



**REPUBLIC OF KENYA**

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

**CIVIL DIVISION**

**HC. CIVIL CASE NO. 258 OF 2016**

**HON. NJERU GATABAKI.....PLAINTIFF**

**VERSUS**

**FAMILY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**CECIL MILLER**

**t/a MILLER & CO. ADVOCATES.....2<sup>ND</sup> DEFENDANT**

**ASHFORD MURIUKI**

**t/a ASHFORD MURIUKI ADVOCATES.....3<sup>RD</sup> DEFENDANT**

**AND**

**MRS. RACHEL MWIHAKI GATABAKI.....INTERESTED PARTY**

**RULING**

1. The Interested Party's Notice of Motion Application dated 11<sup>th</sup> of March 2021 is seeking for orders that:

- 1. Leave be granted to Mrs Rachel Mwhaki Gatabaki, the Interested Party herein to be added as a co-plaintiff in this suit.**
- 2. Leave be granted to Mrs Rachel Mwhaki Gatabaki to amend the Plaintiff.**
- 3. Cost be provided for.**

2. The application is premised on the grounds stated therein and the supporting affidavit. It is stated that the Applicant was joined herein as an Interested Party by the Plaintiff, that the Applicant has sufficient interest in the matter and has been participating as an Interested Party, that the Plaintiff and the Applicant are divorced and that the Applicant needs to pursue her own interest in the subject matter independently. It is further stated that it is equitable to allow the Interested Party to join the suit as a Plaintiff to enable her pursue her claim against the Defendants and that there would be no prejudice caused to the Plaintiff or the defendants if this Application is allowed.

3. It is further stated that the suit arises from monies that were held in a fixed deposit account number 0120xxxxxxx at Family Bank on Kenyatta Avenue in Nairobi. That the Applicant served the 1<sup>st</sup> Defendant with the court order preserving the account. That around December 2014, the Plaintiff and the Applicant agreed to share the monies together with the accrued interest equally. That unfortunately only some part of the money was available and the balance has never been paid to them.

4. Further, that the Applicant hired professional accountants to determine the interest that should have been yielded on the money held by the Defendants in a fixed deposit account and which formed the basis of the suit before court. That the time of filing the suit, the Plaintiff and the Applicant were cooperating and the Applicant was sure that she would have shared equally any amount that they court might decree but the situation has changed and she feels she needs to stand on her own.

5. It is stated in the replying affidavit, that the Applicant has not demonstrated necessity of being enjoined as a Co-plaintiff and that the Applicant's role as an Interested Party is sufficient to enable her to pursue her interests separately from the plaintiff. That the joinder of the

Applicant in the suit as a co-plaintiff will be solely dependant on the success of the Plaintiff's claim and further that the Applicant will still be bound by this honourable Court's finding.

6. It is further contended that the Applicant has not demonstrated any grounds as to why she believes that the decretal amount will not be shared as determined by this honourable court between the Plaintiff and the Applicant. That in addition, the Applicant has failed to demonstrate through any specific actions of the Plaintiff, that the Plaintiff intends to deprive the Interested Party of her share of the decretal sum in his suit and as determined by this honourable court.

7. It is further averred that if this application is allowed, it will only prolong the hearing and determination of this suit, which has been ongoing for the last five years now and will result to more delay in the course of justice. The Plaintiff contends that the Interested Party has the right to ensure that she gets her share of the decretal sum once this suit is determined and her share of the decretal amount is determined by this honourable court, if any.

8. Further, that the Applicant's Application lacks merit and fails to satisfy the requirements to be joined as a co-plaintiff as envisioned under Order 1 Rule 10 of the Civil Procedure Rules, and therefore should be dismissed with costs as it not in the interest of justice and expeditious determination of this matter, that the interested parties Application be allowed.

9. The 1<sup>st</sup> Defendant filed grounds of opposition and stated that the Interested Party has not disclosed any interest to warrant the joinder as a co-plaintiff, and further that the 1<sup>ST</sup> Defendant only had a contractual relationship with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants and not the Intersect Party. Further, that the Interested Party's claim, if any, is purely dependant on the success of the current Plaintiff's claim and that there is no evidence that has been adduced to show that the Plaintiff's claim is matrimonial property commonly owned by the Plaintiff and the Interested Party.

10. The 2<sup>nd</sup> Defendant was not opposed to the application.

11. The 3<sup>rd</sup> Defendant opposed the application. It is stated in the replying affidavit stated that the Applicant has no interest in fact or in law in the subject matter of this suit. Further, that the Applicant was never in the first place joined as an Interested Party herein and leave was never sought or order given to enjoin the Applicant as an Interested Party and that the court should strike out the name of the Applicant from the suit. Further, that the Applicant has no cause of action against any of the parties in the matter. That there is no party known as Interested Party under the Civil Procedure Act or rules, save and unless leave is sought and the court so orders upon ascertainment of the party's interest. That in the circumstances, the Applicant remains a stranger in the proceedings and urges the court to dismiss the Application with costs and proceed to order the name of the Applicant be struck out from the suit. That the said Application offends and contravenes the provisions of Order 1 of the Civil Procedure Rules and further that the joinder of the Applicant will embarrass, delay and complicate the issues in controversy in which the Applicant was not involved or privy to.

12. I have considered the application, responses thereof and the written submission filed by the Applicant.

13. As regards joinder of parties, Order 1 Rule 10 (2) of the Civil Procedure Rules states;

**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.**

14. In **Julius Meme v Republic & another [2004] eKLR** the Court of Appeal laid down the principles to be considered in determining whether to join a party or not as follows;

*“(i) Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;*

*(ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;*

*(iii) joinder to prevent a likely course of proliferated litigation.”*

15. To join a party or not is a discretion of the court. The court in **Habiba W. Ramadhan & 7 others v Mary Njeri Gitiba (2017) eKLR; Nairobi High Court ELC Case No. 119 of 2014** stated as follows:

*“As already observed by the Court, under **Order 1 Rule 10(2)** the Court has discretion to order joinder of any party to a suit at any stage of the proceedings so long as the presence of that party before the Court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions in dispute....”*

16. The Applicant states that she wishes to pursue her interest in suit independent of the Plaintiff since they have since divorced. It it stated that the Applicant has participated in the suit as an Interested Party and wishes to pursue her interests and ensure her rights are protected. From Meme v Republic above, a party will be joined if their presence will result in a complete settlement of the suit, or to ensure protection of the rights of a party who would otherwise be adversely be affected in law or to prevent a likely course of proliferated litigation.

17. The Plaintiff included the Applicant as an Interested Party in the suit during filing. This connotes that she had an identifiable interest in the suit. At paragraph 10 of the Plaint, the Plaintiff avers that he called the Interested Party to inform her of the fraud. At paragraph 12, of the

affidavit in support of the application, it is averred that the Interested Party hired professional accountants to determine the interest accrued. At paragraph 14, it is averred that the Interested Party served a Court Order on the 1<sup>st</sup> Defendant. There is also a consent dated 24<sup>th</sup> December 2014 that confirms the equal sharing of the suit amount. The Applicant therefore has a right to protect.

18. It is stated that the Applicant can still protect her interest as an Interested Party. I am guided by the decision of the Supreme Court in **Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR** where it held;

*“Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court.”*

19. It is therefore clear that as an Interest Party, the Applicant’s powers are limited and cannot raise a fresh issue. It is only fair that such a person be made a co-plaintiff and not an Interested Party with limited powers in court and to be represented by a person with equal stake.

20. The 3<sup>rd</sup> Defendant raised the issue of the Applicant being included in the suit as an Interest Party unprocedurally. To answer this, I am persuaded by the court’s observation in **John Harun Mwau v Simone Haysom & 2 others; Attorney General & 2 others (Interested Parties) [2021] eKLR** where it was stated that;

**“From the court record, it is evident that there was no leave of court sought by the Interested Party to be enjoined in this suit. It is the plaintiff/respondent who joined the interested party to these proceedings *suo motto*. I do agree with the submissions of the Defendants/Applicants that the participation of the interested parties herein from the commencement of the suit without leave of court is to some extent unprocedural. However, i associate with the reasoning of Mwongo J in Kenya Ports Authority V Kenya Power & Lighting Co. Limited (2012) eKLR that procedural technicality is a lapse in form that does not go to the root of the suit. The 1st, 2nd and 3rd interested parties have not objected to being enjoined in the suit and they have even filed Replying Affidavits in opposition. Further, recent trends have shown that interested parties can be enjoined when the suit is filed in court and are part of the original pleadings”**

21. With the foregoing, I find the application is merited and it is hereby allowed as prayed. Costs in cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPT., 2021**

**B. THURANIRA JADEN**

**JUDGE**