



Prime Bank Limited v Midland Emporium Limited & 2 others (Commercial Case E003 of 2022) [2025] KEHC 10867 (KLR) (24 July 2025) (Ruling)

Neutral citation: [2025] KEHC 10867 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E003 OF 2022**

JM OMIDO, J

JULY 24, 2025

BETWEEN

PRIME BANK LIMITED PLAINTIFF

AND

MIDLAND EMPORIUM LIMITED 1ST DEFENDANT

JAGDISH P. KOTECHA 2ND DEFENDANT

JAYESH P. KOTECHA 3RD DEFENDANT

RULING

A. Background

1. By a plaint dated 25th February, 2022, the Plaintiff herein Prime Bank Limited brought this suit against the 1st Defendant Midland Emporium Limited and Jagdish P. Kotecha and Jayesh P. Kotecha, the 2nd and 3rd Defendants respectively, who are the directors of the 1st Defendant, seeking against the said Defendants, jointly and severally, the following reliefs:
 - a. An order directed specifically to the Defendants jointly and severally, directing them to execute, within 14 days from the date of the making of the order of this court, the Replacement Charge and Conditional Discharge of Charge over the land comprised in Title No. Kisumu Municipality/Block 3/30 in favour of the Plaintiff herein.
 - b. In the event of default on the part of the Defendants with respect to order (a) above, the Deputy Registrar of this court do execute the Replacement Charge and Conditional Discharge of Charge over the land comprised in Title No. Kisumu Municipality/Block 3/30 in favour of the Plaintiff herein.
 - c. Costs of the suit.



- d. Interest on (c) above at court rates from the date of the filing of this suit until payment in full.
 - e. Any other relief that the court deems fit to grant.
2. The three Defendants resist the Plaintiff's claim and each of them filed their separate statements of defence. The Defendants' amended statements of defence are all dated 22nd March, 2022.
 3. The contents of the 2nd Defendant's 2-paragraph statement of defence are as follows:
 1. Save and except as is specifically admitted, the 2nd Defendant denies all and singular the averments in the plaint and shall put the Plaintiff to strict proof thereof.
 2. Save and except as paragraphs 3 and 5 of the plaint are a simple description of the 2nd Defendant and no more and that there is no other averment against him, it is contended that this being a director of the 1st Defendant without more is no reason to be sued and there is no plea or cause of action known to law against him and he shall seek to have the suit against him struck out.
 4. The 3rd Defendant's statement of defence similarly contains 2 paragraphs, whose contents are as follows:
 1. Save and except as is specifically admitted, the 3rd Defendant denies all and singular the averments in the plaint and shall put the Plaintiff to strict proof thereof.
 2. Save and except that;
 - a. Paragraph 4 and 5 of the Plaint describe the 3rd Defendant and no more and there is no other averment in the plaint against the said 3rd Defendant, and
 - b. The contention that the 3rd Defendant is a director of the 1st Defendant and no more is no reason to be sued.

there is no cause of action known to law pleaded against the 3rd Defendant and he shall seek to strike out the suit against him.

B. The Notice of Motion Dated 3rd April, 2024.

5. The 2nd and 3rd Defendants filed the motion dated 23rd March, 2022, 3rd April, 2024, expressed to be brought under Order 2 Rule 15 of the [Civil Procedure Rules](#), seeking for the following orders:
 - a. That the Honourable Court be pleased to strike out the claim against the 2nd and 3rd Defendants with costs.
 - b. That costs of this application be borne by the Plaintiff.
6. The grounds upon which the application is premised are on its face and are as follows:
 1. The claim against the 2nd and 3rd Defendants as pleaded in the plaint is scandalous, frivolous and vexatious and an abuse of the process of the court because save and except as paragraphs 3, 4 and 5 of the plaint only describe them (2nd and 3rd Defendants) no other averment has been directed against them.
 2. The mere fact that the 2nd and 3rd Defendants are said to be directors of the 1st Defendant, that alone is not sufficient to have them sued in proceedings where the 1st Defendant is the focus of the Plaintiff's alleged claim(s).



7. The application is supported by the affidavit of the second Defendant sworn on 23rd March, 2022, who therein states that he has authority from the 3rd Defendant to make depositions on oath on his behalf, on the matters therein.
8. In precis, the 2nd Defendant states on oath that the Plaintiff's claim as pleaded focuses on the 1st Defendant with respect of a further charge on LR No. Kisumu Municipality/Block 3/30 and that the Plaintiff has not pleaded or demonstrated that the 2nd and 3rd Defendants were parties to the said further charge.
9. That as such, the Plaintiff has not demonstrated that the 2nd and 3rd Defendants were/are under an obligation to deliver a replacement or discharge of charge or take other action to ensure that the Plaintiff's security was not prejudiced.
10. The Plaintiff resists the motion by the 2nd and 3rd Defendants and to that end filed a replying affidavit sworn on 17th May, 2022 by George Mathui, who describes himself therein as the Plaintiff's Manager, Legal.
11. The deponent to the replying affidavit states therein that the 2nd and 3rd Defendants do not contest the fact that they are directors of the 1st Defendant. He further states that the suit seeks an order directing the Defendants to execute the replacement charge and the conditional discharge of charge over Title No. Kisumu Municipality/Block 3/30 in favour of the Plaintiff. That being directors of the 1st Defendant, it is the 2nd and 3rd Defendants who will be ultimately be required to execute the replacement charge and the conditional discharge of charge over Title No. Kisumu Municipality/Block 3/30, in the event that the suit succeeds.
12. For the reasons foregoing, the Plaintiff is of the view that the 2nd and 3rd Defendants are necessary parties in the suit, and their application should therefore fail.
13. The 1st Defendant did not file any response to the application.
14. This court directed that the application be canvassed by way of written submissions. The Plaintiff and the 2nd and 3rd Defendants filed their respective submissions on the motion.

C. The 2nd and 3rd Defendants' Submissions.

15. The 2nd and 3rd Defendants submitted that the Plaintiff's claim as pleaded in the plaint is specific to the further charge over Title No. Kisumu Municipality/Block 3/30. That as there has not been pleaded in the plaint that the 2nd and 3rd Defendants were parties to the further charge, there is no cause of action against them, notwithstanding that they are directors of the 1st Defendant.
16. The 2nd and 3rd Defendants proffer the position that the 1st Defendant is a separate and distinct legal entity from its directors. To that end, the 2nd and 3rd Defendants have invited the court to be guided by the case of *Salomon v Salomon* [1897] AC 78 in which the House of Lords held that a company is in law a separate person from its members, which decision has been echoed in a number of cases locally, including that of *Lucy Nyambura Kimani v Nzuri Feeds Suppliers Limited* [2021] eKLR and that of *Ukwala Supermarket v Jaideep Shah & another* [2022] eKLR, which the 3rd and 4th Defendants relied upon. In the *Salomon (supra)*, Lord MacNaghten stated thus:

“The company is at law a different person altogether from the subscribers to the memorandum and though it may be that after incorporation, the business is precisely the same as it was before, and same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustees for them. Nor are the



subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act . . .”

17. The 2nd and 3rd Defendants conclude that they were sued merely because they are directors of the 1st defendant yet there is no tenable cause of action disclosed in the plaint against them.

D. The Plaintiff’s Submissions.

18. The Plaintiff submits that the 2nd and 3rd Defendants are necessary parties in the suit. The Plaintiff takes the position that the two are proper parties to the suit and that in paragraphs 14, 15, 16 and 17 of the plaint, the claim against the them is well established.
19. The Plaintiff further submits that the application by the 2nd and 3rd Defendants to strike out the suit against them is an invitation by the two to the court to determine the matter in instalments.
20. The Plaintiff relies on Order 1 Rules 3, 9 and 10 of the [Civil Procedure Rules](#), which provide that:

Order 1 Rule 3 Who may be joined as defendants

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.

Order 1 Rule 9 Misjoinder and non-joinder

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it

Order 1 Rule 10(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.

21. The Plaintiff further relies on the decision of [JMK v MWM & another](#) [2015] eKLR, where the Court of Appeal, in considering the import of Order 1 Rule 10(2) of the [Civil Procedure Rules](#), observed as follows:

Order 1 Rule 10(2) of the [Civil Procedure Rules](#) empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.”



This Court adopted the same approach in *Central Kenya Limited v Trust Bank & 4 others*, CA No. 222 Of 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar’s Code, (*supra*) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our *Civil Procedure Rules*, in *Tang Gas Distributors Limited v Said & others* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

22. In its view thus, the Plaintiff submits that not only should all persons against whom orders are sought in an action arising out of the same set of facts be joined to a suit, but the court has powers to order the joinder of a party in order to enable the court properly and effectively adjudicate over the issues of controversy before it.
23. The Plaintiff further states that as the 1st Defendant is a corporate body, it can only act through the 2nd and 3rd Defendants, who are its directors. The Plaintiff cites the authority of *Chevron (K) Limited v Harrison Charo Wa Shutu* [2016] eKLR in which the court stated that:

“...it is a well-known principle of company law that, being an artificial body, a company can only act through the agency of its organs, the board of directors and shareholders.”
24. I have considered the application, the affidavit in support thereof, the replying affidavit, the pleadings and the submissions by the two sides. The following issues emerge for this court to determine:
 - a. Whether the Plaintiff’s suit against the 2nd and 3rd Defendants should be struck out for being scandalous, frivolous and vexatious and for failing to disclose a cause of action.
 - b. A determination as to the costs of the application.
25. I will determine the above issues in the order that I have set them out.

E. Analysis and Findings.

26. The first issue for me to address is whether the Plaintiff’s suit against the 2nd and 3rd Defendants should be struck out for being scandalous, frivolous and vexatious and for failing to disclose a cause of action.
27. The 2nd and 3rd Defendants have submitted that the only reason as to why they are sued as defendants is because they are said to be directors of the 1st Defendant. They urge that that alone is not sufficient to have them sued in proceedings where the 1st Defendant is the focus of the Plaintiff’s alleged claim.



28. To buttress their argument, the 2nd and 3rd Defendants have referred this court to the plaint and urge that it is clearly pleaded by the Plaintiff that it is the 1st Defendant who was a party to the further charge on LR No. Kisumu Municipality/Block 3/30, from which the claim arises, and that the Plaintiff has not pleaded or demonstrated that the 2nd and 3rd Defendants were parties to the said further charge. That other than being the 1st Defendant's directors, there is nothing to connect the 2nd and 3rd Defendants to the further charge.
29. The 2nd and 3rd Defendants have asked this court to distinguish their legal characters from that of the 1st Defendant and have invited this court to take guidance from the case of *Salomon v Salomon* [1897] AC 78 in which the House of Lords held that a company is in law a separate person or entity from its directors and shareholders.
30. On its part, the Plaintiff states that the 2nd and 3rd Defendants are properly joined in the suit. The Plaintiff submits that although the nature of the entity of the 1st Defendant is corporate, the reliefs that are sought by the Plaintiff in the suit can only be effected by the 2nd and 3rd Defendants, acting for and on behalf of the 1st Defendant as its directors.
31. The answer as to whether the 2nd and 3rd Defendants are proper parties in this suit is, happily, to be found in the authority of *Mabiaini & another v Calculus Investment Company Limited & 2 others* (Civil Suit E125 of 2022) [2023] KEHC 21326 (KLR) (Commercial and Tax) (21 July 2023) (Ruling) F. Mugambi, J had the following to say on a similar subject:

“ 11. The essence of the preliminary objection raised by the Respondents touches on the competency of the Applicants' suit on the grounds that there is misjoinder of the 2nd and 3rd Respondents to the suit. From the amended plaint, the 2nd and 3rd Respondents are sued as directors of the 1st Respondent and are all jointly and severally liable to the Applicants.

12. It is a well settled principle of law that a company is a separate legal entity from its shareholders and directors as enunciated in the locus classicus decision of *Salomon v Salomon* [1897] AC 22. Even then, it is also a well-known fact that the company, being an artificial person, has no hand and mind of its own and that the Board of Directors are the mind of the company for purposes of executing the company's objects. It is for this reason that the law allows for the lifting of the company's veil and personal liability of directors where circumstances so allow.

13. In the case of *Michael Kyambati v Principal Magistrate Milimani Commercial Courts Nairobi & another* [2016] eKLR, the court observed as follows:

The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents, usually the Board of Directors. A company may in many ways be likened to a human body; it also has hands which hold tools and act in accordance with directions from the center. Some of the people in the company are mere servants and agents.....[and] others are directors and managers who represent the directing mind and will of the company, control what it does.....ultimate responsibility rests with the directors.”



14. For the same reasons stated above, I would find no difficulty in finding that the joinder of the 2nd and 3rd respondents as agents through whom the 1st respondent thinks and acts is not fatally defective to warrant striking out of the pleadings. In any case, the effect of misjoinder or non-joinder of parties is provided for by Order 1 of the Civil Procedure Rules, 2010 which provides that:

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

15. From the foregoing, it is my finding that the preliminary objection is devoid of merit and I will therefore move on to determine the application for striking out of the amended statement of defence.”

32. I am of the same persuasion as F. Mugambi J, that much as a the 1st Defendant is, as a body corporate, a persona juridica, with a separate independent identity in law, distinct from its shareholders and directors, a company, the company acts through its agents – usually the directors.

33. It is instructive from the prayers in the plaint that what the Plaintiff is seeking is an order directing the Defendants to execute, within a specified time, the replacement charge and conditional discharge of charge over the land comprised in Title No. Kisumu Municipality/Block 3/30 in favour of the Plaintiff herein. Who, if not the 2nd and 3rd Defendants, would be expected to execute the said documents for and on behalf of the 1st Defendant, if the relief were to be granted? In the circumstances, the suit, I think, is properly brought against the 2nd and 3rd Defendants.

34. Order 1 Rule 9 of the Civil Procedure Rules presents the position in law that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

35. Any outstanding issues between the parties may be presented by the parties and dealt with in the full trial of the suit.

F. Disposition.

36. Being of the foregoing findings, I reach the result that the 2nd and 3rd Defendants’ notice of motion dated 3rd April, 2024 is devoid of merit. I proceed to dismiss. Costs of the motion shall be in the cause.

37. Orders accordingly.

DELIVERED (VIRTUALLY), DATED AND SIGNED THIS 24TH DAY OF JULY, 2025.

JOE M. OMIDO

JUDGE

For the Plaintiff: Ms. Wangari for Mr. Okunde.

For the Defendants: Mr. Havi.

Court Assistants: Mr. Ngoge & Mr. Juma.

Court: Pretrial directions to be taken on 23rd October, 2025.



JOE M. OMIDO
JUDGE

