



Stratogen Limited v County Government of Kisii & another (Civil Case E002 of 2021) [2025] KEHC 1633 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISII
CIVIL CASE E002 OF 2021
TA ODERA, J
FEBRUARY 20, 2025**

BETWEEN

STRATOGEN LIMITED PLAINTIFF

AND

COUNTY GOVERNMENT OF KISII DEFENDANT

AND

**ETHICS AND ANTI-CORRUPTION COMMISSION PROPOSED
DEFENDANT**

RULING

1. The plaintiff filed the notice of motion dated 14.6.23 seeking:
 - 1spent.
2. The plaintiff be granted leave to amend the plaint dated 15.2.2021 to;
 - a. Join Ethics and Anti -Corruption Commission as the 2nd defendant.
 - b. Include prayer for interest on Kshs. 36,300,000.00 from 18.8.2019 in accordance with the prevailing mean commercial lending rate as determined by Central Bank pursuant to section 140 (a) (c) of the *Public Procurement and Asset Disposal Act*.
 - c. include prayer for mesne profits from 18.9.2019
3. Costs of the application.
 2. The application is based on the annexed affidavit of Francis Chiluyi Shirandula and the grounds that:



- a. The defendant owes the plaintiff the sum of Kshs. 36,300,000.00 from 18.9.2019.
 - b. The plaintiff is entitled to interest under Section 140 (a) (c) of the *Public Procurement and Asset Disposal Act*.
 - c. That on 2.5.2020, the Ethics and Anti-Corruption Commission unlawfully and unfairly directed the defendant not to pay the plaintiff the overdue amount.
 - d. The EACC is vicariously liable for the acts of its agents.
 - e. That joinder of EACC in suit is necessary for determination of the issue of its directions.
 - f. That the acts of EACC amount to economic sabotage which has caused plaintiff hardship as it is on the verge of collapse.
 - g. The application is made in the interest of justice.
 - h. Mr. Francis Chiluyi Shirandula who is the plaintiff's Finance Administrator who deponed that the plaintiff and the defendant entered into a contract for supply of Brabd new fire truck vehicle as per the annexed contract dated 28.3.2018 "FCS 1". As per the contract Ksh. 36,300,000.00 was to be paid upon pre-shipment inspection of the fire trucks and the balance of Kshs. Section 140 (a) (c) of the *Public Procurement and Asset Disposal Act*. Upon delivery of the trucks. The 1st instalment was paid as per copy of RTGS "FCS 2".
 - i. On 18.9.2019 the plaintiff delivered the trucks and so the balance fell due. (delivery note ("FCS 3").
 - j. That he is advised by their counsel on record that the plaintiff is entitled to recover the balance of Kshs. 36,000,300/= Section 140 (a) (c) of the *Public Procurement and Asset Disposal Act*. Interest on the balance on prevailing mean Commercial rates under Section 140 (a) (c) of the *Public Procurement and Asset Disposal Act*.
 - k. That plaintiff invoiced the defendant for the unpaid balance as per copy of invoice "FCS 4"
 - l. On 22.5.20 and 15.12.20 EACC without any powers directed the defendant not to pay the overdue sum as per the letters ("FCS 5").
 - m. He accused the EACC of usurping the powers of plaintiff's internal organs i.e contract implementation committee, the inspection and acceptance committee, head of procurement and the accounting officer.
4. EACC who is the proposed 2nd defendant filed grounds of opposition dated 13.2.24 stating that:
- i. there is no privity of contract between it and the plaintiff.
 - ii. That this civil court lacks the jurisdiction to hear and determine the legality or otherwise of the impugned advise given by the intended 2nd defendant in its Constitutional and statutory mandate.
 - iii. no draft amended plaint has been annexed to show whether the applicant has a reasonable cause of action against EACC.



- iv. that the application is frivolous, vexacious, scandalous and otherwise an abuse of the process of the court.
5. The applicant submitted that EACC has oversight powers to ensure that chapter six of *the constitution* is complied with under Article 79 of *the Constitution* but it has no capacity to regulate or investigate the procurement processes. Further that it is entitled to the interest sought under sections 49 (1) and 54 of the *sale of goods act* and Section 140(a) (c) of the PPADA and section 26 of the *Civil Procedure Act*. Also, that no order of High court under Section 56 of the *Anti-Corruption and Economic Crimes Act* (ACECA) was produced and EACC needs to be heard by the court on whether it has powers EACC to regulate and investigate procurement processes under public procurement and disposal Act 2015., whether its actions against plaintiff were administratively fair. It was also submitted that EACC is a necessary party herein under Order 1 Rule 3,4,5,6,7 15(1)(b); Order 7 Rule 1 and Order 10 Rule 8 of the Civil Procedure Rules, 2010 and its joinder in the suit as a defendant will enable the honourable court to make a just expeditious, proportionate and affordable resolution of the dispute in accordance with.
6. Also, that the plaintiff is entitled to interest under section 26 of the *Civil Procedure Act* and costs under section 27 of the same Act.
7. I have carefully considered the application and the response by EACC.
8. The defendant did not file any reply.
9. Joinder of parties is provided for under Order 1 Rule 10 (2) of the Civil Procedure Rules as follows:
 - (2) 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.”
10. Joinder of defendant is provided for under Order 1, rule 3 of the Civil Procedure Rules which provides that -
 - “ All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise”.
11. The principles for granting application for joinder were set out in the case of *In the case of Kenya Union Of Water And Sewerage Employees V Tana And Athi Rivers Development Authority; Union Of Kenya Civil Party (intended Interested Party) (cause E288 Of 2021)* [2022] KEELRC 1379 (KLR) (5 July 2022) (Ruling)

It was held that “Joinder of parties is provided for in Order 1 Rule 10(2) of the Civil Procedure Rules as follows: - (2) 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.”



12. Also, in the case of *Mwilu V Judicial Service Commission & 2 Others; Director Of Public Prosecutions & Another (intended Respondent) (petition 245 Of 2020)* [2020] Kehc 2745 (klr) (constitutional And Human Rights) (7 October 2020) (RULING). It was held -

“When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party
2. He must be a proper party.
3. In the case of a defendant there must be a relief flowing from that defendant to the Plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”

13. The importance of the right to be heard was articulated in the case of *Mbaki & Others vs Macharia & another* (2005) 2 EA 206, at page 210, where the Court stated as follows:

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

14. Hon. Lady Justice Nambuye J, in *Eldoret High Court Civ’ No. 136 of 2000: - Joseph Njau Kingori v Robert Maina Chege & 3 others* [2002] eKLR enumerated four aspects to look at before joining a party to a suit to wit:

- i. Is a necessary party?
- ii. A proper party;
- iii. There is a relief flowing from him to the plaintiff;
- iv. The ultimate order or decree cannot be enforced without his participation in the proceedings.

16. Similarly, the Judges sitting in Nairobi High Court case of *Julius Meme v Republic & another* [2004] eKLR Misc. Criminal App. No 495 of 2003, while, looking at the principles for joinder of parties in Constitutional reference, though different circumstances, held:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to preempt a likely course of proliferated litigation

In the case of *Civicon Limited v Kivuwatt Limited & 2 Others* [2015] EDKLR it was held “

17. Again, the power given under the Rules is discretionary which discretion must of necessity 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. In the same vein, a party seeking joinder who fails to establish any right over or interest in the subject matter cannot be enjoined. This Court in *Meme vs Republic* (2004) KLR 637 considering an application for joinder held that joinder will be permissible:

- (i) Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;
- ii. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
- iii. Where the joinder will prevent a likely course of proliferated litigation.

The Court made reference to the Supreme Court of Uganda case of *Deported Asians Property Custodian Board v Jaffer Brothers Limited* [1999] I EA 55 (SCU) in which it was held that,

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually 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:

18. It is thus clear that the issues arising for determination herein are:
 - a. The presence of the intended defendant must be necessary to enable the court effectively and finally settle the issue before it.
 - b. Whether this court has jurisdiction to hear and determine the legality or otherwise of the impugned advise given by the intended 2nd defendant in its Constitutional and statutory mandate.
 - c. On whether the applicant is entitled to orders for amendment to include interest and mesne profits.
On whether the intended 2nd defendant is a necessary party for final determination of the issues herein
19. It is the contention of the applicant that is EACC which stopped defendant from making the payment of the balance claimed herein and hence it is a necessary party. EACC on its part said there is no privity of contract between it and the plaintiff and thus it cannot be enjoined as a party herein. Under Article 79 of *the Constitution*, EACC has powers to give advisory opinion to public bodies and to investigate breach of chapter 6 under Article 79 of *the Constitution*. It is trite law that only parties to a contract can sue or be sued for its breach. The investigations by EACC does not warrant it being made a party



to a disputed based on contract. I agree with EACC that there is no privity contract between it and the plaintiff and thus it cannot be a necessary party in this case.

Whether this court has jurisdiction to hear and determine the legality or otherwise of the impugned advise given by the intended 2nd defendant in its Constitutional and statutory mandate.

20. On whether this civil court has jurisdiction to hear and determine the legality or otherwise of the impugned advise given by the intended 2nd defendant in its Constitutional and statutory mandate. EACC submitted that this court lacks such jurisdiction to. This issue was not addressed by the plaintiff. I find that whether EACC acted ultra vires or not in its advisory is for determination in Judicial review proceedings and not in this court. I do not find merit in the prayer for joinder of EACC in this matter.

On whether the applicant is entitled to orders for amendment to include interest and mesne profits.

21. The applicant sought leave to amend the plaint to include a prayer for interests to wit; “2(b) Kshs. 36,300,000.00 from 18.8.2019 in accordance with the prevailing mean commercial lending rate as determined by Central Bank pursuant to section 140 (a) (c) of the Public Procurement and Asset Disposal Act. “The prayer is not opposed.
22. Order 8 rule 3 (1) of the Civil Procedure rules provides that “Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings”.
23. The courts have discretion to allow applications for amendment as was held in the case of Ketteman versus vs Hansel properties Limited Hansel Properties (1988) 1 ALL ER 3S at page 62 it was held that “Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Further, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”

In the case of Central Kenya Ltd v Trust Bank Ltd [2000] 2 EA 365 held that “The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs... Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.”

24. On whether the amendment to add prayers for interest and mesne profits, will assist the court in resolving all the issues in controversy and avoid multiplicity of suits, the claim herein is liquidated and thus the applicant will be entitled to Interest in the event that the case succeeds. The applicant also says



it intends to seek mesne profits. No new claim has been introduced but ones pegged on the principal sum. The delay to file the application was 2 years and the applicants says it was due to inadvertence. The delay is thus excusable.

25. The respondent will not be prejudiced by the same as the case is yet to be heard, it will also be entitled to amend its defence if need be. I proceed to allow the prayers to amend the plaint to add prayers for interest and mesne profits.

Conclusion

In the upshot, the application dated 14.6.23 partially succeeds.

26. Prayer 2 (a) denied 2 (b) and 2 (c) are allowed. The application has partially succeeded. Each party to bear its own costs. The amended plaint be filed and served within 14 days from today. Amended defence if any be filed and served within 14 days of service of amended plaint. Mention 5.5.25 for pretrial directions.

T. A.ODERA

JUDGE

20.2.25

Delivered virtually via Teams platform in the presence of:

Court Assistant - Oigo

Mr. Gachuba for Applicant/Plaintiff

Mr. Mokaya for Respondent

