



Acuity Limited v Shah & another; Nakumatt Holdings Ltd (U.A) (Proposed Defendant) (Civil Case E125 of 2018) [2024] KEHC 5147 (KLR) (Commercial and Tax) (13 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5147 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E125 OF 2018
JWW MONG'ARE, J
MAY 13, 2024**

BETWEEN

ACUITY LIMITED PLAINTIFF

AND

ATUL SHAH 1ST DEFENDANT

HOTNET LIMITED 2ND DEFENDANT

AND

NAKUMATT HOLDINGS LTD (U.A) PROPOSED DEFENDANT

RULING

1. Nakumatt Holdings Limited (U.A) has by a Notice of Motion application dated 17th July 2023 moved this Honourable Court under article 47 and 50 of the [Constitution](#), Order 1 Rule 3 of the [Civil Procedure Rules](#), Section 1A, & 3A of the [Civil Procedure Act](#) seeking the following orders:-
 - a. Spent
 - b. That this Honourable Court be pleased to join the proposed 3rd Defendant/Applicant as a party to these proceedings.
 - c. That the aforesaid proposed 3rd Defendant be allowed to file its defence, witness statement and /or any other documents to enable it participate effectively in these proceedings.
 - d. That costs of this Application be in the cause
 - e. That the Honourable Court be pleased to grant any order(s) as will be necessary in the interests of substantial justice.



2. The application is supported by the grounds set on its face and the supporting affidavit of Peter Kahi sworn on 17th July 2023. The application is opposed and the Plaintiff filed grounds of opposition dated 18th October 2023. The Plaintiff did not file a Replying affidavit.
3. In bringing this application, the Applicant argues that it is a necessary party to the current proceedings in that it was the principal tenant under the lease in question in the premises owned by the Plaintiff and that the 1st and 2nd Defendants were guarantors to the said lease. That having been placed under receivership by an order of this Court in case number IP Cause No. 10 of 2012, the debt claimed by the Plaintiff is in list of creditors and therefore the Plaintiff is one of the Creditors in the Insolvency Proceedings.
4. The Applicant further argues that pursuant to the orders issued by the Court on 11th March 2021 in the Insolvency proceedings, the proposed 3rd Defendant was allowed to continue to exist as a legal entity and therefore the questions of law and fact raised in these proceedings affect its rights including the constitutionally guaranteed right to be heard. The Applicant argues that in the pleadings before the Court, it has been mentioned in 21 paragraphs by the Plaintiff in its pleadings and therefore requires a chance to be heard to answer to the issues raised therein.
5. The proposed 3rd Defendant argues, that the Plaintiff having not filed any replying affidavit to controvert or deny the averments by the Applicant, then the issues raised in its supporting affidavit are deemed to be admitted and that the Plaintiff cannot challenge them by filing grounds of opposition. The 3rd proposed Defendant urged the Court to allow its application in order for it to defend itself in the suit before the Court.
6. The Plaintiff opposed the application and filed grounds of opposition. In its submissions before the Court, the Plaintiff argued that the proposed 3rd Defendant had not demonstrated to the Court that it was a necessary and proper party to these proceedings. Having been sued earlier as the 1st Defendant, by a consent order, the proposed 3rd Defendant was removed as a party and the claim against it withdrawn, leaving only the claim against the 1st and 2nd Defendants for determination. The Plaintiff argues that there is no single order sought as against the proposed 3rd Defendant in the present suit and the 1st and 2nd Defendants have been sued in their capacity as guarantors. The Plaintiff argues that the law allows it to bring a claim against guarantors to the fullest extent of their guarantee and the Plaintiff is not under any obligation to claim against the principal debtor. In addition, the Plaintiff argues that a contract of guarantee is a separate and distinct contract and that it gives rise to an independent claim against the guarantors.
7. The Plaintiff further argues that a necessary party is a party to the Constitution of the case without whom a decree cannot be passed and that allowing the Applicant back to the suit will unnecessarily crowd the matter making it hard to conclude.
8. Having heard the submissions by the parties and upon careful consideration of the pleadings filed herein I note that this Court is called to determine whether the proposed 3rd Defendant should be joined as a party to these proceedings.
9. The Civil Procedure Rules has set out who may be joined as Defendants under Order 1 Rule 3 which provides as follows:-

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.

10. I have considered the argument put forward by the Plaintiff in opposing the application for joinder. I note that despite filing grounds of opposition, the Plaintiff did not respond to the averments in the supporting affidavit of the Applicant, having failed to file its own affidavit in reply. I am therefore persuaded that those averments remain uncontroverted and the evidence therein stands unchallenged. This therefore means that the assertions put forward by the proposed 3rd Defendant in its affidavit, which assertions include the fact that the Plaintiff is listed in the insolvency proceedings of Nakumatt Holdings as a creditor, and that it has already filed proof of debt with the Administrator and hence submitted to the jurisdiction of the Insolvency Court, is material to these proceedings.
11. In addition, the Applicant argues that it is an integral part of the series of acts and/or transactions alleged to exist as part of the Plaintiff's case and therefore, it is only fair and just that they are enjoined to these proceedings. Further, the Applicant argues that the Plaintiff has not demonstrated to this Court, what prejudice, if any, it will suffer if the Applicant is joined as a party herein. If anything, the Applicant contends, the presence of the Applicant in these proceedings will enable the Court to deal effectively and finally adjudicate upon all matters in the dispute herein.
12. I have considered all the above arguments as set out in the submissions made by the parties to the court and I am persuaded that the presence of the proposed 3rd Defendants in these proceedings is paramount to avoid duplication of claims by a party emanating from the same set of facts. I therefore find and hold that the application herein has merit and I will allow the same.
13. The upshot of the above finding is that the proposed 3rd Defendant is allowed to join these proceedings forthwith and has leave of the Court to file its Defence, replies, witness statements and list and bundle of documents forthwith. Each party shall bear their own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF MAY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the presence of:-

N/A for the Plaintiff.

Mr. Nganga for the 1st and 2nd Defendant.

Mr. Nganga holding brief for Mr. Aduda for the proposed 3rd Defendant/Applicant

Amos - Court Assistant

