



**Tiwari v Sykes (Civil Suit E414 of 2022) [2024] KEHC 1563 (KLR)
(Commercial and Tax) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E414 OF 2022
FG MUGAMBI, J
FEBRUARY 16, 2024**

BETWEEN

ADRIAN SIMON TIWARI PLAINTIFF

AND

WILLIAM MARTELL SYKES DEFENDANT

RULING

Brief Facts

1. Before the court is the application dated 20th July 2023. It is brought under section 100 of the *Civil Procedure Act*, Order 1 rule 1 and Order 8 rules 3 and 5 of the *Civil Procedure Rules, 2010*. The applicant seeks leave to join Elivalat Fintech Limited as the second plaintiff to this suit and consequently, leave to amend the plaint.
2. The application is premised on the fact that part of the debt claimed by the applicant from the respondent was advanced by the intended second plaintiff where the applicant is a director and principal shareholder.
3. It is the applicant's case that the parties herein entered into a loan agreement dated 7th June 2021 by which the applicant advanced the respondent a loan of Usd 159,000. A further sum of Usd 112,273 was advanced at the respondent's request, through the intended 2nd plaintiff, Elivalat Fintech Limited.
4. The application is opposed by way of a replying affidavit sworn by the respondent on 2nd August 2023. The respondent denies any second loan advanced by the intended 2nd plaintiff and instead submits that this was payment for consultancy services between the respondent and the said party, pursuant to a consultancy agreement dated 1st May 2021. It is further the respondent's submission that the said agreement contains an arbitration clause which would be negated if the applicant were allowed to



enjoin the intended 2nd plaintiff. In any case, the respondent argues that the amendment introduces a new cause of action by way of a new consultancy agreement.

Analysis

5. I have carefully considered the pleadings, evidence and written submissions filed by the rival parties herein. It is important first of all to settle the question of the party that the applicant seeks to have joined in these proceedings. The application, affidavit and submissions presented by the applicant refers to Elivalat Fintech Limited as the proposed 2nd plaintiff. The applicant states that this company is incorporated in Kenya and is a different legal entity from Elivalat Limited, a company based in the United Arab Emirates, with which the respondent has a separate agreement bearing an arbitration clause.
6. This fact is evidenced by the Certificate of Registration in respect of the intended 2nd plaintiff which shows that the said party was registered under the *Companies Act*, 2015 on 30th July 2020. Indeed, I do note that there is an agreement on record dated 1st May 2021, titled Engagement of Consultant. The said agreement is signed between the respondent and Elivalat Limited which as I have stated earlier, is a different legal entity from the intended 2nd plaintiff, Elivalat Fintech Limited. Clause 8 of the said agreement contains an arbitration clause. Having found that the intended 2nd plaintiff is not a party to this agreement, is therefore not bound by the arbitration clause therein as submitted by the respondent.
7. That said, the next question would then be whether the intended 2nd plaintiff should be joined to these proceedings. Order 1 rule 1 of the *Civil Procedure Rules* permits all persons who claim any relief to be joined in a suit so long as their right to seek relief is premised on a similar transaction or series of transactions to that/those relating to the suit. The said provision reads as follows:

“ All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.”
8. The applicant has referred this court to several decisions including *Pravin Bowry v John Ward and Another*, [2015] eKLR and *Julius Meme v Republic & Another*, [2004] eKLR and asked this Court to find that the 2nd intended plaintiff is a proper and necessary party to these proceedings. The applicant alleges that the second loan was advanced to the respondent through the intended 2nd plaintiff Elivalat Fintech Limited which has a sustainable claim against the respondent.
9. The respondent vehemently opposes this view citing cases such as *Jerusha Muthoni Mwangi v Dedan Ikua Kamau & Another & Malewa Ranching Company Limited* [Interested party], 2021 eKLR as well as *Pizza Harvest Limited v Felix Midigo*, [2012] eKLR. The respondent further argues that the intended 2nd plaintiff has no identifiable stake in the proceedings, as it was simply acting as a conduit through which the applicant advanced the 2nd loan. At the very best, the respondent proposes that the intended 2nd plaintiff can only be called in as a witness simply to tell the court to confirm these instructions and whether it did act on them.
10. In the case of *Pravin Bowry v John Ward & Another*, [2015] eKLR, the Court of Appeal examined the criteria for joinder of parties to a suit and referenced a Ugandan case, *Deported Asians Custodian*



Board v Jaffer Brothers Ltd [1999] 1 EA 55 (SCU) as well as Civicon Limited v Kivuwatt Limited and 2 Others, [2015] eKLR. The Court held that:

“The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

11. In Kingori v Chege & 3 Others, [2002] 2 KLR 243, Justice Nambuye (as she then was) also outlined the criteria for the joinder of parties in a legal proceeding. These criteria stipulate that the party in question must be essential to the case; they must be an appropriate party; in the context of a defendant, there must be a specific remedy sought by the plaintiff from that defendant; the final judgment or order cannot be fully executed without their involvement in the case; and their participation is crucial for the court to thoroughly and conclusively resolve and address all the issues presented in the lawsuit.
12. Drawing from these judicial precedents and the law, and having looked at the plaint, I note that the applicant’s case is that there were two loan disbursements. The details of the 2nd loan is contained in the plaint and this is therefore a matter that is already within the knowledge of the respondent. The applicant avers that the money was paid to the respondent by way of SWIFT transfer.
13. Whether this was a loan or payment for consultancy services is not an issue for enquiry at this point, save to observe that this does in fact put the intended 2nd plaintiff at the center of part of the amount claimed. The presence of the intended 2nd plaintiff in the suit is important in clarifying the circumstances under which payment was made and in order to enable this court effectually and completely adjudicate upon and settle all the questions involved.
14. Moreover, the orders that this Court may issue in this cause will certainly bind and affect the said intended party. Prayer a (ii) seeks judgment against the respondent to the tune of Usd 112,273, which amount the plaintiffs aver was disbursed via the intended 2nd plaintiff. This makes the 2nd intended plaintiff more than a bystander witness in this matter. It will be up to the 2nd intended plaintiff to prove the facts upon which the remedy lies.
15. It is also my finding that there will be no prejudice occasioned to the respondent as the intended joinder does not amount to a new cause of action. Considering the relationship between the applicant and intended 2nd plaintiff and the central role of the latter in part of the transaction which is the subject of this suit, I find that it is desirable, for avoidance of multiplicity of suits, to have the intended 2nd plaintiff joined to the suit. Accordingly, I find merit in the prayer for joinder.



16. As to whether the Court ought to allow an amendment of the plaint, section 100 of the *Civil Procedure Act* provides that:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

17. Further, Order 8 rules 3 and 5 of the *Civil Procedure Rules* stipulates as follows:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

18. Fortunately, the principles guiding the grant of an application to amend pleadings are now well settled and were summarized in *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR (Odunga J as he then was) as follows:

- i. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise;
- ii. The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle;
- iii. The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases;
- iv. Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs;
- v. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment.”

Considering these principles, I would accordingly allow the prayer for amendment of the plaint.

Determination

19. In the end I find the application dated 20th July 2023 merited and it is therefore allowed.

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

F. MUGAMBI

JUDGE

