



**First Community Bank Limited v Miller t/a Miller & Company Advocates (Commercial Case E055 of 2019) [2025] KEHC 11316 (KLR) (Commercial and Tax) (24 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11316 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E055 OF 2019**

**AA VISRAM, J**

**JULY 24, 2025**

**BETWEEN**

**FIRST COMMUNITY BANK LIMITED ..... PLAINTIFF**

**AND**

**CECIL G MILLER T/A MILLER & COMPANY ADVOCATES ..... DEFENDANT**

**RULING**

**Introduction and Background**

1. The Court is called upon to determine the Defendant's application dated 17<sup>th</sup> November, 2020, seeking directions regarding the trial of issues raised in the Third Party Notices dated 22<sup>nd</sup> October, 2019. Specifically, the Defendant prays that: -
  - [a] the issue of liability between the Defendant and the Third Parties be determined during the trial of the main suit; and
  - [b] leave be granted to continue proceedings against the 5<sup>th</sup> Third Party, Midland Energy Limited [under administration].
2. The Defendant relies on the grounds that on 17<sup>th</sup> October, 2019, it sought and Muigai, J. granted leave to institute Third Party proceedings. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties have entered appearance, and filed their respective statements of defence, while the 3<sup>rd</sup> and 4<sup>th</sup> Third Parties have not. It is argued that the question of liability between the Plaintiff and the Defendant is substantially the same as that between the Defendant and the Third Parties.
3. Regarding the 5<sup>th</sup> Third Party, the Defendant submits that although consent from the Administrators has been sought, it has not been obtained, thus necessitating leave of this Court to proceed against the company under administration.



4. The Application is supported by the affidavit of Cecil G. Miller, sworn on 17<sup>th</sup> November, 2020. Notably, neither the Plaintiff nor the Third Parties have filed responses or submissions, and only the Defendant has filed written submissions. The Court will therefore determine the Application on the basis that the same is unopposed.

### **Analysis and Determination**

5. The Defendant's submissions emphasize Order 1, rule 22 of the Civil Procedure Rules, which provides: -

If a third party enters an appearance pursuant to the third-party notice, the Defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the Defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the Defendant giving the notice against the third party.

6. The effect of this provision is that once a third party enters appearance, the Defendant must seek the court's directions. The court must be satisfied that a proper question exists regarding the third party's liability to the Defendant. If satisfied, the court may direct that such liability be tried together with or after the main suit.
7. It is undisputed that on 17<sup>th</sup> October, 2019, the court [Muigai J.] granted leave to issue Third Party Notices, which were subsequently filed on 24<sup>th</sup> October, 2019. The 1<sup>st</sup> Third Party filed a statement of defence on 21<sup>st</sup> December, 2019, and the 2<sup>nd</sup> Third Party claimed to have filed one on 18<sup>th</sup> August, 2020, although I note that no record of the same exists in either the Case Tracking System or on the hard copy court file. The 3<sup>rd</sup> to 5<sup>th</sup> Third Parties have not entered appearance or filed any defences.
8. To determine whether a proper question exists, it is necessary to briefly examine the Plaintiff's case and the defences of the Defendant and Third Parties.

### **Plaintiff's Claim**

9. The Plaintiff alleges that it retained the Defendant to prepare and register a first-ranking debenture in its favour and, after confirmation that no other securities existed, the Defendant advised the release of USD 1,180,000.00 to the borrower.
10. The Plaintiff claims the Defendant breached its duty of care and its contractual obligations by registering a debenture that ranked third in priority; failing to disclose earlier securities; and neglecting to obtain necessary consents. The borrower was later placed under administration, jeopardizing the Plaintiff's security.

### **Defendant's Defence**

11. The Defendant denies negligence, breach of contract, or fiduciary duty. It contends that the Plaintiff's instructions were general and professionally executed. It asserts that searches conducted through the Registrar of Companies revealed no encumbrances at the time.



12. The Defendant alleges deliberate misrepresentation and fraudulent conduct by the borrower's directors [3<sup>rd</sup> and 4<sup>th</sup> Third Parties], who manipulated information to secure the loan. It seeks indemnity from them and from the 5<sup>th</sup> Third Party, a sister company of the borrower.

### **1<sup>st</sup> Third Party's Defence**

13. The 1<sup>st</sup> Third Party denies negligence, breach of contract, or liability for indemnity. He avers that he performed duties under the Defendant's supervision with due care and professionalism. In the alternative, if any negligence is established, liability rests solely and vicariously with the Defendant as his employer.
14. Having considered the pleadings as briefly summarized above, I am satisfied that a proper question exists as to the respective liabilities of the Defendant, the 1<sup>st</sup> Third Party, and the 2<sup>nd</sup> Third Party. The issues overlap substantially with those in the main suit, and I am persuaded that it would be fair and efficient to determine the same concurrently.
15. I note that based on the record, the 3<sup>rd</sup> and 4<sup>th</sup> Third Party's have not entered appearance or filed any defences. I therefore shall not issue any directions in respect of the said parties.
16. As regards the prayer seeking leave to continue proceedings against the 5<sup>th</sup> Third Party, which is under administration, the Defendant has relied on inter alia Section 560 [1][d] of the [Insolvency Act](#) which provides that: -

a person may begin or continue legal proceedings [including execution and distress] against the company or the company's property only with the consent of the administrator or with the approval of the Court. [Emphasis mine]

17. Section 2 of the Act, further clarifies that the "the Court" is "the High Court, and if there is an insolvency division of that Court, means that division". In practice, such an application ought to be made to the insolvency court presiding over the insolvency proceedings. The reason for this is to avoid multiplicity of proceedings concerning the same subject matter, and to avoid contradicting decisions arising out of courts of concurrent jurisdiction. This Court is not the insolvency court in respect of the 5<sup>th</sup> Defendant, and therefore it would not be appropriate for this Court to consider and determine that issue. That particular prayer is accordingly struck out. The Applicant is at liberty to raise the said issue before the insolvency court.

### **Disposition**

18. The Defendant's Application dated 17<sup>th</sup> November, 2020, is allowed to the following extent: -
- [a] The issue of liability between the Defendant and the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties shall be determined at the trial of the main suit, concurrently with the issues between the Plaintiff and the Defendant.
- [b] Costs shall be in the cause.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF JULY, 2025**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;



Court Assistant: Sakina

.....for Plaintiff

.....for Defendant

