



**Eldorado Gardens Limited v Thurania & another (Commercial Case E523 of 2022)
[2025] KEHC 8742 (KLR) (Commercial and Tax) (9 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E523 OF 2022
JWW MONG'ARE, J
JUNE 9, 2025**

BETWEEN

ELDORADO GARDENS LIMITED PLAINTIFF

AND

CAROL NKIROTE THURANIRA 1ST DEFENDANT

PAUL PULEI KIOI 2ND DEFENDANT

RULING

1. On 21st March 2024, the 2nd Defendant/Applicant moved this Honourable Court by a Notice of Motion Application filed under a certificate of urgency and brought under Section 1B, 3A of the [Civil Procedure Act](#), Order 1 Rule 3 of the Civil Procedure Rules seeking the following orders:-
 1. That this Honourable Court be pleased to order and it is hereby ordered that the applicant /2nd Defendant was improperly joined and further order that his name be and is hereby struck out as a Defendant in this case.
 2. That costs of this application be provided for.
2. The application is premised on the grounds set out on its face and the supporting affidavit of Paul Pulei Kioi sworn on 21st March 2024. It is opposed and the Plaintiff/Respondent has filed grounds of opposition dated 10th January 2024 and a replying affidavit sworn by Henry Kissinger Figondo sworn on 31st July 2024. Both parties have filed written submissions on the directions of this court which I have carefully considered.
3. In his quest to have the court strike out his name as a party to the suit before this court, the 2nd Defendant argues that the pleadings before this court do not establish a cause of action as against him and the Plaintiff. He argues that other than the fact the 1st Defendant is his spouse, he is not known



- to the Plaintiff and has never been involved in the alleged transactions between the Plaintiff and the 1st Defendant and that he was shocked to learn that he had been listed as a guarantor to loan advances to the 1st Defendant by the applicant.
4. The 2nd Defendant argues that further the purported signature guaranteeing the alleged borrowings between the 1st Defendant and the Plaintiff was confirmed by a forensic expert not to be his and the same despite purporting to guarantee colossal sums of money was not witnessed. He further avers that continued retention in the suit as a party is occasioning him prejudice as he has been forced to engage legal representation to defend himself in a suit where there is no claim against him.
 5. The 2nd Defendant urges the court to strike out his name from the pleadings and further states that there is no prejudice to be suffered by the Plaintiff since any judgment against the 1st Defendant, if and when it is issued by the court, will be executable against their joint assets. In any event and even prior to filing the present suit, no demand was served upon for the repayments of the sums being claimed by the Plaintiff from the 1st Defendant and the only reason he has been dragged to the suit is because he is related to the 1st Defendant who is his wife. He avers that he has no business dealings with the 1st Defendant involving the Plaintiff or at all.
 6. In opposing the present application, the Plaintiff has filed grounds of opposition and a replying affidavit in which they argue that the 2nd Defendant is a necessary party to these proceedings as he acted as a guarantor to the loans obtained by the 1st Defendant from the Plaintiff and cannot therefore remove himself from these proceedings. The Plaintiff argues that the suit before this court discloses a cause of action against the Defendant and therefore the court should retain him in the suit as a necessary party.
 7. In considering whether or not to allow the present application I am guided by the provisions of the Civil Procedure Rules under order 1 Rule 3 that defines who may be joined as a Defendant. The said provisions provide as follows; “3. Who may be joined as Defendants [Order 1, rule 3] ; 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.”
 8. The question that this court must then determine is whether as alleged the 2nd Defendant acted as a guarantor to the alleged loan obtained by the 1st Defendant from the Plaintiff. The 2nd Defendant has denied signing any loan agreements and has argued that the alleged signature on the purported loan agreement was found by a document examiner not to be his. He further argues that the said signature is not witnessed by an independent witness and cannot therefore be relied on as evidence of his contractual obligations to the Plaintiff.
 9. The Plaintiff has urged the court to find the definition of the word guarantor was properly defined by Geraldine Andrews & Richard Miller 2nd Edition “Law of Guarantees” as follows; - “A contract of guarantee is an accessory contract, by which the surety undertakes to ensure that the principal performs the principal obligations. It has been described as a contractor to indemnify the creditor upon happenings of a contingency namely defaults of the principal to perform the principal obligation. The surety is therefore under a secondary obligation which is dependent upon default of the principal and which does not arise until that point.”
 10. In addition to the above definition, the Plaintiff has urged this court to be guided by the courts holding in the case of Mwindani Kombo Mwinyi v Bandari Savings & Credit Society Limited & another [2021]



eKLR where the Court held “ A contract of Guarantee requires that the guarantors acknowledge that they would repay the loan in case of default by the loanee.....”

11. Arising from the above holding and assuming that the court was to be persuaded that the 2nd Defendant acted as a guarantor to the 1st Defendant in the loan agreement with the Plaintiff, which loan agreement has been denied, then the party seeking to pursue such a claim against a guarantor must first establish that the principal has breached the loan agreement and failed to honour their obligations under the said loan agreement. In the present suit before this court, the loan is disputed and there is no finding or holding yet by a court that indeed the 1st Defendant is indebted to the Plaintiff as claimed in the plaint. It follows therefore, to lodge a claim against a purported guarantor at this stage would be premature, as liability is yet to be established.
12. In addition, and upon a perusal of the pleadings filed before this court, the court has noted that the amended plaint filed on 9th January 2023 has not established a nexus between the Plaintiff and the 2nd Defendant. Moreso, in the particulars of breach set out in the said amended plaint, the Plaintiff has confirmed having issued a demand to the 1st Defendant for the repayment of the sums claimed in the plaint but does not particularize such a demand being directed to the 2nd Defendant.
13. For the above stated reasons I agree with the 2nd Defendant that there is not disclosed in the suit before this court a cause of action against him. it is therefore clear to me if such a joinder was to be on account of a guarantee to a loan, the same being disputed by the 1st Defendant and there being no judgment in favour of the Plaintiff having been made by the court against the 1st Defendant, such a claim against a guarantor is premature and must await the outcome of the dispute between the Plaintiff and the 1st Defendant, who is sued as a principal debtor herein.
14. I find therefore that the application by the 2nd Defendant has merit. I allow the same as prayed and I award the costs of this application to the 2nd Defendant. Forthwith the 2nd Defendant shall be struck off from the suit herein. It is so ordered.

DATED SIGNED AND DELIVERED virtually this 9th DAY OF JUNE 2025

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J.W.W. MONGARE

JUDGE

IN THE PRESENCE OF:-

Ms. Nyambura holding brief for Mr. Ochieng for the Plaintiffs/Respondent.

N/A for the Defendant/Applicant.

Amos - Court Assistant

