



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rudufu Limited v Ncba Bank Kenya Plc & another; Suri (Proposed Defendant) (Commercial Case E567 of 2023) [2025] KEHC 10057 (KLR) (Commercial and Tax) (10 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10057 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E567 OF 2023**

**PM MULWA, J**

**JULY 10, 2025**

**BETWEEN**

**RUDUFU LIMITED ..... PLAINTIFF**

**AND**

**NCBA BANK KENYA PLC ..... 1<sup>ST</sup> DEFENDANT**

**PURPLE ROYAL AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**JASBIR SINGH SURI ..... PROPOSED DEFENDANT**

**RULING**

1. By the Notice of Motion dated 17<sup>th</sup> January 2025, the proposed 3<sup>rd</sup> Defendant moved this court, seeking the following orders:
  - i. Spent
  - ii. Leave be granted to the proposed 3<sup>rd</sup> Defendant to be joined in the present suit as 3<sup>rd</sup> Defendant.
  - iii. An order to issue vacating, setting aside and or discharging the orders granted on 14<sup>th</sup> December 2023, issued against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant over the suit property L.R No. 2X9/2XX9 (I.R. 5XX2/14A).
  - iv. An order do issue that the process server named Josephine Lele be summoned for cross-examination over the affidavit of service dated 21<sup>st</sup> November 2023.



- v. A mandatory injunction do issue that the Plaintiff dated 17<sup>th</sup> November 2023 filed in this suit be struck out based on the fact that it is an abuse of the court process and that the orders sought have already been overtaken by events.
  - vi. Any further orders.
  - vii. That the costs of the application be provided for.
2. The application was brought under Order 1 Rule 3, Order 40 Rule 7 and Order 51 of the Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Act, Article 159 of the Constitution and all enabling provisions of the Law. It is premised on the grounds on the face of the record and supported by two affidavits sworn by the Applicant on 17<sup>th</sup> and 28<sup>th</sup> January 2025.

### **Factual Background.**

3. The proposed 3<sup>rd</sup> Defendant contends that he is the bona fide and lawful purchaser of the suit property, L.R No. 2X9/2XX9, having acquired it through a public auction on 10<sup>th</sup> June 2021. He asserts that the Plaintiff, despite knowledge of the transfer of the suit property, obtained interim injunctive orders on 14<sup>th</sup> December 2023 through material non-disclosure, thereby unlawfully encumbering his property. The orders have allegedly hindered his right to deal with the property, resulting in financial loss.
4. He also challenges the integrity of the affidavit of service dated 21<sup>st</sup> November 2023, deposed by one Josephine Lele, and seeks her cross-examination on the same. He argues that the Plaintiff concealed the existence and outcome of a previous suit, HCCC No. 151 of 2019, raising similar issues, which was dismissed. He contends that the present suit is res judicata and an abuse of the court process.
5. The Plaintiff opposed the application through an affidavit sworn by its director, Mr. Simon Ngigi, on 23<sup>rd</sup> January 2025. He avers that the Plaintiff is the registered proprietor of the suit property, which was charged to the 1<sup>st</sup> Defendant for Kshs. 150 million. He maintains that the auction conducted by the 2<sup>nd</sup> Defendant was irregular and unlawful, and that the property was sold below market value without prior notice.
6. The 1<sup>st</sup> Defendant, through the affidavit of Ms. Christine Wahome sworn on 28<sup>th</sup> January 2025, supports the application. She asserts that the Plaintiff defaulted on the loan, now standing at Kshs. 188,758,509.00, and that all notices requisite under the law were duly issued. She contends that the Plaintiff concealed material facts in obtaining the injunctive orders and failed to serve the 1<sup>st</sup> Defendant with the pleadings until July 2024.
7. The application was canvassed by way of written submissions. The 3<sup>rd</sup> proposed Defendant filed submissions dated 31<sup>st</sup> January 2025, the 1<sup>st</sup> Defendant filed submissions dated 12<sup>th</sup> February 2025 and the Plaintiff's submissions are dated 13<sup>th</sup> February 2025.

### **Issues for determination.**

8. This Court has considered the application, the affidavit in response and the written submissions filed by the parties as well as the authorities relied upon and finds the following issues arise for determination: -
  - a. Whether the Proposed 3<sup>rd</sup> Defendant should be joined to the proceedings;
  - b. Whether the interim orders issued on 14<sup>th</sup> December 2023 should be set aside;
  - c. Whether the process server should be summoned for cross-examination;



- d. Whether the Plaintiff should be struck out as an abuse of the court process.
9. On the first issue, Order 1, Rule 10 of the *Civil Procedure Rules* provides for substitution and addition of parties. Order 1 Rule 10 (2) states that:
- “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.”
10. Further Order 1 Rule 3 thereof provides that any person:
- “...may be joined as a defendant 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.”
11. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:
- i. He must be a necessary party.
  - ii. He must be a proper party.
  - iii. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
  - iv. The ultimate order or decree cannot be enforced without his presence in the matter.
  - v. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.
12. In the instant case, the proposed 3<sup>rd</sup> Defendant has a stake in the suit property L.R No. 2X9/2XX9 (I.R. 5XX2/14A) by virtue of being a bona fide purchaser of the charged property in favour of the Plaintiff. It is trite that a party with a proprietary or beneficial interest in the subject matter of a suit should be given an opportunity to be heard hence, the proposed 3<sup>rd</sup> Defendant is a necessary party to the proceedings and ought to be enjoined in the suit.
13. I associate myself with the decision of the Court of Appeal in Tanzania in *Tang Gas Distributors Ltd v Said & Others* [2014] EA 448 to the effect 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.”
14. I therefore allow the prayer for joinder.



15. On whether the interim orders issued on 14<sup>th</sup> December 2023 should be set aside, Order 51 Rule 15 of the Civil Procedure Rules accords this court the jurisdiction to set aside ex parte orders. The 3<sup>rd</sup> Defendant argues that there was material non-disclosure.
16. In the case of Zebedee Mmata Injera versus Benson Anubi Luhong; Joanne C.K. Luhongo (Interested Party) [2021] eKLR, it was held as thus:

“... while Order 51 Rule 15 of the civil procedure rules gives the court power to set aside any order made ex parte, the court’s discretionary power should, however, be exercised judiciously, with the overriding objective of ensuring that justice is done to all the parties. That the court’s discretion to set aside an ex parte ruling/judgment is not restricted, but should be so exercised not to cause injustice to the opposite party. It is incumbent upon the party seeking the court’s favor or discretion to adduce sufficient and plausible reasons that are demonstratable, and persuasive to the court...”
17. It is not in dispute that at the time of filing the instant suit the Plaintiff failed to disclose that the property had been sold in 2021, and that a previous suit, HCCC No. 151 of 2019, had been dismissed. These are material facts that would have influenced the court’s decision had they been disclosed. The Court cannot condone such deliberate concealment.
18. The Plaintiff’s explanation that the transfer was irregular and that the auction was flawed is not sufficient justification for the concealment. The appropriate forum to challenge the auction would have been in that earlier suit or by way of appeal.
19. The non-disclosure of the sale and transfer of the property to the 3<sup>rd</sup> Defendant materially undermines the integrity of the orders obtained. The orders issued on 14<sup>th</sup> December 2023 are hereby set aside *ex debito justitiae*.
20. Should the process server be summoned for cross-examination? The Applicant seeks to cross-examine the process server on the contents of the affidavit of service dated 21<sup>st</sup> November 2023. The affidavit is contested for alleging service upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who allegedly were not properly served. It is also alleged that the 2<sup>nd</sup> Defendant was misrepresented as an advocate.
21. Cross-examination of a process server is allowed where service is disputed and where the affidavit is challenged on material particulars. This was affirmed in *Kenya Power & Lighting Co. Ltd v Benson Mumia* [2016] eKLR.
22. However, the 1<sup>st</sup> Defendant now concedes it was not served until July 2024, and thus does not oppose the application. There is therefore no longer a live controversy justifying the cross-examination of the process server.
23. The prayer for cross-examination of the process server is declined.
24. And on whether the plaint should be struck out as an abuse of the court process, the power to strike out pleadings is discretionary and must be exercised sparingly and only in the clearest of cases. As was held by the Court of Appeal in *The Co-Operative Merchant Bank Ltd v George Fredrick Wekesa* Civil Appeal No. 54 of 1999:

“A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”



25. A similar position was adopted in *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* Civil Appeal No. 35 of 2000 where the same court expressed itself thus:

“No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

26. The Plaintiff’s suit seeks to invalidate a concluded statutory sale and appears to raise the same issues determined in HCCC No. 151 of 2019. However, striking out a suit is a draconian remedy that should only be exercised in clear cases where the pleadings disclose no reasonable cause of action or are plainly an abuse of court process (See *DT Dobie & Co (K) Ltd v Muchina* [1982] KLR 1).

27. Although the non-disclosure warrants censure, the issues of title, regularity of auction, and allegations of fraud are substantive matters that require a full hearing. The application to strike out the plaint is premature at this stage and is declined.

### **Conclusion and Final Orders.**

28. In view of the foregoing, I make the following orders:

- i. The Applicant, Jasbir Singh Suri, is granted leave to be joined as the 3<sup>rd</sup> Defendant in this suit.
- ii. The orders issued by this Court on 14<sup>th</sup> December 2023 are hereby vacated and set aside.
- iii. The prayer for cross-examination of the process server is declined.
- iv. The prayer to strike out the Plaint is declined.
- v. The costs of this application shall be in the cause.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF JULY 2025.**

**PETER M. MULWA**

**JUDGE**

In the presence of:

Mr. Ngethe for Plaintiff

Ms. Ochieng for 1<sup>st</sup> Defendant

Mr. Oketch for proposed 3<sup>rd</sup> Defendant

Court Assistant: Carlos

