



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI HIGH COURT

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 79 OF 2015

THE BOARD OF TRUSTEES, KENYA ENTREPRENEURSHIP

EMPOWERMENT FOUNDATION.....PLAINTIFF

VERSUS

MYC4.....DEFENDANT

AND

JOEL THAMU CHEGE ON HIS OWN BEHALF & ON THE BEHALF OF

ALL THE MEMBERS & BENEFICIARIES OF KENYA ENTREPRENEURSHIP

EMPOWERMENT

FOUNDATION.....INTENDED INTERESTED PARTIES/APPLICANT

RULING

1. For determination by the Court was the application dated 30th April 2015, filed on 4th May 2015. The application was brought under the aegis of Order 40 Rules 2, 3 & 4 and Order 50 Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicants sought the following prayers *inter alia*;
 1. *Spent.*
 2. ***THAT the Applicants be enjoined in this matter as Interested Parties;***
 3. ***THAT the Respondents do furnish within seven (7) days security for the Applicant's costs to the satisfaction of this Honourable Court or at the sum of Kshs 35,991,133/-.***
 4. ***THAT the Defendant/Respondent and agents, its subsidiaries or any person acting on their behalf be and is hereby prohibited by way of an injunction from harassing, intimidating, or in any other way demanding any funds from the Applicants through newspapers advertisements and notices, phone calls and/or text messages or other means whatsoever.***

2. The application was predicated upon the grounds that the Defendant had been harassing, and in an illegal and unlawful manner, demanding payment from the Applicants when there was no contractual obligation to them, that they stood to suffer if their interests as Interested Parties through enjoining to the suit was not considered and that, the Defendant was a foreign Company incorporated in Denmark, with no permanent offices in Kenya and would therefore, if not compelled to deposit security for costs, be unable to have an award enforced against them. Further, and in support of the application, the Applicants filed an affidavit deponed on even date. Therein, it was deposed to that the Defendant, through newspaper advertisements and text messages, demanded for the repayment of the loan facilities extended to them by the Plaintiff be made to them directly and/or through their agents, failure to which further repayments made would not be credited to the loan amounts. It was further deposed to that the demands made by the Defendant was illegal and unlawful, and therefore, sought to estop the Defendant from making such demand, and, that such demands put a risk on the Applicants' savings with the Plaintiff.
3. The Defendant filed its submissions dated 27th November 2015 on 1st December 2015. Reference was made to a Replying affidavit in objection to the application by the Applicants dated 30th April 2015. Further, in Court on 3rd February 2016, the Defendant stated that it had filed both its Witness Statement and Replying Affidavit in opposition of the said application. Unfortunately, there is no record of either the Witness Statement nor the Replying Affidavit referred to by the Defendant. In the circumstances, the Court would consider, albeit reservedly, the submissions filed by the Defendant, as testimony in objection to the application by the Applicants.
4. With regards to prayer (2) of the application, the Applicants sought to be enjoined as Interested Parties to the suit for the reasons that; (a) they were privy to the suit and (b) that the Defendant had made demands from them for the repayment of loan facilities that had been extended to them by the Plaintiff. Further, it was heard that the Defendant, by itself and/or through its agents, had demanded from the Applicants the repayment of loans that had been facilitated to them through the Plaintiff, by (1) short message service or SMS and (2) through notices in the newspapers, more particularly on 27th April 2015. They deemed these demands as illegal and unlawful, and sought this Courts intervention by, firstly, being enjoined in the suit as Interested Parties, secondly, for orders for security for costs, and thirdly, for the Defendant to be estopped from making any or further demands for repayment of loan facilities. They relied upon the provision of Order 1 Rule 10(2) of the Civil Procedure Rules.
5. However, these were not the provisions that they relied upon as the basis of their application. In consideration of Article 159(2)(d) of the Constitution, as read together with Article 50 thereof, the Court would consider, in so far as the application is concerned, the underlying issues of the instant application, and would not fetter itself with the considerations of want of form. The substratum of the application is what is to be considered, and in exercise, therefore, of its authority under Section 3A of the Civil Procedure Act, as read together with Sections 1A and 1B thereof, the Court would determine the pertinent issues of the application.
6. Turning back to Order 1 Rule 10(2) of the Civil Procedure Rules, it is provided thus;

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.

An interested party, with regards to the aforementioned provision, falls within the ambit of any person (s) whose presence before the Court may be necessary to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.

7. Who is an *interested party*? According to **Black's Law Dictionary**, Ninth Edition, an interested party is defined as;

A party who has a recognizable stake (and therefore standing) in a suit.

This is quite distinct from a *necessary party*, whom, according to the Black's Law Dictionary is determined as;

A party who, *being closely connected to a lawsuit*, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings.

The definition of who a necessary party is was further illustrated by Havelock, J (as he then was) in **Elisheba Muthoni Mbae v Nicholas Karani Gichohi & 2 Others (2014) eKLR** where the learned Judge cited the case of **Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others Nairobi (Milimani) H.C.C.C No. 2363 of 1998 (UR)**, where Ringera, J (as he was then) observed that;

“The guiding principle in deciding whether to add a party is whether the presence of that party is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. As stated in SARKAR’S LAW OF CIVIL PROCEDURE, Vol. I at pages 531 and 532 there are two tests in the application of this principle:-

1. ***There must be a right to some relief against the party sought to be added in respect of the matter involved in the proceedings in question.***
2. ***It should not be possible to pass an effective decree in the absence of such a party.”***

8. What then, according to the definition given of an interested party, was the Interested Parties stake in the instant suit? The Interested Parties have based their application on two issues, primarily that; (1) the Defendant had made demands from them for the repayment of facilities yet they had not entered into an contractual obligation with them and (2) that they were members, borrowers and beneficiaries of the Plaintiff.
9. With regards to the demands, the Interested Party reiterated that the Defendant, either by itself or through its agents, had through short messaging service or SMS and notice in the newspaper, demanded for the repayment of the loans that they had received from the Plaintiff be made directly to them. Further, that by the said demands, they Defendant had infringed upon the agreement they had with the Plaintiff, and had therefore no privity, or contractual obligations with the Defendant. They claimed that the demands, as issued by the Defendant, were illegal and unlawful. Does this therefore, in any extent of the definition, make them interested parties to the suit?
10. As was enunciated by Ringera, J (as he then was) in **Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others** (supra), there are two (2) tests which are applicable in determining whether a party is necessary to a suit: i.e. (1) there is a right to some relief sought against the party sought to be added and (2) that there would be no effectual and complete decree in the absence of such party. This is what Order 1 Rule 10(2) explicitly sets out. A party, to be added to a suit, has to show that some interest, vested or otherwise, would be diminished or wasted, if such party is not made a party to the suit.
11. In **Amon v Raphael Tuck & Sons Ltd (1956) 1 All ER 273**, Devlin, J held at p. 286-287:

“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 he 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, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

Further, in **Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR**, Odunga, J held *inter alia* on the issue of interested parties being enjoined in a suit;

“The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and

Procedure Rules, 2012, defines an interested party as “a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation”. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings... It is however a requirement that a person who intends to be joined to existing legal proceedings ought to show that he has “an identifiable stake or legal interest in the proceedings before the court.” The position of an interested party is different from a person invoking the provisions of Article 258 of the Constitution which provides as follows:

(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

It is clear that that Article deals with institution of proceedings. Article 3(1) of the Constitution on the other hand provides that “Every person has an obligation to respect, uphold and defend this Constitution” while Article 48 enjoins the State to “ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access. Whereas under the current Constitutional dispensation the Court ought not to lock out a person who prima facie shows that he has “an identifiable stake or legal interest in the proceedings before the court” in determining whether or not to join a person to pending proceedings the Court ought to take into account the provisions of Article 159(2)(b) of the Constitution that justice shall not be delayed.”

12. It is not explicitly clear what interest or stake the Interested Parties have in the instant suit. In as much as they have attached documents marked as JTC-2, JTC-3 and JTC-4, there is no nexus as to how they, as Interested Parties, would be adversely, or even remotely affected by the outcome of any decision that may be rendered by this Court. This is the identifiable stake or legal interest that has been enunciated in both **Judicial Service Commission v Speaker of the National Assembly & Another** (supra) and **Werrot & Co. Ltd & Others v Andrew Douglas Gregory & Others** (supra). As has correctly been stated, the only obligation that the Interested Parties have in the present circumstances was with the Plaintiff. Therefore, any dealings that the Plaintiff may have directly or indirectly had with the Defendant, and in the absence of evidence of how these dealings would adversely, or otherwise affect the rights and interests of the Interested Parties, pegged on its contractual obligations to the Plaintiff, would not automatically mean that the Interested Party had a legitimate and identifiable stake or legal interest in the matter.

13. It being that the Applicants cannot be enjoined in the instant proceedings as Interested Parties for being unable to demonstrate how their alleged legitimate interests are to be affected and that the Court would be unable to come to a well-reasoned determination without their presence (see **Pizza Harvest v Felix Midigo [2013] eKLR**), the application would stand to be dismissed. The allegations as set out for determination in the suit would not require the Applicants to be added as Interested Parties to the suit, as a fair, just and expeditious disposition thereof may be made without their presence. They have not demonstrated that all the issues in contention or, that all the questions with regards to the instant suit, may not be effectively and adequately determined without their presence. Having considered that the Applicants may not be added as interested parties, it would follow that the application, and with regards to prayers (3) and (4) of the

application would fail, as the Applicants have no *locus standi* in the matter to seek such prayers.
14. The upshot is that the application filed by the Applicants is deemed to be unmeritorious, and the same is hereby dismissed with costs awarded to the Defendant.

Dated, signed and delivered in court at Nairobi this 19th day of February, 2016.

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C. KARIUKI

JUDGE