



REPUBLIC OF KENYA



KENYA LAW
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Faulu Microfinance Bank Limited v Paul Wambua Valuers Limited (Civil Suit E016 of 2022) [2024] KEHC 5455 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEHC 5455 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL SUIT E016 OF 2022
SN MUTUKU, J
APRIL 9, 2024**

BETWEEN

FAULU MICROFINANCE BANK LIMITED PLAINTIFF

AND

PAUL WAMBUA VALUERS LIMITED DEFENDANT

RULING

1. The Plaintiff (the Applicant) herein has brought a Notice of Motion (the Application) dated 4th November 2022 against the Defendant (Respondent) seeking to strike out the Defendant's Statement of Defence and Counterclaim dated 19th September 2022 and costs of the application on the grounds that the Statement of Defence introduces a co-Defendant, Robert Nyamweya Onchonga thereby altering the character of the suit without leave of the court.
2. The Application is supported by grounds on the face of it and in the Affidavit sworn by Maurine Kahiro, an advocate in the employment of the Applicant. It is argued that the Respondent is abusing the court process by including a co-defendant without leave of the court and that if this court were to admit the Defence and Counterclaim, it would be prejudicial to the Applicant who has no claim against the co-defendant.
3. The Respondent has not filed any response to the application, nor has he filed submissions. The record of the court shows that the Application under determination was served on the Respondent's advocates on the 27th July 2023 at their offices in Luther Plaza (Opposite St. Paul's Chapel). Service was acknowledged by stamping on the documents. Subsequently, the Respondent's counsel has been served using their given email address dkmuinduko@gmail.com.
4. The record of the court shows that during court mentions, there has been no attendance by the said advocate or the Respondent. It is on the basis of the confirmed service through filed Affidavits of



Service that this court proceeded to issue directions that the Application be canvassed by way of written submissions and proceeded with the matter.

5. The Applicant has filed submissions dated 2nd November 2023. The Applicant has submitted on one issue: whether the Defendant's Statement of Defence and Counterclaim should be struck out. They have submitted that the Defendant's Statement of Defence introduces a second defendant Robert Nyamweya Onchonga who is not a party to the suit. That the law does not allow joinder of a party to pleadings as a matter of right. That the drafters of Order 1 Rule 10 of the [Civil Procedure Rules](#) intended that a formal application for leave is a prerequisite before joinder save for where the court exercises its discretion suo moto.

6. The Applicant relied on [Good News Church of African v Board of Management, Eldoret Secondary School](#) [2020] eKLR, where the court held that:

“Parties are at liberty to choose the necessary parties in a suit where they claim certain reliefs arising from a transaction or a wrong committed. A party cannot force a plaintiff to sue persons that they do not have a claim against as if the case is dismissed then the party must bear the burden of paying costs.

That is a reason why a party files a suit in court, he/she must be sure of the party to have a duel with. You do not start battles on all fronts hoping to settle on one person. You must be sure of the defendant you want to sue....”

7. They submitted that the choice of whom to sue lies with the Plaintiff and there may be cogent reasons as to why a litigant has opted not to sue some other persons; that in the absence of an application for joinder, the Applicant is unable to ascertain the contribution the alleged second defendant will provide to warrant his participation in these proceedings. The inclusion of the alleged second defendant alters the character of the suit given that the claim for professional negligence stems from the contractual relationship between the Applicant and the Respondent and the alleged second defendant is not privy to it.

8. It was submitted that the inclusion of the alleged second defendant is both unprocedural and an abuse of the court process for reasons that no leave was applied for or obtained before the joinder and that the Respondent is thrusting upon the Applicant a party against whom it has no cause of action or intention to sue or even if it has, has opted not to pursue the action.

9. It was submitted that the inclusion of the alleged second defendant is not a procedural technicality and goes to the root of the suit; that the Defence and Counterclaim introduce a new cause of action which essentially changes the character of the suit and it requires a formal application and parties given an opportunity to be heard.

10. It was submitted that the Application is unopposed and ought to be allowed as prayed. The Applicant urged that this court finds the application with merit and grant the orders sought.

11. Order 1 Rule 10 (2) of the [Civil Procedure Rules](#) provides 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.



12. As argued by the Applicant, there are two options around this issue as provided under the above Rule. To move the court to order that the name of any party improperly joined be struck out through an application or the court to do so suo moto. In the matter before me, the Respondent has not moved this court through an application for joinder of Robert Nyamweya Onchonga nor has the court suo moto ordered his addition as a co-defendant.
13. I have noted that despite service of the Application and the dates directed by the court for directions, the Respondent has not filed Replying Affidavit or any other document opposing this application. It is therefore not opposed as submitted by the Applicant.
14. The inclusion of another defendant by the Respondent alters the character of the suit. This was done without leave of the court and the Respondent has not even filed any documents opposing the application. For the above reasons, it is my considered view that I have no material to go by in finding in favour of the Respondent. I find in favour of the Applicant. The Notice of Motion dated 4th November 2022 is merited. It is hereby allowed as prayed. The result is that the Defendant's Statement of Defence and Counterclaim is hereby struck out with costs to the Plaintiff.
15. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 9TH APRIL 2024.

S. N. MUTUKU

JUDGE

