



Dry Associates Limited & 3 others v Karanja & 8 others; Archdiocese of Nairobi (Kenya) Registered Trustees (Interested Party) (Commercial Case 536 of 2011) [2025] KEHC 897 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)

Neutral citation: [2025] KEHC 897 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 536 OF 2011
MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

**DRY ASSOCIATES LIMITED 1ST PLAINTIFF
HORSE ASSOCIATES OF KENYA 2ND PLAINTIFF
DAVID HENRY GRAY 3RD PLAINTIFF
DAUDI N NTURIBI 4TH PLAINTIFF**

AND

**TIMOTHY KARUNGU KARANJA 1ST DEFENDANT
SIRIUS SOLUTIONS LIMITED 2ND DEFENDANT
MERIDIAS CAPITAL LIMITED 3RD DEFENDANT
BLUECREST HOLDINGS LIMITED 4TH DEFENDANT
DIEFEL INVESTMENTS LIMITED 5TH DEFENDANT
GRAY PROPERTIES 6TH DEFENDANT
DAL WEALTH MANAGEMENT LIMITED 7TH DEFENDANT
EQUITORIAL COMMERCIAL BANK LIMITED 8TH DEFENDANT
CROWN BERGER LIMITED 9TH DEFENDANT**

AND

**ARCHDIOCESE OF NAIROBI (KENYA) REGISTERED
TRUSTEES INTERESTED PARTY**



RULING

1. Before me is a Chamber Summons application dated 1st March 2012, filed by the interested party under the provisions of Sections 1A, 1B & 3A of the [Civil Procedure Act](#), Order 1 Rules 10(2) & 25 of the [Civil Procedure Rules, 2010](#), and all enabling provisions of the law. The interested party seeks orders that it be joined to these proceedings as a plaintiff.
2. The application is based on the grounds on the face of the Summons, and it is supported by an affidavit sworn on the same day by Fr. Antony Mwituria, the interested party's Procurator and Trustee. He averred that the interested party is the primary registered entity to which the affiliates - the Sister of Mary Magdalene Retreat House, Mary Help of the Sick Mission Hospital, and St. Theresa's Project are connected. He further averred that the said affiliates were investors who have since lost their investment due to the defendants' actions as detailed in the plaint. He asserted that the orders sought in this suit directly impact the affiliates' interests, thus they ought to benefit from the same. He maintained that joining the interested party to these proceedings is essential for the Court to fully and effectively resolve all matters in dispute.
3. In opposition to the application, the plaintiffs filed a replying affidavit sworn on 9th October 2023, by George Kenya, the 1st plaintiff's Finance Manager. He averred that the interested party seeks to join this suit on the basis that its affiliates suffered investment losses which included, funds misappropriated from fixed deposits at Imperial Bank and commercial papers issued by Insteel Limited, due to fraudulent actions by the defendants. He asserted that this suit relates specifically to funds invested in Crown Berger commercial papers, which were fraudulently diverted by the 1st defendant in collusion with the 9th defendant and other third parties. He therefore, he asserted that the intended interested party's claims are unrelated to the subject matter of this suit, as they concern separate investments in Insteel Limited and Imperial Bank, neither of which are parties to this case.
4. Mr. Kenya claimed that the dispute in this suit arises from contractual breaches involving employer-employee and issuer-broker relationships, making the intended interested party's joinder unnecessary. He maintained that the intended interested party's claims constitute a distinct cause of action and should be pursued in a separate suit, as their involvement would not assist the Court in resolving the existing contractual and fraudulent claims.
5. In a rejoinder, the interested party filed a further replying affidavit sworn on 10th January 2024 by Fr. Antony Mwituria, the interested party's immediate former Procurator and Trustee. He averred that it is necessary for the interested party to be joined to this suit to represent its affiliates who are among the investors adversely impacted by the fraudulent actions of the 1st defendant and the 1st plaintiff. He further averred that the investment losses suffered by the interested party's affiliates is as a result of the 1st plaintiff's failure to maintain adequate systems and risk controls. He contended that whether or not the interested party's affiliates' losses can be attributed to the defendants' actions, is an issue that can only be determined once the interested party is joined to the suit.
6. Fr. Mwituria claimed that this suit relates to recovering funds lost through fraud, hence it should address all affected investors and not just specific claims against the 9th defendant. He stated that the interested party's investments in Insteel Limited were based on trust in the 1st plaintiff's expertise and professionalism, making the 1st plaintiff responsible for the actions of its employees. He deposed that the interested party's claim is not a separate cause of action as it is directly tied to this suit.



7. The application herein was canvassed by way of written submissions. The interested party's submissions were filed on 10th January 2024 by the law firm of Nyiha, Mukoma & Company Advocates, while the plaintiff's submissions were filed by the law firm of Oraro & Company Advocates on 5th December 2023. It is noteworthy from the Court record and the Case Tracking System that the defendants did not file any response(s) and/or submissions in opposition to the instant application.
8. Ms Koech, learned Counsel for the interested party relied on the provisions of Order 1 Rule 10(2) of the *Civil Procedure Rules, 2010* and the Supreme Court's holding in the case of *Francis Muruatetu & another v Republic & another* [2015] eKLR, and submitted that the interested party's affiliates suffered losses due to directives issued through the 1st defendant, who acted as an employee of the 1st plaintiff. He submitted that for that reason, the interested party has a right to restitution and must be joined to this suit to allow the Court to fully resolve all the disputes involved in this suit.
9. She further submitted that one of the orders sought by the plaintiffs is a declaration that the 1st defendant acted outside the scope of his employment, and argued that such a finding would impact the intended interested party's legal rights against the 1st plaintiff and potentially limit their ability to recover their losses, depending on the financial capacity of the defendants. She referred to the case of *Kairu v Mutunga* (Environment and Land Appeal E018 of 2022) [2023] KEELC 21723 (KLR), and asserted that the interested party has met all the requirements to be joined to this suit as an interested party.
10. Ms. Lubano, learned Counsel for the plaintiff cited the provisions of Order 1 Rule 1 of the *Civil Procedure Rules, 2010* and the case of *Joseph Wabua Kigwe v Total Kenya Limited* [2005] eKLR, and submitted that the interested party's claim stems from separate transactions involving investments in Imperial Bank and Insteel Limited commercial papers, who are not parties to this suit. He contended that this suit involves contracts between the 1st plaintiff, the 1st defendant, and the 9th defendant, focusing on misappropriation of funds related to Crown Berger commercial papers, breach of contract by the 1st & 9th defendants, and negligence by the 9th defendant. She argued that the interested party has not demonstrated any investment in Crown Berger commercial papers or losses suffered due to the defendants' actions. She surmised that the interested party's claims and reliefs do not stem from the same transaction as those in this suit, hence they should be pursued in a separate suit.

Analysis and Determination.

11. I have considered the instant application and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the plaintiff, as well as the written submissions filed by Counsel for the interested party and the plaintiffs. The issue that arises for determination is whether the interested party should be joined to this suit as a plaintiff.
12. A Court's discretion to make an order for joinder of parties is derived from the provisions of Order 1 Rule 10(2) of the *Civil Procedure Rules, 2010* which states that -

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.



13. The Court in the case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR, addressed the import of the aforesaid provisions as follows -

Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.

14. The interested party in this case seeks to be joined to these proceedings as a plaintiff. Order 1 Rule 1 of the *Civil Procedure Rules, 2010* makes provision for persons who may be joined to a suit as a plaintiff. It states that –

All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.

15. The interested party's case is that its affiliates the Sister of Mary Magdalene Retreat House, Mary Help of the Sick Mission Hospital, and St. Theresa's Project were investors through the 1st plaintiff, and they have since lost their investment due to the defendants' actions as detailed in the plaint. The interested party asserted that the investment losses suffered by the interested party's affiliates is as a result of the 1st plaintiff's failure to maintain adequate systems and risk controls. It claimed that the orders sought by the plaintiffs in this suit directly impact the said affiliates' interests, hence they should benefit from the same. The interested party contended that it ought to be joined to these proceedings to represent its affiliates who are among the investors adversely impacted by the fraudulent actions of the 1st defendant and the 1st plaintiff.

16. In the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Applicant)* [2021] KEHC 4369 (KLR), when determining an application for joinder of a party as either a plaintiff or an interested party, the Court relied on the Court's holding in the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243 and stated as follows–

In this case the application has been made by an intending party as either Plaintiff or Interested Party. Whereas there is nothing inherently objectionable in a person applying to be joined as an interested party in a pending suit, it is doubtful whether such a person joined as an interested party can transform the suit into one in which he becomes the principal claimant and seek substantive reliefs in the suit. In this case, it is clear that the Applicant intends to protect his rights in the suit property by contending that he was not served with



the statutory notice. That in my view is a substantive claim that cannot be determined by the Applicant being joined as an interested party.

17. On perusal of the interested party's further replying affidavit, it seems to suggest that its suit and/or cause of action is against the 1st plaintiff and the 1st defendant since it claims that its affiliates' investments in Insteel Limited were based on trust in the 1st plaintiff's expertise and professionalism, making the 1st plaintiff responsible for the actions of its employees. It is worthy of note that in instances where the Court finds that a party should be joined to a suit as a plaintiff, the order that follows therefrom is for the plaintiff to amend its plaint. In view of the foregoing, it is my finding that it is impossible for this Court to make such an order even in the event it finds that the interested party's claim and the plaintiffs' claim stem from the same cause of action. This is because the interested party seeks to protect its affiliates' investments which were allegedly lost as a result of the fraudulent actions by the 1st plaintiff and the 1st defendant. Further, I am of the finding that the cause of action the 1st defendant proposes to introduce is a substantive claim that cannot be aptly determined by the interested party being joined to this suit as a plaintiff.
18. In the circumstances, since none of the parties to this suit has sought for the interested party to be joined to this suit, the interested party cannot seek to be joined as a plaintiff in these proceedings.
19. In the end, this Court finds that the instant application is incompetent. It is hereby struck out with costs to the plaintiffs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ndegwa h/b for Mrs Koech for the interested party/applicant

Ms Claire Mwangi for the plaintiffs/respondents

No appearance for the defendants/respondents

Ms B. Wokabi - Court Assistant.

NJOKI MWANGI, J.

