



**Kirika v Njiru & 5 others; National Co-operative Housing Union Limited (NACHU) (Interested Party) (Insolvency Petition E071 of 2021) [2021] KEHC 392 (KLR) (Commercial and Tax) (22 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 392 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
INSOLVENCY PETITION E071 OF 2021  
DAS MAJANJA, J  
DECEMBER 22, 2021**

**BETWEEN**

**JOHN KIREEINI KIRIKA ..... PETITIONER**

**AND**

**BENARD KIARIE NJIRU ..... 1<sup>ST</sup> RESPONDENT**

**ESTATE OF THE LATE STEPHEN THUKU MUNGARA ..... 2<sup>ND</sup> RESPONDENT**

**ESTATE OF THE LATE JAMES KAMAU THIONGO ..... 3<sup>RD</sup> RESPONDENT**

**MARGARET WANJIRU NGENGA ..... 4<sup>TH</sup> RESPONDENT**

**ESTATE OF THE LATE PETER GICHERU MUTHIORA ..... 5<sup>TH</sup> RESPONDENT**

**NEW PILION ESTATES LIMITED ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**NATIONAL CO-OPERATIVE HOUSING UNION LIMITED  
(NACHU) ..... INTERESTED PARTY**

**RULING**

1. The Proposed Interested Party, the National Co-operative Housing Union Limited (“NACHU”), has filed the Notice of Motion dated 9<sup>th</sup> December 2021 made, inter alia, under Order 1 Rules 3 and 10 of the Civil Procedure Rules (“the Rules”) seeking leave to be joined to the suit as an interested party. The application is supported by the affidavit sworn on 9<sup>th</sup> December 2021 by NACHU’s Chief Executive Officer and Secretary to the Board of Directors, Mary W. Mathenge. It is also supported by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents (“the Respondents”) through the Replying Affidavit of Anthony Waweru



Kamau, one of the directors of the 6<sup>th</sup> Respondent (“the Company”) sworn on 9<sup>th</sup> December 2021. The application is opposed by the Petitioner through the Grounds of Objection dated 14<sup>th</sup> December 2021 and his affidavit sworn on even date.

2. It is common ground that on 17<sup>th</sup> November 2021, the Petitioner filed the petition to liquidate the Company citing and alleging amongst other grounds mismanagement by the 1<sup>st</sup> Respondent, a deadlock due to a complete breakdown in the relationship among the shareholders, failure and/or refusal to comply with statutory and regulatory requirements, exclusion of the Petitioner from the management and running of the Company and the sale of the Company’s only asset known as LR No. 11295 (“the suit property”) to NACHU.
3. NACHU is a registered apex membership organization comprising of registered Housing Societies as its members on whose behalf it acquires properties for onward marketing/sale to the members and the public at large. By an Agreement for Sale dated 30<sup>th</sup> March 2021 as varied on 31<sup>st</sup> August 2021, the Company agreed to sell the suit property situated in Ruiru/Juja to NACHU for a sum of about KES. 3.21 Billion with the tentative completion date being 31<sup>st</sup> May 2022.
4. When the Petitioner filed the petition, it also filed the application dated 16<sup>th</sup> November 2021 seeking among other orders, an injunction to restrain the ongoing sale. On the 3<sup>rd</sup> December 2021, I did grant orders restraining the sale or disposal of the suit property pending the hearing and determination of the application or until further orders of this court. It is on the basis of this ongoing transaction and presumably the interim injunction that NACHU now seeks to be joined to this suit as an interested party.

#### The Submissions

5. NACHU claims that it is an innocent purchaser for value and has a legitimate, identifiable, sufficiently proximate or direct stake herein and adequate grounds to warrant a joinder to this suit in order to articulate the gravity of its situation and to assist in a just and fair resolution of this cause. It contends that there are sufficient reasons to allow this application and it is only fair that it is joined to the petition.
6. The Respondents support NACHU’s position by stating that NACHU stands to lose immensely both in terms of money and reputation by the existence of these proceedings and the continuation this Court’s orders dated 3<sup>rd</sup> December 2021.
7. The Petitioner opposes the application for joinder by stating that NACHU has not demonstrated sufficient grounds for it to be joined in the suit nor has it raised sufficient grounds for the Court to exercise its discretion in his favour. He submits that NACHU only seeks joinder on grounds of contractual obligations and rights set out in a contract for sale of the suit property which is void ab initio, illegal and unenforceable, and which the NACHU themselves have not complied with. The Petitioner avers that NACHU’s interest in the insolvency of the Company is not proximate enough to justify its joinder and that as a purchaser of one of the Company’s assets, the insolvency process in the hands of a liquidator or administrator will take care of the NACHU’s interest together with other persons claiming any interests in the Company assets.
8. The Petitioner further argues that NACHU is neither a creditor nor a contributory or shareholder in the Company and its interest is peripheral to the interests of the Company and its shareholders and that NACHU should not be allowed to obfuscate the insolvency process. The Petitioner further deposes that NACHU has not demonstrated to the court what prejudice, losses or damages, it would suffer in case of non-joinder. In short, he claims that the matters in the insolvency proceedings do not concern or involve NACHU.



## Analysis and determination

9. The main issue for the court's determination is whether NACHU should be allowed to join this suit as an interested party. Order 1 Rule 10(2) of the Rules, grants the Court 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. In *Pravin Bowry v John Ward & Another NRB CA Civil Appeal No. 70 of 2009 [2015] eKLR* the Court of Appeal adopted with approval the decision in *Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A 55 (SCU)* where the Supreme Court of Uganda observed that:

A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter....

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.

10. Likewise, the Supreme Court, in *Francis Kariuki Muruatetu & Another v Republic & 4 Others SCK Petition No. 16 of 2015 [2016] eKLR*, summarised the following principles regarding the joinder of interested parties which are relevant to this case:

- (i) Personal interest and/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 nearly 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 replica of what the other parties will be making before the court.

11. I have considered NACHU's application alongside the principles I have recited and I am satisfied that it deserves a seat in this suit for the following reasons. First, as the intended purchaser of the Company's only asset, it has an identifiable and direct stake in the insolvency proceedings of the Company as the transaction's performance and completion depends on it. NACHU also faces a reputational stake in the suit as the Petitioner has already imputed impropriety on NACHU's part and it is only fair and just if NACHU is allowed to give its side of the story. Second, any order against the Company in the insolvency proceedings will more or less affect the sale transaction and if NACHU is not given an opportunity to be heard, it stands to suffer prejudice. Third, NACHU has demonstrated the case



it intends to put forth before the court. Some of the issues it intends to raise are the doctrine of res judicata and res sub judice which go to the root of the proceedings in relation to the suit property. Last, I find that the Petitioner will not suffer any prejudice if NACHU is joined to these proceedings as an interested party. If anything, its presence will help the court effectually and completely adjudicate upon and settle all questions in dispute and determine whether the Petitioner has made out a case in respect of the sale of the suit property.

#### Conclusion and disposition

12. In conclusion I hold that NACHU, the proposed interested party, is a necessary party to this suit whose presence before court is required to enable the court to effectively and conclusively adjudicate on the matters in question. It is therefore joined to these proceedings as an interested party.
13. I have only dealt with one aspect of the interested party's application and having regard to the fact that there are other applications and a preliminary objection pending resolution, I now order as follows:
  - 1) The Application dated 9<sup>th</sup> December 2021 is allowed to the extent that the National Co-operative Housing Union Limited (NACHU) be and is hereby joined to these proceedings as an interested party.
  - 2) The Petitioner's application dated 16<sup>th</sup> November 2021, the Respondents' Notice of Preliminary Objection dated 8<sup>th</sup> December 2021 and Notice of Motion dated 9<sup>th</sup> December 2021 and the remainder of the Interested Party's application dated 9<sup>th</sup> December 2021 relating to the grant of an injunction pending the hearing and determination of the petition shall be heard together and I shall upon delivery of this ruling give directions for their disposal.

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

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr. M. Onyango.

Mr Kamara with him Ms Kiama instructed by P. K. Kamaara and Associates Advocates for the Petitioner.

Prof Kindiki with Ms Thairu instructed by M. W. Thairu and Company Advocates for 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents.

Mr Kamonjo instructed by Kaingati Kamonjo and Company Advocates for the 2<sup>nd</sup> Respondent

Mr Mwangi with him Ms Adera and Mr Maweu instructed by Adera and Company Advocates for the Proposed Interested Party.

