



Titus Makhanu & Associates Advocates v Alicate Holding Limited; Southern Shield Holdings Limited (Interested Party) (Miscellaneous Application E145 of 2021) [2024] KEHC 1558 (KLR) (Commercial and Tax) (16 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1558 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E145 OF 2021
FG MUGAMBI, J
FEBRUARY 16, 2024**

BETWEEN

TITUS MAKHANU & ASSOCIATES ADVOCATES APPLICANT

AND

ALICATE HOLDING LIMITED RESPONDENT

AND

SOUTHERN SHIELD HOLDINGS LIMITED INTERESTED PARTY

RULING

Brief background

1. The applicant filed the Notice of Motion application dated May 23, 2023, brought under Order 39 Rule 2, Order 40 Rule 1, Order 51 Rule 1 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#), seeking, among others as their prayer no 3:

That an order do issue from this Honourable Court preventing the interested party, either by itself, or through its subsidiaries, representatives, directors, agents, employees, and/ or whatsoever from transferring any of its shares and/ or assets pending the hearing and determination of this application and/or final determination of the taxation process.

2. On May 26, 2023, this Court allowed prayer no. 3 of the application (as above) for interim orders pending hearing and determination of the application, as prayed. In opposing the application, the interested party filed the notice of Preliminary Objection (PO) dated June 30, 2023, on the grounds that:



- i. The Court has and had no jurisdiction to issue the orders of May 26, 2023 or any other order against the interested party for being not a party in these proceedings.
 - ii. The orders of 23rd May 2023 are unconstitutional for being issued contrary to Article 52 of the Constitution of Kenya (2010).
 - iii. The orders of May 23, 2023 are oppressive, and capricious for being issued against the rules of natural justice.
 - iv. The application is bad in law as in regards to the interested party and for failure to comply with Order 1 rule 10 of the Civil Procedure rules 2010.
3. Pursuant to this Court's directions, both the interested party and the applicant filed their submissions on the preliminary objection, dated July 7, 2023 and July 18, 2023 respectively.
 4. The interested party maintained that as of January 10, 2023, these proceedings only involved the applicant and the respondent as parties, with no evidence of a court order directing the inclusion of the interested party as a party to the matter. Consequently, they argued that the application dated May 23, 2023 was premature, rendering any court orders affecting them as null and void.
 5. In opposition to the objection, the applicant argued for the Court's jurisdiction to grant the orders dated May 23, 2023, citing Order 1 rule 10, which affords the Court discretion to join a party to proceedings if deemed necessary for resolving the issues at hand comprehensively and effectively.
 6. The applicant referenced Civicon Limited V Kivuwatt Limited & 2 Others, [2015] eKLR and Trusted Society of Human Rights Alliance V Mumo Matemo & 5 Others, [2014] eKLR to bolster their argument, asserting that the interested party's involvement is essential at this stage due to the transfer of shares during the ongoing taxation process, which they argue could potentially affect the final outcome of the case.

Analysis

7. I have carefully considered the preliminary objection, rival submissions and authorities filed by the opposing parties. At the centre of the objection is the question whether the court can issue an order against a non-party to proceedings.
8. It is undisputed that the interested party was not a party to these proceedings. While acknowledging this, the applicant contends that the Court holds the authority to join the interested party at any stage of the proceedings, as per Order 1 rule 10(2) of the Civil Procedure Rules. This position finds support in the decision of the Court of Appeal of Tanzania, which I concur with, in Tang Gas Distributors Ltd V. Said & Others, [2014] EA 448. The Court 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.”
9. An examination of Order 1 rule 10(2) reveals that the Court may exercise this power either on its own motion or upon an application by either party either orally or formally. In the present case, Court has not moved on its own motion neither has it been moved by any party to have the interested party enjoined to the proceedings.



10. The jurisprudence on issuing orders against non-parties is well-established. The Court of Appeal's decision in *Earnest Orwa Mwai V Abdul S. Hashid & Another*, [1995] eKLR underscored that an order cannot bind an appellant who was not a party to the proceedings. This principle was echoed in *Town Council of Ol'kalou V Ng'ang'a General Store*, Civil Appeal No. 269 of 1997, reinforcing the doctrine that non-parties cannot be bound by court orders.
11. This principle is rooted in the fundamental tenet of natural justice that no party should be condemned unheard, as has been argued by the interested party. This was well articulated in *Kiai Mbaki & 2 Others V Gichubi Macharia & Another*, [2005] eKLR, where the Court emphasized the sanctity of the right to be heard.
12. Consistent with the principle established in *Musa Ogaro Osoro V Wakenya Pamoja Sacco Ltd & Another*, [2016] eKLR, this Court finds that issuing an order against a non-party is not only improper and untenable but also futile.

Determination

13. For all these reasons the preliminary objection is upheld and the application dated May 23, 2023 is hereby dismissed with costs to Southern Shield Holdings Limited. The interim orders granted against the said Southern Shield Holdings Limited are also vacated.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16TH DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE

