will not enforce an arbitration clause against a third party. In view of the above, he submitted that Plaintiffs could not purport to include him as a party to this suit.
25. On their part, the Plaintiffs submitted that the 3<sup>rd</sup> Defendant was properly joined in the suit because he had admitted that he was a shareholder in both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. They argued that they had raised triable issues of the 3<sup>rd</sup> Defendant's role in the transactions forming the gravamen of the suit and that those questions mainly involved around whether he committed fraud and deceit on their part, in inducing them to enter into the subject transactions.
26. They were emphatic that the trial of the question of fraud, at the arbitration, would involve examining 3<sup>rd</sup> Defendant's role thus making him a necessary party to the proceedings. They invoked Section 7 of the *Arbitration Act* and argued that the court was prohibited from entertaining questions touching on merit of the dispute.
27. They pointed out that the question of whether or not the 3<sup>rd</sup> Defendant was properly a party to an arbitration was one that was reserved for the arbitral tribunal. It was their submission that raising the question at this stage would be an attempt to short-circuit the impending arbitration process as they were questions that went into obligations and rights and were not merely procedural.
28. It was evident from their affidavit evidence that the Plaintiffs enjoined the 3<sup>rd</sup> Defendant herein on the basis that he was the controller and the beneficial owner of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It was their argument that this purported control raised a question of conflict of interest and that his actions and inactions consequently contributed to the frustrations and disruptions of their business leading to the 1<sup>st</sup> Plaintiff's inability to meet its financial obligations in a timely manner.
29. As was rightly pointed out by the Plaintiffs herein, in hearing applications under Section 7 of the *Arbitration Act* No 4 of 1995, the court was not required to inquire into the merits or others of the case which was within the purview of the arbitral tribunal.
30. Having said so, as the present application was brought pursuant to the Originating Summons before this court, this court was called upon to establish whether or not the presence of the 3<sup>rd</sup> Defendant herein was necessary for the granting of the orders the Plaintiffs had sought.
31. The main prayer in the said Originating Summons was for the determination of the following question:-

Whether pending the commencement and determination of the arbitral proceedings between the Plaintiff and the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants concerning their various obligations and rights and breaches of the contracts dated 3<sup>rd</sup> April 2012 and 26<sup>th</sup> January 2016 both relating to Vittoria Suites Hotel and the land below described, Honourable Court (sic) should issue interim measures of protection in the form of an injunction restraining the Defendants from interfering with the management and operations of Vittoria Suites Hotel and from auctioning, selling off or in any way disposing the subject



matter thereof, Title Number Kisumu Municipality/block 12/182 located at Milimani Estate Kisumu (hereinafter referred to as “the subject property”).

32. Section 7 of the *Arbitration Act* provides as follows:-

1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application”.

1. This court perused the Joint Venture and Share Holding Agreement dated 3<sup>rd</sup> April 2012 and noted that the same was between the Plaintiffs and the 2<sup>nd</sup> Defendant. In the Loan Note Agreement dated 26<sup>th</sup> January 2016 was by the 1<sup>st</sup> Plaintiff herein, it had acknowledged being indebted to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Both Agreements had arbitration agreements. They never made any reference to the 3<sup>rd</sup> Defendant herein.

2. Under Order 1 Rule 10 (2) of the *Civil Procedure Rules*, 2010, it is provided 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.”

35. It must, however, be noted that the power of striking out a party from a suit is a draconian step and ought to be exercised judiciously, sparingly and only in clear cut cases as it has the potential of denying a party a chance and/or opportunity to present its case in the best way it knows how.

36. Having said so, an unnecessary party ought not to be strung along merely because its opponent is casting his net wide on a fishing expedition. The cause of action against a party must be clear and not opaque to establish a reasonable cause of action against such party, a prima facie or arguable case.

37. Section 3 of the *Arbitration Act* states that an arbitration agreement:-

“ means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.”

38. Notably, as has been seen hereinabove, the 3<sup>rd</sup> Defendant was not a party to both Agreements. The Plaintiffs did not also demonstrate that there existed any legal relationship, whether contractual or not between them and the 3<sup>rd</sup> Defendant herein.

39. After carefully analysing the 3<sup>rd</sup> Defendant’s affidavit evidence, this court came to the firm conclusion that the inclusion of the 3<sup>rd</sup> Defendant herein in the proceedings before it was not necessary as it could and determine the Plaintiffs’ Originating Summons without him being a party herein. As Clause 22.7 of the Joint Venture Agreement and Clause 10 of the Loan Note Instrument intended to bind the



parties to dispute, there was clearly a misjoinder of the 3<sup>rd</sup> Defendant herein as there was no reasonable cause of action against him.

40. Both parties raised substantive issues which were outside the jurisdiction of this court. Indeed, the question of whether or not the 3<sup>rd</sup> Defendant could be enjoined in the arbitration proceedings in his personal capacity or if there would be need for the corporate veil to be lifted or if he had been fraudulent or acted ultra vires were issues that could arise before the arbitral tribunal. This court thus restrained itself from commenting on the same and/or giving a determination of the same as this court had no mandate where parties had expressly indicated that they wished to have their dispute determined through arbitration.

### **Disposition**

41. For the foregoing reasons, the upshot of this court's decision was that the 3<sup>rd</sup> Defendant's Notice of Motion application dated 21<sup>st</sup> December 2021 and filed on 24<sup>th</sup> December 2021 was not merited and the same be and is hereby dismissed. The Plaintiffs will bear the 3<sup>rd</sup> Defendant's costs of the application.
42. It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 28<sup>TH</sup> DAY OF JULY 2022**

**J. KAMAU**

**JUDGE**

