



**Sciborski v Okoth t/a Okoth & Company Advocates (Civil Appeal E105 of 2024)  
[2025] KEHC 2987 (KLR) (Commercial and Tax) (14 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2987 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E105 OF 2024  
BM MUSYOKI, J  
MARCH 14, 2025**

**BETWEEN**

**ROMUALD JOZEF SCIBORSKI ..... APPELLANT**

**AND**

**JACOB OKOTH T/A OKOTH & COMPANY ADVOCATES ..... RESPONDENT**

*(Being an appeal from the ruling and orders of Hon.  
B.M Cheloti (PM) delivered on 22nd December 2023)*

**JUDGMENT**

1. The appellant was dissatisfied with the ruling of Hon. B.M Cheloti, Principal Magistrate delivered on 22<sup>nd</sup> December, 2023 in Milimani Chief Magistrate commercial suit No. E796 of 2021 which allowed an application to join Dr. Robert Sidhe (hereinafter referred to as ‘the proposed 2<sup>nd</sup> defendant’) as a 2<sup>nd</sup> defendant in the said suit among other ancillary orders. The appellant’s memorandum of appeal faulted the Honourable Magistrate on the following grounds;
  - a. That the trial magistrate erred in fact and in law and misdirected herself by finding that the proposed 2<sup>nd</sup> defendant is a necessary and proper party to the suit.
  - b. That the learned trial magistrate erred in law and in fact in failing to apply the judicial principles to be considered in an application for joinder of parties to a suit.
  - c. That the learned trial magistrate erred in law and in fact in failing to apply the evidential threshold to be considered in an application for joinder of parties to a suit.
  - d. That the trial magistrate erred in law and in fact by taking into consideration the respondent’s submissions filed irregularly outside the leave days issued by the court.



- e. That the trial magistrate erred in law and in fact in failing to accord due regard to the appellant's replying affidavit, submissions and authorities on the issue of joinder of the 2<sup>nd</sup> proposed defendant.
2. The record of appeal does not have the plaint or the defence in the lower court and I found it hard to understand the real issues before the trial court. However, I gather from the application dated 3<sup>rd</sup> March 2023 which culminated to the ruling being appealed, the supporting affidavit and replies filed in opposition, that the appellant and one Professor Kaindi instructed the respondent who is a law firm to open an escrow account where money related to a project with the University of Nairobi was to be channelled. The respondent had sought to enjoin the proposed 2<sup>nd</sup> defendant because according to it, he was a principal player in the running and operation of the account.
3. According to the appellant, the escrow agreement was between himself and Professor Kaindi in his capacity as a representative of the University of Nairobi and not with the proposed 2<sup>nd</sup> Defendant. The appellant further contends that as per the escrow agreement, the appellant and the aforementioned Professor Kaindi were the only ones with the authority to handle the escrow account and that the escrow agreement did not include the proposed 2<sup>nd</sup> defendant. The appellant argues that the proposed 2<sup>nd</sup> defendant was not a necessary party to the suit neither did he have any clear identifiable and proximate interest in the matter.
4. The appellant has cited the case of *Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 EA 55 where the court postulated as follows:
- “...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 person.”
5. The appellant has also cited *King'ori vs. Chege & 3 Others* [2002] 2 KLR 243 where the court observed that for a defendant to be joined as a party, there must exist a relief flowing from that proposed defendant to the plaintiff without whom no orders at all can be passed. The court in the matter held that:
- “...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed.’
6. The respondent filed submissions dated the 25<sup>th</sup> of November 2024 opposing the appeal. According to the respondent, the appellant's prayer in the plaint dated 27/05/2021 was for compensation regarding withdrawal of monies held in the escrow account being a sum of Kshs. 6,000,000 and USD 100,000. The respondent further states that according to the escrow agreement dated 20<sup>th</sup> January 2020, the European-African Institute for Health Service Management was the entity on whose behalf the funds in the escrow account were held and the proposed 2<sup>nd</sup> defendant not only represented the institute in the grant but also contributed funds to the escrow account through the institute.



7. The respondent relies on the case of *Civicon Limited vs Kivuwatt Limited, Smart Cargo Limited & Commissioner, Kenya Revenue Authority Customs Services Department* [2015] eKLR where the court stated that: -

“...What makes a person a necessary party is that he has relevant evidence to give on some of the questions involved; and this would make him a necessary witness. The only reason which makes it necessary to make a person a party to an action is so that they 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.”

8. The respondent adds that the appellant lodged a criminal complaint against both the respondent and the proposed 2<sup>nd</sup> defendant in relation to the subject matter of these proceedings. As a consequence, thereof, both the respondent and the proposed 2<sup>nd</sup> defendant are accused in Kibera Criminal Case No. E1322 of 2021; *Republic vs Jacob Auma Okoth and Dr. Robert Sidhe*.

9. Having considered the proceedings before the lower court, grounds of appeal and rival submissions by both counsel, I find that the main issue that crystalizes for determination is whether there were justifiable grounds for joining or adding the proposed 2<sup>nd</sup> defendant as a defendant to the suit. Under Order 1 Rule 3 of the Civil Procedure Rules, a person may be joined in a suit as a defendant against whom any right to relief arising out of an act or transaction is alleged to exist. The said provision provides as follows:

“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.”

10. Order 1 Rule 10(2) of the Civil Procedure Rules provides that a court may, either on application made by a party or without, allow joinder of a party whose presence it considers to be necessary in a suit.:

‘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.’

11. The guiding principles in considering whether to allow joinder was stated in the case of *Joseph Njau Kingori v Robert Maina Chege & 3 Others* [2002] eKLR where the court held that for joinder an intending party; he must be a necessary party, he must be a proper party, in the case of the defendant there must be a relief flowing from that defendant to the plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter and his presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.

12. In the case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR as follows:

‘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 person.'

13. The Court of Appeal in the case of *Meme v. Republic*, [2004] 1 EA 124, held that a party could be enjoined in a matter for reasons such as:
  - 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 prevent a likely course of proliferated litigation.
14. As I have stated above, I don't know what reliefs were sought in the plaint since the appellant has not included the pleadings filed in the trial court in the record of appeal and the trial court's record was not forwarded to this court. The only lead to the cause of action is the background given in the appellant's submissions in the lower court which appear on page 33 of the record of appeal and the ruling of the magistrate which appears on page 89 of the record of appeal. From the said background, the appellant sued the respondent for recovery of Kshs 6,000,000.00 and USD 100,000 and general damages for professional negligence based on the grant award agreement and the operation of the escrow account.
15. It is apparent that the cause of action revolves around management of the escrow account by the respondent. What is not clear to this court is the basis for the negligence. It would have helped this court if the pleadings were availed to enable me ascertain the role the respondent claimed the proposed 2<sup>nd</sup> defendant played in the movement of the money. As it stands now, this court cannot dismiss the claim that the proposed 2<sup>nd</sup> defendant participated in the management of the money or funds in the said account and in the circumstances, I find it difficult to fault the magistrate who had the benefit of all the facts and full pleadings and I believe that she must have considered the same in reaching the decision she did. She actually states at paragraph 4 of the ruling that she reviewed the application, affidavits in support and against, submissions, annexed documents and authorities.
16. In addition to the above, I have noted that Dr. Robert Sidhe appended his signature as a witness to the agreement between the plaintiff and the University of Nairobi which agreement was the basis for the escrow account agreement. It is the same Dr. Robert Sidhe who is alleged to have been involved in the movement of the money. On the face of it, I am satisfied that the said Robert Sidhe will be a necessary party to enable the court appreciate the circumstances under which the money moved from the escrow account. This is so considering the contents of the respondent's supplementary affidavit dated 15<sup>th</sup> December 2023 which appears on pages 71 to 75 of the record of appeal.
17. In view of the above, it is my position that the Honourable Magistrate did not err in allowing the application. Consequently this appeal is dismissed with costs to the respondent.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF MARCH 2025.**

**B.M. MUSYOKI**



**JUDGE OF THE HIGH COURT.**

Ruling delivered in presence of Miss Kimani holding brief for Mr. Muga for the appellant and in absence of the respondent

