



**REPUBLIC OF KENYA**

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

**CIVIL APPEAL NO. 637 OF 2017**

**SAMUEL MUTAHI GATHOGO T/A VALLEY AUCTIONEERS.....APPELLANT**

**-VERSUS-**

**AUCTIONEERS LICENSING BOARD.....RESPONDENT**

**AND**

**WILL DEVELOPERS & CONSTRUCTION**

**LIMITED.....INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

1. The Notice of Motion dated 17<sup>th</sup> October, 2018 is brought by the intended interested party (hereinafter referred to as “*the applicant*”). The same is supported by the grounds set out on the body thereof and the affidavit of *Purity Makori*. The following orders are sought therein:

***i) THAT Will Developers & Construction Limited be enjoined in the appeal as an interested party.***

***ii) THAT this Honourable Court be pleased to issue directions for service of all pleadings herein on the intended interested party.***

***iii) THAT the costs of the application and suit be provided for.***

2. In her affidavit, *Purity Makori* stated that the applicant had previously lodged a professional misconduct complaint before the respondent under Disciplinary Cause No. 36 of 2016; that in allowing the complaint, the Appellant was fined sum of Kshs.50,000/= together with costs amounting to Kshs.20,000/=. That the appellant, being dissatisfied with the aforesaid decision, has now appealed to this court but has not included the applicant as a party to the appeal and yet the applicant stands to be affected by the outcome on appeal.

3. In response thereto, the appellant filed Grounds of Opposition, by and large arguing that the appeal is derived from the decision rendered by the respondent and hence the relevant parties are solely the appellant and respondent; that the application is defective for failure to comply with Order 1, Rule 10 (2) of the Civil Procedure Rules; that there is neither a cause of action nor relief(s) that stands to flow from the appellant or respondent to the applicant and in any case, the decree is enforceable without the applicant’s involvement in the appeal and hence, the applicant is not a necessary party.

4. The parties made oral arguments with *Miss Makori* advocate for the applicant leading. *Miss Makori* essentially submitted that the applicant ought to be enjoined in the proceedings by virtue of the fact that the decision by the respondent was in favour of such applicant in the sense that costs were awarded to the applicant.

5. In his rival submissions, *Mr. Wawire* holding brief for *Mr. Mueke* counsel for the appellant, contended that according to Order 1, Rule 10 (2) of the Civil Procedure Rules the court bears the discretion to enjoin any party necessary to the suit and that it is therefore only the court or a party to the proceedings who can apply to enjoin another. The case of *Technomatic Limited t/a Promopack Company v Kenya Wine Agencies Limited & Another [2014] eKLR* was cited. The Respondent argued that the applicant is not a proper and necessary party for joinder, and will only delay the conclusion of the appeal. Counsel added that the applicant has no role to play in the appeal.

6. In her response, *Miss Makori* maintained that since the applicant was the complainant in the proceedings before the respondent and costs were awarded to it, this court should take judicial notice of this in finding that the applicant is a necessary party.

7. I have duly considered the grounds articulated in the Motion and affidavit in support thereof; the Grounds of Opposition together with the rival oral submissions. I first wish to address the argument raised by the appellant as concerns *Order 1, Rule 10 (2)* of the Civil Procedure Rules. The aforesaid provision expresses the following:

***“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.”***

8. The above statutory provision bestows upon the courts the discretion to either have a party improperly before it struck out from the proceedings or have a necessary party enjoined in the proceedings, irrespective of whether or not an application has been made in that respect. This is in turn backed by *Rule 7 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* providing that a person can seek leave of the court either orally or by way of a formal application to be enjoined as an interested party. While noting the appellant’s argument to the effect that only the court or a party to the proceedings can seek to enjoin another, I do not find this position to be tenable and more so in view of *Rule 7 (1)* cited above, which enables a party wishing to be enjoined as an interested party to apply accordingly.

9. Having established the above, it is upon me to now address the substantive prayer on whether or not the applicant should be enjoined in the appeal as an interested party. Various attempts have been made at defining the relevant term. For instance, *Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013* has taken the following definition:

***“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.”***

10. Similarly, the case of *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others [2017] eKLR* draws from the Black’s Dictionary 9<sup>th</sup> edition definition of the term as follows:

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

11. That said, it is imperative that I consider the principles encompassing enjoinder of an interested party. These were well elaborated in the Supreme Court decision of *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others & Michael Wainaina Mwaura (as Amicus Curiae) [2017] eKLR* wherein reference was made to *Francis Kariuki Muruatetu & Another v Republic & 5 others Petition 15 as consolidated with 16 of 2013 [2016] eKLR* in this sense:

***“One must move the Court by way of a formal application. Enjoinder is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:***

***(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.”***

12. The elements stated hereinabove were reiterated in the *Kenya Medical Laboratory Technicians and Technologists Board* case (supra). In relation to the first principle, I have perused the availed copy of the impugned decision delivered by the respondent and noted that one Johnson Mwanzia Wambua is indicated as being the complainant in that instance. Nonetheless, upon further perusal of additional relevant documents, I have established that the said complaint before the respondent involved both the applicant and appellant herein and that the subject matter was premised on facilities advanced to the applicant through its directors. Furthermore, it is well noted that the aforesaid Johnson Mwanzia Wambua is said to be a director of the applicant. I am also alive to the fact that the appeal is against that very decision. In light of the foregoing, I am convinced that the applicant has a legal stake or interest in the matter, being not only a proper party but a necessary one for that matter.

13. In respect to the second principle, it was the applicant’s simple submission that the outcome of the appeal will affect it one way or another since the appellant seeks to set aside the decision entered in favour of the applicant and in which the applicant was awarded costs. I am in agreement that the applicant stands to be prejudiced if the appeal is heard in its absence. Owing to the fact that it was a party to the proceedings before the respondent and that these proceedings were of a disciplinary nature, it would be in the interest of justice for the applicant to be granted the opportunity of participating in the appeal if it so wishes. In finding so, I am persuaded by Honourable Justice John Mativo’s analysis in *Kenya Medical Laboratory Technicians and Technologists Board* (supra).

14. The upshot is that the Motion is meritorious and I will allow prayers (i) and (ii) of the same. I further order that a copy of the record of appeal and other requisite documents be served upon the applicant within fourteen (14) days from the date hereof, following which parties are to take directions on the appeal. Costs shall abide the outcome of the appeal.

**Dated, signed and delivered at NAIROBI this 21<sup>st</sup> day of February, 2019.**

**L. NJUGUNA**

**JUDGE**

**In the presence of:**

..... for the Appellant

..... for the Respondent

..... for the Intended Interested Party