



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 324 OF 2019**

**AFRICA MERCHANT ASSURANCE CO. LIMITED.....APPELLANT**

**-VERSUS-**

**MAMA RAEL MEMORIAL FOUNDATION**

**(Suing through its registered trustees).....RESPONDENT**

**AND**

**ELIZABETH KOSKEI.....1<sup>ST</sup> INTENDED INTERESTED PARTY**

**LAWRENCE TANUL.....2<sup>ND</sup> INTENDED INTERESTED PARTY**

**NANCY KHAKANE.....3<sup>RD</sup> INTENDED INTERESTED PARTY**

**RULING**

1. Before me for determination is the Notice of Motion dated 21<sup>st</sup> December, 2020 brought by the 1<sup>st</sup> to 3<sup>rd</sup> intended interested parties herein, supported by the grounds set out therein and the facts stated in the affidavit of the 2<sup>nd</sup> intended interested party who is the General Manager of the appellant herein. The intended interested parties are seeking to be enjoined in the appeal proceedings, and are further seeking an order setting aside and/or vacating the ruling delivered by this court on 16<sup>th</sup> December, 2020 and upon granting the above orders, leave to respond to the application dated 30<sup>th</sup> July, 2020.
2. The respondent opposed the Motion by putting in the Grounds of Opposition dated 19<sup>th</sup> January, 2021.
3. Following the directions of this court, the interested party and the respondent filed and exchanged written submissions on the Motion.
4. I have considered the grounds set out in the Motion respectively, the facts deponed in the supporting affidavit, the Grounds of Opposition and the rival submissions on record plus the authorities cited.
5. A brief background of the matter is that, the appellant lodged an appeal with the High Court against the ruling and order delivered by the trial court on 25<sup>th</sup> May, 2019 in CMCC NO. 8566 OF 2018 and upon doing so, sought and was granted a conditional stay of execution by this court on 5<sup>th</sup> December, 2019.
6. Subsequently, the appellant filed the application dated 15<sup>th</sup> January, 2020 and sought a review of the conditions for a stay of execution. Upon hearing the application, this court allowed the application by ordering the appellant to deposit a sum of Kshs.2,000,000/ in a joint interest earning account and to secure the balance of Kshs.13,000,000/ by way of a bank guarantee from a reputable bank, failing which execution would proceed.
7. Soon thereafter, owing to the default on the part of the appellant in complying with the above conditions, the respondent approached this court by way of the application dated 30<sup>th</sup> July, 2020 seeking execution against the appellant. Upon hearing the Motion, this court allowed the application vide the ruling delivered on 16<sup>th</sup> December, 2020.
8. The aforesaid application and ruling have prompted the instant Motion. I note that the Motion is seeking twin orders.
9. The first order has to do with enjoyment of the intended interested parties to the appeal.

10. In his supporting affidavit, the 2<sup>nd</sup> intended interested party states that the orders made on 16<sup>th</sup> December, 2020 are specifically directed to the intended interested parties and are adverse to them, since they are required to disclose the true owners and assets of the appellant within a limited time, failing which they will be held liable to settle the decretal sum owed by the appellant. That the intended interested parties were never served with a copy of the application dated 30<sup>th</sup> July, 2020 which precipitated the ruling of 16<sup>th</sup> December, 2020 and that the respondent does not stand to be prejudiced should the Motion be allowed.

11. The intended interested parties submit that they therefore have an identifiable legal stake/interest in the proceedings.

12. The respondent have replied by arguing that the Motion is incompetent and unfounded since the intended interested parties have failed to comply with the order issued on 16<sup>th</sup> December, 2020.

13. The term ‘interested party’ is defined under **Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** and echoed by the court in the case of **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2015] eKLR** as follows:

***“interested party” means 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.”***

14. Similarly, the court in the case of **Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR** cited by the intended interested parties defined an interested party as:

***“A party who has a recognizable stake (and therefore standing) in the matter.”***

15. The guiding principles encompassing the enjoinder of an interested party to a suit were articulated by the Supreme Court in the decision of **Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR** with reference to **Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR** thus:

***“(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.”***

16. Under the first principle, upon considering the position by the intended interested parties hand in hand with those portrayed by the respondent, I am of the view that the intended interested parties have not brought any credible evidence to demonstrate an identifiable legal stake in the proceedings.

17. In respect to the second principle on prejudice, the law is well settled that a party ought to demonstrate the prejudice he or she stands to suffer if adverse orders are made. I considered the averments made by the intended interested parties which I have set out hereinabove and upon weighing them against those made by the respondent, I am satisfied that the intended interested parties have reasonably shown the prejudice they stand to suffer if they are not enjoined in the appeal proceedings.

18. I am equally satisfied that the intended interested parties have satisfied the final principle since I note from their submissions that they are riding on the argument that the respondent has not brought any credible evidence to justify the lifting of the corporate veil of the appellant or to show that the intended interested parties are directors and/or shareholders of the appellant.

19. In the premises, I am convinced that the enjoinder of the intended interested parties in the appeal is necessary.

20. On the second order, the 2<sup>nd</sup> intended interested party states that the intended interested parties were never cross-examined so as to ascertain their liability on behalf of the appellant. This position was reiterated in their submissions.

21. In contrast, the respondent is of the view that the intended interested parties are not entitled to any of the orders sought since they are in disobedience of the order issued on 16<sup>th</sup> December, 2020.

22. Upon weighing the varying positions above, I am of the view that the instant Motion raises sufficient grounds to warrant a granting of the second order sought.

23. The outcome therefore is that, the Motion dated 21<sup>st</sup> December, 2020 succeeds in terms of orders 2, 3 and 4 and consequently the following orders are made:

**(i) The intended interested parties be and are hereby enjoined to the appeal.**

(ii) The ruling and order issued on 16<sup>th</sup> December, 2020 is hereby set aside and the Notice of Motion dated 30<sup>th</sup> July, 2020 is hereby reinstated.

(iii) The interested parties are granted leave of 14 days to respond to the Notice of Motion dated 30<sup>th</sup> July, 2020.

(iv) There shall be no order on costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2021.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

Kanyonge for the Appellant

Mr. Kurauka for the Respondent

Mr. Kanyonge h/b for Mr. Ong'anda for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Intended Interested Parties.