

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1262 OF 1997

JACOB MARIANUS KIRIAMA PLAINTIFF/APPLICANT

VERSUS

KENYA CO-OPERATIVE

CREMERIES LTD 1ST DEFENDANT/RESPONDENT

NEW KENYA CO-OPERATIVE

CREAMERIS LTD ...PROPOSED 2ND DEFENDANT/RESPONDENT

RULING

The plaintiff herein has a judgment in his favour delivered on 1st July, 1999. To date that judgment has not been executed and the reasons would appear to be what the present application is based on. The plaintiff has filed an application by way of Notice of Motion to join the proposed 2nd defendant in this suit for purposes set out in the application dated 4th June and filed on 2nd July, 2018.

The application seeks to have the decree amended to read the 2nd defendant and notice to show cause why the said decree should not be executed against it. There are several grounds that have been set out on the face of the application alongside a replying affidavit sworn by the co-administrator of the estate of the plaintiff who passed on before the decree was executed.

The application is opposed and there is a replying affidavit sworn by the Acting Company Secretary of the proposed 2nd defendant. This was followed by a supplementary affidavit sworn by the co-administrator aforesaid. The parties have filed extensive submissions and cited several authorities which I have gone through.

On reading both the submissions and the authorities, I am persuaded that there are two limbs to the application which may not be decided currently in this ruling. The first limb is whether or not the proposed 2nd defendant should be joined as a party in this matter and the second is whether or not, after the said joinder, execution should be levied against it. I say so because, in the second limb there are several issues that stand out and may not be determined in an application of this nature. The applicant submits that the proposed 2nd defendant took over the assets and liabilities of the 1st defendant herein.

If that be the case, then the decree should be addressed to it for purposes of execution. For the issues to be ventilated to the satisfaction of the parties, I note that notwithstanding several technical issues that have arisen, *prima facie* evidence points to the fact that the proposed 2nd defendant took over the operations of the 1st defendant. That alone requires it to be cited in these proceedings.

On whether or not liabilities of the 1st defendant were taken over by the proposed 2nd defendant, this is a contested issue which may not be determined by affidavit evidence. I believe the averments by the respective deponents and the documents presented should be subjected to oral interrogation and tested by way of cross-examination. To take any other path may lead to prejudice and injustice to the parties. This is not an application for execution and that is why I believe such a step is necessary.

In view of the foregoing, the 2nd defendant is hereby joined as a party to these proceedings. The Judge who will be seized of this matter shall give directions as to the mode of hearing after the issues have been filed and crystallised by the parties for determination. As this is a very old case, parties should identify issues for determination within 30 days from the date hereof and appear before the Deputy Registrar on 20th January, 2020 to confirm compliance. The costs shall be in the cause.

Dated, signed and delivered at Nairobi this 19th Day of December, 2019.

A. MBOGHOLI MSAGHA

JUDGE