



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 555 of 2011**

**CRESCENT DISTRIBUTION SERVICES LIMITED.....PLAINITFF**

**VERSUS**

**EGNITE TECHNOLOGIES LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETER KARIUKI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Defendants' Chamber Summons application dated 14<sup>th</sup> January 2013 was brought under the provisions of Sections 1A & 3A of the Civil Procedure Act, Order 1 Rule 10 (2), (4) and (25) of the Civil Procedure Rules 2010 and all other enabling provisions of the law. It sought the following orders **THAT:-**

- a. **The names of KLINEISOFT TECHNOLOGIES LIMITED and CHRIS KARIUKI be enjoined in the suit as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.**
- b. **Any such orders as this honourable court may deem fit to issue.**
- c. **The costs of this application be provided for.**

1. The grounds on which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied on in support of the application were as follows:-

- a. **THAT the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were proper parties to this suit.**
- b. **THAT the issues raised in the Plaint would not be fully adjudicated upon without the presence of the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants and thus ends of justice would not be met.**
- c. **THAT the intended 3<sup>rd</sup> and 4<sup>th</sup> Defendants' role in the supply contract and attendant payment in issue and as pleaded in the Plaint was so central that they could not be left out in this suit.**

- d. **THAT the Plaintiff did not stand to suffer any prejudice if the orders sought are granted.**
- e. **THAT it was only fair in the interests of justice that the present application be allowed.**
1. Peter Kariuki, the 2<sup>nd</sup> Defendant herein swore the Supporting Affidavit on his own behalf and that of the 1<sup>st</sup> Defendant on 14<sup>th</sup> January 2013. In his affidavit, he contended that the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants procured goods for a tender for Coffee Research Foundation through the 1<sup>st</sup> Defendants' account with the Plaintiff company.
  2. He further deposed that the said 3<sup>rd</sup> and 4<sup>th</sup> proposed Defendants paid the Plaintiff USD 700,000 and Kshs 728,100/= on 24<sup>th</sup> December 2010 and 14<sup>th</sup> December 2011 respectively. Thereafter, the Plaintiff and the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants entered into negotiations of how the balance would be paid. It was the Defendants' case that the Plaintiff and the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants were dealing directly and they were unaware of how much money was outstanding. Further, the Defendants stated that they never benefitted from the monies. They attached copies of documents showing the transactions between the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants and the Plaintiff as proof of their said relationship.
  3. In response thereto, on 31<sup>st</sup> January 2013, Leila Bashir Ibrahim swore the Replying Affidavit on behalf of the Plaintiff herein. He deposed that the 2<sup>nd</sup> Defendant approached him regarding the supply of goods following a tender that he had won from the European Community. The same was through, Klinessoft Technologies Limited, another of the 2<sup>nd</sup> Defendant's companies.
  4. He added that the 2<sup>nd</sup> Defendant failed to inform the Plaintiff that payment of the goods would only be effected through his account as the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not have an account with the Plaintiff. The outstanding amount stood at USD 150,977.66.
  5. It was the Plaintiff's case that there was no nexus between it and the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants and that the appropriate procedure would have been for the said proposed Defendants to have been enjoined as third parties. The Plaintiff argued that the enjoining the said proposed parties would unduly encumber the Plaintiff with additional costs.
  6. When the matter came up in court on 18<sup>th</sup> March 2013, advocates for both the Plaintiffs and Defendants requested the court to give its ruling based on the written submissions filed herein. The Defendants written submissions were dated and filed on 14<sup>th</sup> February 2013 while those of the Plaintiff's submissions were dated 14<sup>th</sup> March 2013 and filed on 15<sup>th</sup> March 2013.
  7. In their submissions, the Defendants were insistent that the Plaintiff was at all material times aware that it was dealing with the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants. They argued that they had clearly shown that the issue of the payments of the tender could not be dealt with without including the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants as parties to the suit herein.
  8. They relied on the case of **Laisa Mpyoe & 2 others vs Kajiado Central Milk Project "The Board" & 5 others [2012] eKLR** where Odunga J cited the case of **Kingori vs Chege & 3 others [2002] eKLR** in which Nambuye J (as she then was) stated that the relevant tests of determining whether or not to join a party in proceedings were as follows:-
    - i. **He must be a necessary party.**
    - ii. **He must be a proper party.**
    - iii. **In the case of the 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 effectively and completely adjudicate upon and settle all questions involved in the suit.**

1. The Defendants also relied on the case of **Departed Assians Property Custodian Board vs**

**Jaffer Brothers Limited (1991) 1 EA 55, cited in Kennedy Mwita & Another vs Board of Trustees NSSF & 2 others [2012] eKLR** where it was held that:-

**“ a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectively 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.”**

1. The Plaintiff also submitted that the Defendants ought to have brought third party proceedings against the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants and not join them as co-defendants. It relied on the case of **Commissioner for Transport vs FO Boero (1954) KLR** where it was decided that :-

**“Third party procedure is a means for trial of questions between the defendant and the third party of the liability of the third party to make a contribution or indemnity and not for the joining of the third party as a co-defendant.”**

1. In the Civil Procedure Rules, 2010, Order 15 (1)(a) requires that a party who wishes to issue a notice to a third party apply to court within fourteen (14) days after the close of the pleadings for leave to do so. It states as follows:-

**“Where a defendant claims as against any other party not already a party to the suit (hereinafter called the third party) that he is entitled to contribution or indemnity...he shall apply to the court within fourteen (14) days after the close of pleadings for leave of the court, to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers *ex parte* supported by affidavit.”**

1. A party who proceeds to take out third party proceedings looks up to the third party for indemnity or contribution. I have perused the documents attached to the Defendants’ Supporting Affidavit and note that they were not seeking indemnity or contribution from the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants. Their case was hinged on the premise that their role in the transaction herein was a superficial one. It was limited to introducing the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the Plaintiff and allowing the said proposed Defendants to use its account with the Plaintiff to obtain goods for their tender. In essence, the Defendants contended that there was no privity of contract between themselves and the Plaintiff.
2. The Plaintiff argued it was aware that the 2<sup>nd</sup> Defendant was a director of Klinesoft Technologies Limited. This was borne by the fact that the preamble in the Agreement dated 4<sup>th</sup> May 2011 marked “PK 2” stipulated that:-

**“That the director and the Associate are directors of the companies Klinesoft Technologies Limited and Egnite Technologies respectively.”**

16. In the said agreement, the proposed 4<sup>th</sup> Defendant, Chris Kariuki was described as “the Director” and Peter Kariuki, the 2<sup>nd</sup> Defendant herein was described as “ the Associate.” The word “**respectively**” means that the two (2) persons were directors in their respective companies. It was not correct as the Plaintiff had contended that the 2<sup>nd</sup> Defendant was an associate in the proposed 3<sup>rd</sup> Defendant’s company. The companies are separate and distinct legal persons and must for all purposes and intent be treated as such.

17. It is puzzling why a party would want to bring another of its companies in legal proceedings with the intention that it bears liability on its behalf. This may very well be probable. However, the real circumstances of what really transpired between the parties are a subject of proof of the same as a factual issue that should be determined in a trial

18. The court is under a duty to give each and every party a fair opportunity to ventilate its case. A party has the liberty to couch its case and present it to court in whatever manner it deems appropriate. Neither the court nor other parties can dictate to a party how it should conduct its case. A court is

obligated to allow a party to conduct its case and find in its favour if the claim is within the confines of the law and it succeeds in proving its claim.

19. The Defendants opted to file application to enjoin the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants in accordance with Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010 which provides as follows:-

**“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 a 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 a plaintiff or a 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.”**

20. Whether or not to allow such an application is dependent on the exercise of the discretion by the court. The court’s discretion is, however, not an absolute one. It must be exercised judiciously upon the court being satisfied that the application has basis on facts and legal principles. The court should concern itself with establishing whether a party against whom an application has been made will suffer prejudice and if so, whether such a party would be adequately compensated by way of costs.

21. The Plaintiff’s assertions that it would incur additional costs to prosecute this matter, if the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants were enjoined in the suit as co-defendants, does not in any way amount to prejudice. It may amount to an inconvenience or annoyance to a Plaintiff who will now have to change how it will prosecute its case but it cannot in any way fall under a prejudicial act.

22. This court will be required to make a determination of common question of law and fact to establish whether the supply contract was between the Plaintiff and the Defendants herein or between the Plaintiff and the proposed Defendants. It will save the court judicial time to have the matters resolved in one suit. I find that the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants are proper and necessary parties for the determination of the issues at hand. The Defendants herein cannot set up their defence without them being parties to the proceedings herein. In addition, in the event the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants were found to be liable at the conclusion of the case, it would be imperative that they be parties to the suit so as to be bound by the decision of the court. It would be difficult to enforce an order or execute a judgment if they were not parties to the suit.

23. Bearing in mind that the 2<sup>nd</sup> Defendant has a right to fair trial under Article 50 (1) of the Constitution of Kenya, 2010, that is court is guided by the principle in Article 159 (2) (a) of the Constitution that justice shall be done to all and that the court must act with the aim of attaining a just determination of the proceedings as provided for in Section 1B of the Civil Procedure Act Cap 21 ( laws of Kenya), I will exercise my discretion and allow the Defendants to enjoin the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants as parties to the suit herein for the purpose of determining the real question in controversy between the parties.

1. Accordingly, I hereby allow prayer No (1) of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant’s Chamber Summons application dated 14<sup>th</sup> January 2013. Costs in the cause.
2. Orders accordingly.

**DATED and DELIVERED at NAIROBI this 24<sup>th</sup> day of May 2013**

**J. KAMAU**

**JUDGE**