



Excellent Logistics Ltd v Simplepay Capital Limited & another; Two One Flour Limited (Intended Interested Party) (Commercial Case E319 of 2024) [2025] KEHC 1780 (KLR) (Commercial and Tax) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E319 OF 2024
FG MUGAMBI, J
FEBRUARY 7, 2025**

BETWEEN

EXCELLENT LOGISTICS LTD PLAINTIFF

AND

SIMPLEPAY CAPITAL LIMITED 1ST DEFENDANT

CHARITY WANZA MUNENE T/A ULTIMATE AUCTIONEERS 2ND DEFENDANT

AND

TWO ONE FLOUR LIMITED INTENDED INTERESTED PARTY

RULING

1. By a proclamation notice dated 11th June 2024, the 2nd defendant on the instructions of the 1st defendant purported to proclaim some motor vehicles, the particulars of which are as set out in the application, towards settlement of a loan.
2. The proclamation was as a result of an investment agreement entered into between the plaintiff and the 1st defendant. It is not in issue that under the agreement dated 13th April 2023, the 1st defendant agreed to invest USD 210,000 in the plaintiff. The plaintiff contends that the proclamation issued by the 2nd defendant is unlawful because all outstanding amounts owed to the 1st defendant arising from the agreement have been fully settled. Additionally, the plaintiff argues that any disputes between the parties should have been referred to arbitration as stipulated in the agreement and maintains that the proclaimed motor vehicles belong to a different company, not the plaintiff.



3. As a result, the plaintiff filed, contemporaneously with its plaint, the application dated 12th June 2024. The application seeks injunctive relief against the defendants, from repossessing, and in any way whatsoever interfering with the motor vehicles listed in the proclamation, pending the hearing and determination of the suit. It is supported by the affidavit of FREDRICK NDUNGU, a Director of the plaintiff, sworn on even date.
4. The application is opposed by the defendants, through a replying affidavit sworn on 9th July 2024 by YASHIKA SAGAR, the Operations Manager of the 1st defendant.
5. While the defendants acknowledge the existence of the investment agreement, they assert that the total amount repaid by the plaintiff is USD 177,363.68, falling short of the full repayment of the investment loan as alleged. The 1st defendant further argues that the payment receipts attached by the plaintiff to the supporting affidavit do not conclusively prove full repayment of the loan. This point is confirmed through the plaintiff's supplementary affidavit sworn on 29th July 2024 admitting that the total amount paid towards the loan was in fact USD 177,363.68.
6. The defendants also contend that the plaintiff has continued to breach the terms of the agreement, despite the leniency extended by the 1st defendant, a fact that the plaintiff failed to disclose to the court.
7. In response to the claim that the motor vehicles listed in the proclamation belong to another company, the defendants argue that the plaintiff lacks the locus standi to institute or maintain the present suit. They further contend that, as the vehicles are alleged to be third-party property, any challenge to their attachment must be made through objector proceedings by the rightful owners, not by the plaintiff. The defendants maintain that the proper parties to contest the attachment of the motor vehicles are the owners themselves.
8. A second application dated 29th July 2024 was filed by Two One Flour Limited (hereinafter TOFL) seeking to be enjoined as an interested party or as the 2nd plaintiff in this suit. It also seeks leave to file pleadings in the matter as well as injunctive orders against the defendants, from repossessing, and in any way interfering with the motor vehicles listed in the proclamation, pending the hearing and determination of the suit.
9. The application is supported by an affidavit sworn on 29th July 2024 by MARK NDUNGU, a Director of TOFL. TOFL asserts that the attached motor vehicles belong to it and that it was neither a party to the investment agreement between the plaintiff and the 1st defendant, nor did it consent to the vehicles being offered as security. The company further claims that it was not served with a demand notice regarding the alleged outstanding debt.
10. The application is opposed by the defendants through a replying affidavit sworn on 26th August 2024, by YASHIKA SAGAR. The defendants argue that TOFL cannot move the court to be enjoined in the proceedings, as such an application should be made by a party already participating in the suit. They further contend that the issues raised by TOFL constitute a fresh cause of action, and therefore the company cannot be enjoined as an interested party. The defendants assert that since the plaintiff lacked the capacity to file the suit in the first place, TOFL cannot rely on that defective suit to seek joinder, as the suit itself is fatally flawed.
11. That notwithstanding, the defendants further contend that the motor vehicles which are the subject of the attachment were offered as additional security by the guarantors in the investment agreement, namely FREDERICK NGUGI NDUNGU and JOSEPHINE WATETU MUTERU. They acknowledge that the two guarantors are directors of both the plaintiff and TOFL and contend that the additional securities were registered with the consent of the said Directors.



12. Additionally, the defendants argue that the two companies are effectively one entity and that the Directors formed TOFL as a sham to defraud creditors. They argue that, in any case, no valid basis has been established for granting the injunctive relief sought by TOFL in the second application.

Analysis and Determination

13. I have reviewed the parties' pleadings, evidence, submissions and authorities. The issues that arise for determination are whether the suit filed by the plaintiff is defective, whether the application for joinder of TOFL ought to be allowed and finally, whether both applicants have met the threshold for granting the injunction orders they seek.
14. Regarding the legal basis for the suit, I have reviewed the plaint. As already stated, the suit is premised on the investment agreement entered into between the plaintiff and the 1st defendant. The primary issue for determination in the suit will be whether there is any money due from the plaintiff to the 1st defendant.
15. Apart from the injunctive relief, which the defendants correctly challenge, the plaintiff seeks additional prayers such as an order for the 1st defendant to render full accounts and total payments made by the plaintiff towards the repayment of the investment loan as well as a declaration that the plaintiff does not owe the 1st defendant any monies under the investment agreement. While I agree that the plaintiff cannot sustain injunctive relief over motor vehicles it does not own, I find that the suit is otherwise not fatally defective, as the plaintiff still has a valid and actionable claim under the investment agreement.
16. Having established that the suit is sustainable, the next question is whether TOFL ought to be enjoined in the suit as a 2nd plaintiff or an interested party. As correctly pointed out, the power to order joinder of parties to a suit is provided under Order 1 Rule 10(2) of the Civil Procedure Rules. This discretionary power is broad, allowing the court to order joinder even without any party's formal application. The guiding principle is whether the presence before the court [of that party], 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.
17. I reiterate my earlier observation that the dispute before court centers on the investment agreement and a loan facility extended to the plaintiff by the 1st defendant. TOFL claims ownership of the motor vehicles subject to attachment and asserts that it was not a party to the investment agreement. I am satisfied that TOFL has demonstrated sufficient interest in the attached motor vehicles, which are central to the dispute. Its joinder is necessary to ensure the court fully resolves the issues of ownership and attachment, which are collateral to the investment loan.
18. The argument that the issues raised by TOFL constitute a new cause of action is unpersuasive, as TOFL's claim arises from the same investment agreement. The defendants have in fact acknowledged the relationship between the plaintiff, the 2nd defendant, and the guarantors in the agreement, who are also Directors of both the plaintiff and TOFL. Allegations of fraud with respect to TOFL is a question of fact that cannot be conclusively determined at this stage. Such allegations require substantive evidence and will be best addressed during the trial. It is therefore crucial for TOFL to participate in the proceedings to effectively defend itself against the allegations leveled by the defendants.
19. Regarding whether TOFL should be enjoined as a plaintiff or an interested party, the Black's Law Dictionary defines an interested party as one who has a recognizable stake, and therefore standing, in a matter. My understanding of this is that an interested party is not one of the principal claimants in the proceedings and that their interest is typically indirect or collateral. In other words, while the interested party does not directly initiate the claim, they are nonetheless affected by a decision made by the court.



20. Since TOFL's primary interest lies in protecting its property (the motor vehicles), without directly challenging the terms of the investment agreement between the plaintiff and the 1st defendant, I am of the view that they would be in a position to do so as an interested party. Accordingly, the application for joinder succeeds, and TOFL is enjoined to these proceedings as an interested party.
21. Regarding the prayer for injunction, I concur with the defendants' submission that the plaintiff lacks the locus standi to seek injunctive relief over the subject motor vehicles. Consequently, I will not address that prayer. However, the application by TOFL seeks similar injunctive relief.
22. In this regard, TOFL must satisfy the conditions established in *Giella V Cassman Brown & Co Ltd*, [1973] EA 358. These conditions require an applicant to demonstrate a prima facie case with a probability of success, show that they would suffer irreparable harm that could not be adequately compensated by damages, and, if the court is in doubt, have the application determined on the balance of convenience.
23. These conditions are applied as separate, distinct and logical hurdles which an applicant must surmount sequentially. This means that if a prima facie case is not established, the considerations of irreparable harm and the balance of convenience do not arise. (see *Nguruman Limited V Jan Bonde Nielsen & 2 Others*, [2013] KECA 347 (KLR)).
24. TOFL has produced copies of the logbooks for the attached motor vehicles, which confirm its ownership. The logbooks are not contested by the defendants who instead argue that the motor vehicles were offered as additional securities by the Directors of the plaintiff and TOFL. Notably, the defendants do not challenge the assertion that TOFL was not a party to the investment agreement. In light of this evidence, I find that TOFL has established a prima facie case with a probability of success. It would be prudent to preserve the motor vehicles, which are the subject matter of the attachment pending the hearing and determination of the suit.

Disposition

25. Accordingly, I make the following orders:
 - i. The application for joinder succeeds, and TOFL is enjoined to these proceedings as an interested party.
 - ii. The plaintiff's application dated 12th June 2024 is struck out for want of locus standi.
 - iii. The application dated 29th July 2024 is successful and TWO ONE FLOUR LIMITED is hereby enjoined as an interested party to this suit.
 - iv. The said interested party is granted leave to file pleadings, affidavits and any other documentary evidence as shall be appropriate in prosecuting and defending the plaintiff's and defendants' case and applications.
 - v. A temporary injunction restraining the defendants their directors, agents, auctioneers, employees, servants, workers, assignees and/or associates or any other person(s) claiming through them from repossessing, attaching, selling or offering for sale, auctioning, and/or in any way whenever and whatever interfering with KCH 280S Landrover, KMHA 775J Grove Crane, KCJ 6742 Nissan Advan , KCG 0612 Nissan, KBW 821T Mercedes Prime Mover, KCL 203A Mercedes Prime Mover, KBW 782M Mercedes Prime Mover, KBY 993J Mercedes Prime Mover, KCD 401D Mercedes Prime Mover, KCD 402D Mercedes Prime Mover, KCE 423Y Mercedes Prime Mover, ZE 2004 Trailer and KHMA 633G Hyster Forklift is issued, pending the hearing and determination of the suit.



vi. Costs shall await the outcome of the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 7TH DAY OF FEBRUARY 2025.

F. MUGAMBI

JUDGE

