



Strategic Investment Limited v ABC Investment Limited; Lexis International Limited (Proposed Defendant) (Civil Suit E037 of 2021) [2025] KEHC 8804 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEHC 8804 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E037 OF 2021
HI ONG'UDI, J
JUNE 19, 2025**

BETWEEN

STRATEGIC INVESTMENT LIMITED APPLICANT

AND

ABC INVESTMENT LIMITED RESPONDENT

AND

LEXIS INTERNATIONAL LIMITED PROPOSED DEFENDANT

RULING

1. In the amended Notice of Motion dated 17th July 2024 the defendant/applicant seeks to have the proposed 2nd defendant/interested party enjoined in this cause as 2nd defendant/interested party plus costs of the application.
2. The application is premised on the grounds on its face as well as the affidavit sworn by the defendant/applicant's director D. M. Ngunia on even date. He reiterated the contents of his affidavit sworn on 22nd May 2024 where he deponed that the proposed 2nd defendant/interested party was to do a bit of financing for an off-plan project being undertaken by defendant/applicant. That the project successfully took off and the proposed 2nd defendant/interested party put up a few floors but there was cash crunch which led to the project stalling. Further, that the proposed 2nd defendant/interested party invoked the arbitration clause in their agreement and arbitration proceedings against the defendant/applicant were commenced.
3. He further deponed that during the arbitration proceedings a compromise was reached and a consent by the parties adopted as an arbitral award on or around 1st September, 2023. He stated that vide an order given on 17th April, 2024, in Nakuru H.C Misc. Application No. E403 of 2023 Lexis International Limited v ABC Investment Limited the said award was adopted and recognized as a judgment of the court. He further stated that through its advocates on record the defendant /applicant



vide a letter dated 6th May, 2024 informed the plaintiff/respondent of the said developments. The plaintiff/ respondent was also informed of the fact that any claim could only be against the proposed 2nd defendant/interested party and as such it ought to be brought on board in this suit.

4. The proposed 2nd defendant/interested party filed a replying affidavit sworn by its director Mahesh Vekaria on 19th February 2025. He opposed the defendant/applicant's application and averred that he was not privy to the agreement between the plaintiff/respondent and the defendant/applicant and hence not a necessary party to this suit. Further, that the proposed 2nd defendant/interested party had no stake or interest in this suit as the outcome does not in any way concern it. He termed the application as vexatious, frivolous and an abuse of the court process and ought to fail.
5. The defendant/applicant filed a supplementary affidavit sworn by its director D. M. Ngunia on 7th May 2025 where he reiterated the contents of the affidavit in support of its application.
6. The application was canvassed by way of written submissions.

Defendant/applicant's submissions

7. These were filed by Mirugi Kariuki & company advocates and are dated 7th May, 2025. Counsel identified three issues for determination and the first one is whether the proposed 2nd defendant/interested party is a necessary party in these proceedings which arise from an arbitral award dated 1st September 2023. Counsel submitted that the said award confirmed that the proposed 2nd defendant/interested party was a necessary party in these proceedings.
8. He reproduced the contents of clause 3 of the arbitral award which provides as follows;

“That the agreements between the respondent and Project Consortium and terms thereof, and Strategic Investment Company dated 10th May 2016 shall be novated to the claimant who shall thereby indemnify the respondent against any claim, demand and/or charges from the said Consortium.”

9. The second issue is whether the applicant has proved existence of all the elements to entitle the proposed 2nd defendant/ interested party being enjoined in these proceedings. On this he submitted that the said award puts the proposed 2nd defendant/interested party at the center of the dispute between the plaintiff/respondent and the defendant/applicant. He urged the court to issue orders enjoining the proposed 2nd defendant/ interested party as the 2nd defendant rather than an interested party.
10. He placed reliance on Order 1 rule (10) (2) of the Civil Procedure Rules, Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 and the Supreme Court's decision in Communications Commission of Kenya and 4 Others v Royal Media Services Ltd and 7 Others, Petition No 14 of 2014 [2014] eKLR as cited in Mathias Masinde Mumbwani v Stella Cheruto & 2 others; Mary Liha Mutsamd (Intended Interested Party) [2019] eKLR) where it was held as follows;

“In determining whether the applicant should be admitted into these proceedings as an interested party we are guided by this court's decision in the Mumo Matemo case where the court at Paragraphs 14 and 18 held; An interested party is one who has a stake in the proceedings, though he/she was not a party to the cause ab initio or she is one who will be affected by the decision on the court when is made either way. Such a person feels that his



or her interests will not be articulated well unless he himself or she herself appears in the proceedings and champion his/her cause.”

See also;

- i. Kenya Medical Laboratories Technicians and Technologies Board & 6 Others v Attorney General & 4 others [2017] eKLR.
 - ii. Shirving Supermarket Limited v Jimmy Ondicho Nyabuti & Others [2018] eKLR.
 - iii. Elizabeth Nyambura Njuguna & Another (suing as the legal representatives of Njuguna Mwaura Mbogo) v E. K Banks Limited & 2 Others; Edward Kings Onyancha Maina (interested party) [2019] eKLR, among others.
11. The last issue is whether costs should issue, counsel contended that the defendant/applicant was entitled to costs. He placed reliance on the decision in *NBI HCCC No. 191 OF 2008 Orix Oil Limited V Paul Kabeu* 2014 eKLR
 12. He urged the court to allow the defendant/applicant’s application.

Proposed 2nd defendant/Interested party’s Submissions

13. These were filed by Tito & company advocates and are dated 7th May, 2025. Counsel identified two (2) issues for determination. The first one is whether the proposed 2nd defendant should be joined as a 2nd defendant or an interested party to this suit. Counsel submitted that the present suit is purely between the plaintiff/respondent and the defendant/applicant thus, the proposed 2nd defendant /interested party had no identifiable stake or legal interest in the suit. Counsel argued that the defendant/applicant seeks to unlawfully introduce quite a new cause of action in these proceedings.
14. In support of his arguments he placed reliance on Order 1 rule 10 (2) of the Civil Procedure Rules 2010 and the decision in *Omboko v Speaker & Chairperson of Busia County Assembly Service Board & 6 Others* where the court relying on *Kingori vs. Chege & 3 Others* [2002] 2 KLR 243 set the guiding principles on the question of joinder as follows:

“...parties cannot be added so as to introduce necessary parties who ought to have been joined as parties who are necessary to the *Constitution* of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the question involved in the proceedings.”

See also:

- i. Civicon Limited v Kivuwatt Limited & 2 Others [2015] eKLR.
- ii. John Harun Mwau v Simone Haysom & 2 Others; Attorney General & 2 Others (Interested parties) [2021] eKLR.
- iii. Nyamai & 291 Others v South Eastern University College [2023] KEELC 17199 (KLR).



15. On the second issue on whether the proposed 2nd defendant should be awarded costs of the suit, counsel while relying on section 27 of the *Civil Procedure Act* and the decision in *Cecilia Karuru Ngayu v Barclays Bank of Kenya & AMP; Another* [2016] eKLR, urged the court to award costs to the proposed 2nd defendant/Interested party.

Analysis and determination

16. I have considered the application together with the affidavits and the submissions by the respective parties. In my view, the issue for determination is whether the proposed 2nd defendant/ interested party should be enjoined in this cause.

17. In addressing this issue, this court is guided by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides: -

“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.”

18. In the case of *Werrot & Company Ltd & Others V Andrew Douglas Gregory & Others*, [1998] eKLR the court stated as follows:

“For determining the question of who is a necessary party there are two tests;

- i. there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and
- ii. it should not be possible to pass an effective decree in the absence of such a party.”

19. Similarly, in the case of *Amon v Raphael Tuck & Sons Ltd*, (1956) 1ALLER273, cited in *Pizza Harvest Limited v Felix Midigo* [2013] eKLR where the Court elaborated on who a necessary party is. Devlin, J stated as such at p. 286-287: “What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he 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.”

20. In light of the provision of the law and the decisions cited above, it is clear that in order for the court to enjoin the proposed 2nd defendant/interested party to the suit, it must be satisfied that the plaint discloses a cause of action against it or the Court finds it convenient or desirable to have some of such persons heard in order for the court to find a complete answer to the issue/issues raised. I have considered the plaint dated 22nd December 2021 and the plaintiff’s cause of action as against the defendant/applicant. The plaintiff is seeking among other orders for a refund of kshs. 25, 085, 000/



= being money paid as part payment for sale of office suites which were being constructed by the defendant/applicant.

21. It is the defendant/applicant's case that subject to the arbitral award of 1st September, 2023 the plaintiff /respondent's claim could only be against the proposed 2nd defendant/interested party and as such it ought to be brought on board in this suit. The proposed 2nd defendant/interested party on its part contends that it was not privy to the agreement between the plaintiff/respondent and the defendant/applicant hence not a necessary party to this suit. Further, that it had no stake or interest in this suit as the outcome does not in any way concern it.
22. Having carefully perused the arbitral award dated 1st September 2023, I note that at page 2 paragraph 3 it is stated as quoted at paragraph 8 of this Ruling and so I will not rehash it.
23. From the stated excerpt above, there is no doubt that the proposed 2nd defendant/interested party will be affected by the decision of this court and its enjoinder to the suit is necessary for purposes of settling the dispute between the plaintiff/ respondent and the defendant/applicant. The plaintiff/ respondent's claim arises from the agreement /contract dated 10th May 2016 which is what is captured in the arbitral award. Further the said project which the plaintiff/respondent was to benefit from was being constructed by both the defendant/applicant and the proposed 2nd defendant/interested party. In my humble view, the proposed 2nd defendant/ interested party is a necessary party to this case for the dispute to be sorted out. It should be given an opportunity to state its case. It can only do that as a 2nd defendant and not interested party herein.
24. Consequently, this court finds the application dated 17th July, 2024 to be merited and the same is allowed, and the following orders shall issue:
 - i. The plaintiff to file and serve an amended plaint on both defendants within 14 days.
 - ii. The 1st defendant is granted leave to amend its defence within 14 days. The 2nd defendant to file and serve its defence within 14 days. Time to run from the date of service of the amended plaint.
 - iii. Parties to file and exchange their witness statements and any documents they would wish to rely on within 30 days after the filing of the defences.
25. Mention before the DR on 19th August, 2025 to confirm compliance before the matter is listed for the pre-trial conference.
26. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 19TH DAY OF JUNE, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

