



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**COMMERCIAL & TAX DIVISION**  
**HIGH COURT CIVIL CASE E272 OF 2019**

**EQUITY BANK LIMITED .....PLAINTIFF**

**VERSUS**

**DAYTONS VALUERS LIMITED.....DEFENDANT**

**RULING**

**BACKGROUND**

By Plaint filed on 5<sup>th</sup> September 2019, the Plaintiff instructed the Defendant on 19<sup>th</sup> September 2015 to inspect and conduct professional valuation on suit property **Title Kabete/Karura/2059** and the Defendant delivered the Report on 21<sup>st</sup> September 2015.

The Valuation Report indicated the suit property **Kabete/Karura/2059** measuring 0.2040 hectares was valued at Ksh 55,000,000/- together with improvements. These developments included, a 3 storey block of flats of 15 Units of 3 bedrooms each fully occupied with total rental income of Ksh 402,000/- monthly.

In total violation and breach of the said contract, the Defendants overvalued the suit property Kabete/Karura/2059. The Valuation report was used the basis upon which the Plaintiff advanced loan facility to East Africa Data Handlers Limited and charged the suit property.

**APPLICATION**

The Defendant filed Notice of Motion of 4<sup>th</sup> December 2019 brought under **Order 1 Rule 10 (2) Order 51 CPR 2010 Section 1A & 3A CPA** and sought the following orders;

- a) That an Order be issued to add East Africa Data Handlers Limited and John Ngugi Wanjiru to be joined as Defendants to this suit.
- b) That the Plaintiff be ordered to produce to the Defendant
  - i. East Africa Data Handlers Ltd Loan Application Request
  - ii. Letters of Offer of 17<sup>th</sup> September 2015 & 8<sup>th</sup> April 2018
  - iii. Plaintiff's Credit Policy & Analysis Report

- iv. All Valuation Reports over suit property Kabete/Karura/2059
- v. Title Document of Kabete/Karura/2059
- vi. Plaintiff's Official Search Report on suit property Kabete/Karura/2059
- vii. Loan Account Statement for East Africa Handlers Limited.

The Application was supported by the Applicant's affidavit whose gist discloses that John Ngugi Wanjiru was the Defendant's former employee whose employment was terminated. John Ngugi Wanjiru conducted valuation of suit property **Kabete/Karura/2059** and admittedly, he conjured a 3 storey block of flats whereas on the ground was 1 maisonette on the suit property.

The Applicant sought the said East Africa Data Handlers Ltd assuming its Directors who were offered by the Plaintiff Bank a loan facility with the suit property **Kabete/Karura/2059** as security and thereafter defaulted in servicing the loan ought also to be joined to this suit.

The Plaintiff filed on 2<sup>nd</sup> March 2020, Grounds of Opposition to the instant application objecting to grant of the sought orders. The gist is that the Plaintiff's claim against the Defendant is based on breach of contract entered between parties and Professional negligence against the Defendant arising from undertaking valuation of the suit property **Kabete/Karura/2059** and exaggerating the value of the property.

The Plaintiff deposed that it is at liberty to choose which party to sue and what its cause of action is. It is the Defendant who brought up fraud as a cause of action which it may pursue against the intended parties in separate proceedings.

The Documents sought to be produced by the Plaintiff relate and belong to 3<sup>rd</sup> Parties who are not part of these proceedings yet and releasing the same would amount to infringement of their right to privacy.

The Defendant filed Supplementary Affidavit on 13<sup>th</sup> March 2020. The Defendant asserted that the Plaintiff's cause of action is loss allegedly suffered due to its customer defaulting on loan repayments.

The Defendant stated that joining these parties will help the Court understand better the pertinent underlying issues and to answer many suspicious happenings.

The Defendant should not be held liable for criminal and fraudulent activities of its agents which in the interest of justice, the concerned party should be enjoined to answer to the same.

Whereas the Plaintiff is at liberty to choose which party to sue the Court has power and mandate to order any person to be joined to the proceedings to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

## **DETERMINATION**

The Court considered pleadings and submissions by Counsel on behalf of each party as follows;

**The Plaintiff relied on; Joseph Leboo & 2 Others vs Director of Forest Services & Anor [2013] eKLR, where Munyao J. stated;**

***“I think courts need to be careful before making an order for a person to be joined as a defendant where the application for that joinder is not emanating from the plaintiff. This is so as to avoid thrusting upon the plaintiff a party against whom the plaintiff does not intend to sue, or the plaintiff feels he has no cause of action against, or even if he does, has opted not to pursue the action. It is important, unless there will be great prejudice to***

***an existing party, or a clear lacunae in the proceedings, for courts not to seem to be choosing a defendant for the plaintiff to sue. This is because the choice of whom to sue is that of the plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons. Even, in the absence of any reason, the choice to sue ought to be left to the litigant and this choice ought not to be disturbed without the presence of compelling reasons.***

See also *Marigat Group Ranch & 3 Others vs Wesley Chepkoimet & 19 Others [2014] eKLR*, it was held;

***“In this case, the plaintiffs have made a choice on whom to sue. They have chosen to sue the 20 persons named as defendants. They have sued them because they say that it is these 20 persons who are trespassers. .... That is their view of the matter and I think that view needs to be respected.”***

In *Evanson Waitiki vs Kenya Power & Lighting Co Ltd [2018]eKLR*, on the joing of 3<sup>rd</sup> Parties to the suit.

***“If the defendant thinks it has a claim against the proposed parties, it can pursue those 3<sup>rd</sup> party proceedings against them....”***

The Defendant relied on; *Technomatic Ltd t/a PromopackCovs Kenya Wine Agencies & Anor [2014]eKLR*; Havelock J. in analysing **Order 1 rule 10 (2)**, established that the guiding principles when an intending party is to be joined to a suit are;

***i) He must be a necessary party.***

***ii) He must be a proper party***

***iii) In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.***

***iv) The ultimate order or decree cannot be enforced without his presence in the matter.***

***v) His presence is necessary to enable the court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”***

In *Werrot & Co Ltd & 3 Others vs Andrew Douglas Gregory & 2 Others [1998]eKLR* Ringera J. stated;

***“for determining the question who is a necessary party there are two tests;***

***i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and***

***ii) It should not be possible to pass an effective decree in the absence of the party.....”***

See Also *Amon vs Raphael Tuck & Sons Ltd(1956) 1All ER 273, cited in Pizza Harvest Limited vs Felix Midigo [2013]eKLR*, Devlin J. Held;

***“what makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that the has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately....the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should***

**be bound by the result of the action which cannot be effectually and completely settled unless he is a party.”**

See also **Joseph Njau Kingori vs Robert MainaChege & 3 Others High Court Eldoret Civil case 136 of 2000**, all on who necessary parties are.

The Defendant submitted as follows;

The Defendant relied on **Article 35(1) COK 2010** on right to information as sought in the application.

The Defendant relied on **Order 7 Rule 5 (d) CPR 2010** that a Defence ought to be filed with all documents to be relied on.

This Court is guided by **Order 1 Rule 10 (2) CPR 2010**, which provides the Courts discretion in joining 3<sup>rd</sup> Parties to proceedings as follows;

***(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.***

The Defendant relied on the following provisions to justify why its defence has not been filed within the requisite period/to date, **Order 7, rule 1 CPR**;

***Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.***

**Order 7 Rule 5 (d) CPR** provides;

***The defence and counterclaim filed under rule 1 and 2 shall be accompanied by-***

***(d) copies of documents to be relied on at the trial.***

This Court finds that the Defendant Applicant's application to join 3<sup>rd</sup> Parties premature at this stage because;

a) The Defendant failed to comply with **Order 7 Rule 1 CPR** as outlined above. The Defendant ought to have filed a Defence within the requisite statutory period and served the Plaintiff.

The Requirement to file Defence after service within 28 days from filing suit (14 days to enter appearance and 14 days to file and serve defence) thereafter is couched in mandatory terms and not qualified that if and when a party obtains all relevant documents then a party may file the Defence.

The Defendant/Applicant relied on **Order 7 Rule 5 (d) CPR** that allows the Defence to be filed with all documents to be relied on.

A reading of the said provision relates to filing of Defence and Counterclaim. A Counterclaim is a separate suit and would logically involve documents relevant to establishing the suit to be annexed. This would enable the Plaintiff to know at the earliest the suit against him/them.

Secondly, **Order 8 CPR** grants amendments to pleadings by parties any time before judgment. The Defendant retains opportunity to amend pleading as and when relevant documents are availed with leave

of Court even after filing defence.

**Order 50 R 6 CPR** allows enlargement of time to comply with CPR Rules which would include leave to file relevant documents if and when they are available.

**Order 11 Rule 3 & 5 CPR** provide for Pre-Trial/Case Conference where parties/Counsel agree before Case Managers the Lists of Witnesses, Witness Statements, Bundle of Documents, Expert(s) Reports, Interlocutory Applications etc, before the hearing of the suit commence. It is at this stage that Notice to produce documents and/or Notice to examine a Witness, application if need be would be appropriately made.

From the above provisions of the law that grant a party to file documents/amend pleadings even after filing plaint or defence or any application, the Defendant had no legal basis not to file defence within the requisite period.

The Defendant ought to have filed defence within the statutory period with documents available at the time and reserve the right to produce other documents at the Pre-Trial Conference or in Court before or during the hearing of the suit with leave of the Court.

The Court notes that some of the documents sought by the Defendant are already availed by the Plaintiff in Plaintiff's List of Documents annexed to the Plaint.

**b) On whether to join 2 parties East Africa Data Handlers & John Ngugi Waweru; the Court considers;**

### **Order 1 Rule 3 CPR**

#### **3. Who may be joined as defendants [Order 1, rule 3.]**

***All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.***

As Case-law considered above dictates, the Plaintiff reserves the right to sue the relevant party whom relief is sought from. In the instant case the Plaintiff sued the Defendant for alleged professional negligence arising out of a contract to provide valuation of suit property **Kabete/Karura/2059**. The Plaintiff alleged the suit property overvalued and therefore exposed the Plaintiff to risk and financial loss. The Plaintiff alleges particulars of breach of contract and of professional negligence against the Defendant. The cause of action cannot possibly include/relate to the intended 3<sup>rd</sup> Parties East Africa Data Handlers & John Ngugi Maweru sought to be joined as they had/have no privity of contract with the Plaintiff. The applicant did not provide details of East African Data Handlers Limited who are the Directors and their whereabouts or their nexus to the Plaintiffs claim/cause of action. What is their nexus to this matter are they necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit? As per the cases cited ***Joseph Leboo & Marigat Case*** supra, the plaintiff ought to choose the Defendants to sue.

The Defendant alluded to East African Handlers Limited breach and/or default to service the advanced loan facility is what generated the current claim against it. The loan facility was given to the Plaintiffs customers upon fulfilling conditions which included providing security which was Kabete/Karura/2059. The value of the suit property on paper was sufficient to serve the recovery of loan by virtue of the value indicated in the valuation Report. The Plaintiff could not realize the value from the property upon exercise of statutory power of sale as on the ground was 1 maisonette and not 3 storey block of 15 flats as described in the Valuation Report. Therefore, the valuation Report contained misrepresentation of the suit property and increased its value contrary to its real value. The East Africa Handlers Limited are liable for not servicing the loan which is not the dispute here and not overvaluing the suit property.

The Plaintiff may pursue in separate proceedings against East African Handlers Limited in default of the Loan Facility of Ksh 15,000,000/- and 2<sup>nd</sup> Loan 19,000,000/- which were based on the suit property **Kabete/Karura/2059** alleged to house developments of block of flats 15 units of 3 bedrooms each and on the ground was a maisonette and detached servant quarters.

The inflated value of the suit property in the Valuation report of Ksh 55,000,000/- was not drawn and signed by the beneficiary of the Loan Facility.

With regard to John Ngugi, he was an employee of the Defendant who is said to have undertaken the valuation of the suit property **Kabete/Karura/2059** and was terminated for gross misconduct, for over valuation of the suit property. The Defendant alluded to have reported the matter to Police, what transpired and whereabouts of the said employee were not disclosed.

If these were criminal proceedings definitely, the said Intended 3<sup>rd</sup> parties would be directly involved but these are civil proceedings where the Plaintiff relies on a contract with the Defendant and claims professional negligence. To join the 2 intended 3<sup>rd</sup> Parties would necessitate the Plaintiff to amend the Plaintiff and coin/curve a new cause of action as presently there would be no relief flowing from the new Defendants to the Plaintiff.

The Defendant reserves the right to institute separate proceedings against the 2 intended Defendants or call any or both of them as Defence Witnesses during hearing of the Plaintiff's suit *interpartes*.

**c) Should the Plaintiff avail the listed documents to the Defendant?**

**Article 35COK 2010 provides; Access to information**

***(1) Every citizen has the right of access to-***

***(a) information held by the State; and***

***(b) information held by another person and required for the exercise or protection of any right or fundamental freedom***

**Article 31 Constitution of Kenya, provides;**

***Every person has the right to privacy, which includes the right not to have—***

***(a) their person, home or property searched;***

***(b) their possessions seized;***

***(c) information relating to their family or private affairs unnecessarily required or revealed; or***

***(d) the privacy of their communications infringed.***

The Constitution protects the Defendant's right to access to information and at the same time a person's right to privacy. These are competing rights, the Plaintiff bank cannot divulge personal information submitted to it for its own use and contains confidential information and the Plaintiff releases it/them to another party without their knowledge approval or consent. It would amount to infringement of right to privacy.

Whereas the Defendant is also entitled to access to information, to the extent the information relates to 3<sup>rd</sup> Parties and not the Plaintiff, the Defendant ought to rightfully and legally pursue such information from the source directly.

**DISPOSITION**

- 1. The Defendant/Applicant's application filed on 4<sup>th</sup> December 2019 is dismissed with costs to Plaintiff**
- 2. The suit be processed in the normal legal process by the parties.**

**DELIVERED SIGNED & DATED IN OPEN COURT ON 28<sup>TH</sup> AUGUST 2020 (VIDEO CONFERENCE)**

**M.W. MUIGAI**

**JUDGE**

**IN THE PRESENCE OF;**

**J.K KIBICHO & CO. ADVOCATES FOR PLAINTIFF – N/A**

**WAWIRA GACHOKI & CO. ADVOCATES FOR DEFENDANT– N/A**

**COURT ASSISTANT - TUPET**