



Langat & 2 others v Atticon Limited & 7 others (Civil Case E201 of 2021 Consolidated with E138 of 2019 & E029 of 2018 of 2021) [2021] KEHC 60 (KLR) (Commercial and Tax) (24 September 2021) (Ruling)

Neutral citation: [2021] KEHC 60 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E201 OF 2021 CONSOLIDATED WITH E138 OF 2019 & E029 OF 2018 OF 2021**

**A MABEYA, J
SEPTEMBER 24, 2021**

BETWEEN

**ARNOLD KIPKIRUI LANGAT 1ST PLAINTIFF
BARONS ESTATE LIMITED 2ND PLAINTIFF
NONIKO HOLDINGS LIMITED 3RD PLAINTIFF**

AND

**ATTICON LIMITED 1ST DEFENDANT
FRANKLIN MITHIKA LINTURI 2ND DEFENDANT
EMILY NKIROTE BUANTAI 3RD DEFENDANT
BRENDA MITHIKA 4TH DEFENDANT
FAMILY BANK LIMITED 5TH DEFENDANT
REGISTRAR, MERU 6TH DEFENDANT
LINKIT LIMITED 7TH DEFENDANT
REGISTRAR OF COMPANIES 8TH DEFENDANT**

RULING

1. Before Court are 3 applications which shall be determined concurrently.
2. The first one is a Notice of Motion dated 16/7/2021 lodged by the 5th defendant. The same was brought *inter-alia* under Order 42 Rule 6(1) & (2) of the *Civil Procedure Rules* 2010.



3. The applicant sought a stay of proceedings pending the hearing and determination of its appeal to the Court of Appeal against the ruling delivered on 5/7/2021. The grounds for the application were set out in body of the Motion and the supporting affidavit of Keziah Ruto sworn on 5/7/2021.
4. The grounds were that; by a ruling made on 5/7/2021, the Court allowed the consolidation of the instant suit with E138 OF 2018 - BARRONS ESTATES LIMITED VS ATTICON LIMITED & OTHERS and HCCC NO.029 FO 2019 NINIKO HOLDINGS LIMITED & OTHERS V ATTICON LIMITED & OTHERS. That the 5th defendant had appealed against the said ruling through a Notice of Appeal dated 8/7/2021. Copies of the proceedings and certified copy of the ruling were applied for on 6/7/2021.
5. It was contended that the intended appeal goes to the root of the suit and challenges its entire validity; that it will therefore be in the interests of justice and the efficient management of judicial time if the proceedings herein are stayed pending the outcome of the appeal.
6. The 1st plaintiff opposed the application vide his replying affidavit sworn on 26/8/2021. He averred that the applicant had not laid out the grounds of appeal against the ruling being appealed against. That it had not been demonstrated how the intended appeal goes to the root of the consolidated suit as alleged. No prejudice had been demonstrated that would arise from the order of consolidation.
7. The 1st plaintiff further contended that precious judicial time will be wasted if the stay was granted as opposed to the consolidation of the suits.
8. The plaintiff and 5th defendant filed submissions in support of their respective arguments which the court has considered.
9. The issue for determination is whether these proceedings should be stayed pending appeal.
10. Order 42, Rule 6(1) provides for stay of execution or proceedings. In *Christopher Ndolo Mutuku & another v Cfc Stanbic Bank Limited* [2015] Eklr, the court set out the principles to be applied in granting a stay of proceedings.
 - a. The decision whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice.
 - b. The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted.
 - c. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.
 - d. In considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”
11. The court finds the above principles sound and will apply them to the present application.
12. The 5th defendant did not provide a draft memorandum of appeal so as to weigh the prima facie merits of the intended appeal or whether there is an arguable appeal.



13. Be that it may, it was contended that the intended appeal would go to the root of this suit and that if the intended appeal is successful, time and resources of both the judiciary and the parties to the suit would be spent in vain and cannot be recovered. That no prejudice would be suffered by the parties if the orders are granted as it would only preserve the integrity of the appeal process.
14. The 5th defendant has an undoubted right to appeal against the impugned ruling. However, it was not shown how the intended appeal would challenge the validity of the consolidated suit. There is no dispute that the three suits are inter related. The evidence and the witnesses are almost all the same in all the three cases. Time and resources of all parties and the judiciary is more likely to be wasted if the proceedings are stayed pending the appeal as opposed to the consolidated suit proceeding to trial. Even if the appeal is successful, there would be no prejudice to be suffered.
15. There is the constitutional desire that disputes should be determined expeditiously. Article 159 of the Constitution espouses the overriding objective of the law, that is, that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That is why the law on stay of proceedings is concerned with whether it will be in the interests of justice to order a stay.
16. The Court notes that the consolidation of the suits as ordered in the ruling of 5/7/2021 is meant to expedite the disposal of the three suits. It will be convenient to the parties and the Court to determine the dispute between the parties once and for all. The delay that would be occasioned by the stay of proceedings would defeat the purpose of expeditious disposal of matters under Article 159 of the *Constitution*.
17. In view of the foregoing, the Court finds no merit in the application for stay and hereby dismisses the same.
18. The second application for determination is a Notice of Motion dated 29/7/2021 by the 1st, 2nd, 3rd, 4th and 7th defendant. It was brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 1 Rule 10(2) and Order 51 Rules 1 and 10 of the Civil Procedure Rules 2010.
19. The Motion sought that one Maryanne Jebet Kitany be enjoined in the proceedings as an interested party or in any other capacity as the court may deem just and for directions from the court on how the proposed interested party shall participate in these proceedings.
20. The grounds for the application were set out in its body and the affidavit of Emily Nkirote Buntai sworn on 29/7/2021. These included; that the participation of the proposed interested party is crucial as she was, at all material times, the Chief Executive Officer of Atticon Limited, the 1st defendant herein; that she allegedly discovered a series of unauthorised withdrawals of colossal amounts of money from Atticon's bank accounts and reported the matter to the CID for investigations and recorded a statement to that effect.
21. It was contended that the proposed interested party has a direct and/or indirect interest in the various subject matters relating to the consolidated suits which interests cannot be effectively canvassed by the parties on record; that her joinder would help the court determine the real issues in contest.
22. The application was opposed by the proposed interested party vide her replying affidavit of 16/8/2021. She contended that she has no personal stake, legal interest or duty in the present proceedings as to necessitate her joinder. That the applicants were replicating matters that were already canvassed in Milimani CMCC 1044 of 2018. That the applicant's depositions are bare assertions lacking in particularity and are not sufficient to infer any interest to warrant her joinder in these proceedings



23. She averred that she has never been a shareholder nor director of Atticon Limited. That the applicants had neither demonstrated that the outcome of the proceedings will directly affect her nor that she was a necessary party thereto.
24. The joinder application was also opposed by the plaintiff vide a replying affidavit sworn by himself.
25. He averred that the application had not met the settled principles on joinder of interested parties to a matter. That the applicants had not demonstrated any identifiable stake that the proposed interested party had in any of the matters constituting the consolidated suit. That they had not demonstrated how having the intended interested party in the consolidated suit, as a party and not a witness, would help the court to effectually and completely determine the issues between the parties.
26. The Court has considered the depositions and submissions of the parties. The issue for determination is whether Maryanne Jebet Kitany should be enjoined in these proceedings as an interested party.
27. Order 1 Rule 10(2) of the Civil Procedure Rules states:
- “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”.
28. In *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] Eklr, the Supreme Court considered the elements necessary where a party seeks to be enjoined as an interested party to a suit. These are;
- “(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”.
29. In *Trusted Society of Human Rights Alliance v. Mumo Matemo & 5 Others*, Sup. Ct. Pet. No. 12 of 2013, the Supreme Court held: -
- “Consequently, 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”.
30. In the present suit, the applicants, contended that the proposed interested party has a stake in the proceedings since she had in another suit, Milimani CMCC No.1044 OF 2018, deponed that she had



been appointed the Chief Executive Officer of the 1st defendant by its directors. That as such Chief Executive Officer, she had discovered unauthorized withdrawals of huge amounts of money from the company's bank accounts which led her to report the matter to the C.I.D.

31. The court has reviewed the respective complaints filed in E029 of 2019 and E138 of 2018 and finds that the claims therein and the present consolidated suit involve a claim by the plaintiffs against the defendants for alleged fraudulent charges registered against the assets of the plaintiffs and their companies.
32. There is proof that the proposed interested party acted as the CEO of the 1st defendant, having so stated on oath in the aforesaid suit. It has been alleged that the interested party was actively involved in one of the defendants when the irregularities complained of took place. That the same were either sanctioned, overseen or authorized by her.
33. Although the proposed interested party denied these allegations, a fact stated on oath cannot be denied. When denied, it reflects negatively on a party. It may be that the proposed party may have evidence that can assist the Court unravel the dispute herein.
34. I have perused the record, I have not seen her name offered as a witness for any of the parties. It is alleged that she has evidence that can help the Court completely adjudicate the case. She made a report to the DCI which resulted in criminal proceedings being contemplated against some defendants. This is all open in the bundle of documents filed in court.
35. That in my view is sufficient reason why the application is merited. If the proposed Interested Party not enjoined in any capacity and yet it is clear none of the parties have listed her as a potential witness, the Court may miss an important opportunity of having a necessary person with crucial information to assist in the determination of the dispute between the parties.
36. In view of the foregoing, the Court is satisfied that the application is meritorious and allows the same.
37. The third application for determination is a Notice of Motion dated 10/8/2021 by the plaintiff. It was brought inter-alia under Order 50 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules; section 59 of the *Interpretation and General Provisions Act* and Article 159(2) of the Constitution of Kenya.
38. In the Motion, the 2nd plaintiff sought an order that the defendants in E138/2018 Barons Estate Limited v Atticon Limited & 5 Others be deemed as duly served with summons and properly before court. Alternatively, an order granting leave to the 2nd plaintiff to serve summons upon the defendants out of time.
39. The grounds for the application were set out in its body and the supporting affidavit of Collins Ngetich sworn on 10/8/2021. It was contended that the defendants have not filed their defences in Suit No. E138 of 2018 as they were not served with summons to enter appearance. That the plaintiff's previous advocates had failed to serve the summons upon the defendants. That regardless, the defendants continuously participated in the proceedings in the said suit and that thereby, the Court should deem them as having been served with the Summons.
40. The 2nd plaintiff pleaded that the mistakes of its former advocates should not be visited upon it. That the defendants would not suffer any prejudice if the orders sought were granted as they have participated in the said suit for the past 3 years.
41. That to the contrary, the plaintiffs would suffer prejudice if the order is not granted as they have a case with reasonable chances of success that ought to be heard.
42. The 1st to 4th and 7th defendant opposed the application vide a replying affidavit sworn by the 3rd defendant. She averred that failure to serve summons is not a mere irregularity but a fundamental



breach which makes a suit liable for striking out. That failure to extract and serve summons under this rule is such a fundamental defect in the proceedings that inherent powers of the court under Section 3A of the Civil Procedure Act cannot cure.

43. It was further averred that a party to a suit may be aware of the suit but unless prompted by the summons in the manner provided for in the rules, the jurisdiction of the court is not invoked.
44. The defendants contended that the application had been brought after an inordinate and inexcusable delay. That the overriding objective and the inherent jurisdiction of the court cannot justify the failure to comply with the laid down provisions of the law. That in any event, no sufficient explanation had been provided for the delay in extracting and serving the defendants Summons.
45. The 5th defendant opposed the application vide a replying affidavit sworn by Keziah Rutto, its Legal Manager. She averred that by virtue of Order 5 Rule 1(8) Civil Procedure rules, summons ought to have been extracted by 14/12/2018 failing which the Suit would abate.
46. That although the Court has discretion to extend the time for taking certain steps in a matter, it is to be exercised based on laid down principles. That the plaintiff had not provided an affidavit from its previous advocates to explain why they failed to extract the summons so as to warrant the exercise of discretion in the plaintiffs' favour. That the defendants' participation in interlocutory applications filed by the plaintiff did not negate the requirement to extract and serve summons.
47. The parties filed their respective submissions which the Court has carefully considered.
48. When a suit is filed, a Summons is issued to the defendant ordering him to appear within the time specified therein. Order 5, Rule 1(2) of the Civil Procedure Rules provides that summons are to be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
49. Further, Order 5 Rule 1(5) states that every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.
50. The Rules provide that the plaintiff ought to present the plaint together with a summons at the time of filing the suit. The next step is that the court will sign and seal the summons which will then be served upon the defendant(s). Initially the summons is valid for a period of twelve months.
51. In the present case, the 2nd plaintiff filed its plaint in E138 of 2018 on 14/11/2018 and an amended one on 14/3/ 2019. It however failed to extract and serve summons upon the defendants. The reason advanced is that previous advocates failed in their duty to do so.
52. Although there had been inordinate delay in extracting and serving the Summons, the Court cannot turn a blind eye to the fact that the defendants had participated in the applications filed in the same suit for a period of about 3 years.
53. The defendants have not denied that they were served with the principal pleading (Plaint) and the interlocutory applications. Not only did they respond to those applications but they actively participated their prosecution. At no time did they raise the issue of the Summons until the three suits were consolidated.
54. The parties actively participated in the suit leading the Court to think that the suit had not abated. Even if it had abated, with the consolidation order, the same was activated and revived and it merged with the other two 'live' suits. The defendants acquiesced to the state that the suit was still active and cannot now turn back and seek for its abatement.



55. The wording of Order 5 shows that the purpose of service of Summons is to enable the defendant to enter appearance. In this scenario, the defendants were not only aware of the suit but did considerably participate in the prosecution of interlocutory suits. It is not a scenario of them being unaware of the suit.
56. In *Paulina Wanza Maingi v Diamond Trust Bank Limited & another* [2015] eKLR, it was held: -
- “In my humble view, since the purpose of summons to enter appearance is to notify the defendant and or invite them to defend the suit, and the 1st defendant having filed a notice of appointment of advocates and statement of defence which was not even filed under protest, and six years having elapsed since this suit was instituted, it would be a travesty of justice to dismiss the suit for want of summons when the 1st defendant has actively been participating in the suit.”
57. This Court fully reiterates the foregoing in the present case. It would be a grave injustice to declare the 2nd plaintiff's suit void for want of Summons as the defendants were aware of the suit and participated in it during the three years of its existence.
58. It will be in the spirit of Article 159 of the constitution and Section 3A of the of the Civil Procedure Act to allow the 2nd plaintiff's suit to continue. Had it not been consolidated with the present suit, the Court would have allowed the extraction and service of the Summons out of time. No prejudice will be suffered by the defendants as opposed to that which will be suffered by the 2nd plaintiff. If the suit is abated. In this regard, the application is meritorious and is allowed.
59. Accordingly, the Court makes the following orders: -
- a. Due to the order of consolidation made on 5/7/2021, the parties shall henceforth be as set out in the heading of this ruling.
 - b. The application dated 16/7/2021 is dismissed.
 - c. The application dated 29/7/2021 is allowed and **Maryanne Jebet Kitany** is hereby enjoined as an interested party in this suit. She is to enter appearance and file and serve her defence within 14 days of the date hereof.
 - d. The application dated 10/8/2021 is hereby allowed and the service of summons by 2nd plaintiff is hereby dispensed with. The defendants do file and serve their defences within 14 days of the date hereof.
 - e. Parties to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF SEPTEMBER, 2021.

A. MABEYA, FCI Arb

JUDGE

