



**Ethics and Anti-Corruption Commission v Hartland Enterprises Limited &  
5 others (Anti-Corruption and Economic Crimes Civil Suit E030 of 2022)  
[2024] KEHC 4731 (KLR) (Anti-Corruption and Economic Crimes) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4731 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT E030 OF 2022**

**EN MAINA, J**

**MAY 9, 2024**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**HARTLAND ENTERPRISES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JAMES MUMALI OYUKAH ..... 2<sup>ND</sup> DEFENDANT**

**MARY PAULINE ODUOR ..... 3<sup>RD</sup> DEFENDANT**

**ODHIAMBO DANIEL KAUDO ..... 4<sup>TH</sup> DEFENDANT**

**FAITH ADHIAMBO APUKO ..... 5<sup>TH</sup> DEFENDANT**

**PATRICK TONUI ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling concerns an application by the 5<sup>th</sup> Defendant seeking leave to amend her Statement of Defense, enjoin an additional party as Defendant and in the alternative, that she be allowed to issue a Third-Party Notice to the proposed Defendant.

**The Parties**

2. The Plaintiff is a public body established under Section 3 (1) of the *Ethics and Anti-Corruption Commission Act*, 2011 whose mandate is to combat and prevent corruption, economic crime and unethical conduct in Kenya through law enforcement, prevention, public education, promotion of standards and practices of integrity, ethics and anti-corruption.



3. The 1<sup>st</sup> Defendant is a Limited Liability Company which was the awardee of the tender that is in dispute in the main suit.
4. The 2<sup>nd</sup> Defendant is the Director of the 1<sup>st</sup> Defendant.
5. The 3<sup>rd</sup> Defendant, is a co-director of the 1<sup>st</sup> Defendant company.
6. The 4<sup>th</sup> Defendant is a former clerk of the County Assembly of Homa Bay, where the tender in issue in the main suit was awarded.
7. The 5<sup>th</sup> Defendant is the current Clerk of the County Assembly of Homa Bay.
8. The 6<sup>th</sup> Defendant was the Project Quantity Surveyor for the Construction of the proposed MCA's offices in Homa Bay County.

### **The Applicant's Case**

9. The application coming for consideration in this Ruling is the Notice of Motion dated 11<sup>th</sup> April 2024 brought under Order 1 Rule 10(2), and 15, Order 7 Rule 5 & 16(2), Order 8 Rule 3(1) and 5, and Order 51 of the Civil Procedure Rules, seeking the following orders;
  - i. Spent
  - ii. The 5<sup>th</sup> Defendant be granted leave to amend her statement of Defense in terms of the amended Statement of Defense dated 5<sup>th</sup> April 2024 on record, which should be deemed as duly amended and filed.
  - iii. The Chief Architect, Ministry of Transport Infrastructure, Public Works, Housing and Urban Development – the Project Manager, who issued an interim Certificate dated 14<sup>th</sup> April 2021 and certified the payments as project manager to the County Assembly of Homa Bay be added as Defendant.
  - iv. Upon such joinder, the 5<sup>th</sup> Defendant be allowed to issue notice to Co-Defendant as contemplated by Order 1 Rule 10(2) of the Civil Procedure Rules.
  - v. In the alternative, the 5<sup>th</sup> Defendant be allowed to take out and issue Third Party Notice against the Chief Architect, Ministry of Transport Infrastructure, Public Works, Housing and Urban Development – the Project Manager.
  - vi. That costs of the application be provided for.
10. The application is based on the following grounds;
  - i. That the applicant, a Public Officer, has been sued in these proceedings by virtue of her role as an accounting officer of a Public entity.
  - ii. That the presence of the Chief Architect who supervised the work and certified the interim certificate of payment is necessary to enable the Court determine the issues in controversy.
  - iii. That the Applicant believe the suit against her contravenes statutory provisions but did not plead it in her earlier statement of Defense.
  - iv. That upon such joinder, the Chief Architect shall plead indemnity against experts and professionals who signed the 2<sup>nd</sup> Interim Certificate of payment.



- v. That the Defense on record does not answer the allegations made against the Defense and appears not to constitute a proper defense, thus needing amendment.
  - vi. That professionals hired by the County and in charge of processes relevant to the suit have not been enjoined in the proceedings.
  - vii. That the amendment and joinder shall assist the Court determine the issues in controversy.
  - viii. That the amendments will facilitate the Applicant's right of access to justice and right to a fair trial which should be readily allowed.
  - ix. That none of the parties to the suit will be prejudiced by the Application as the trial is yet to commence.
  - x. That it will be just and equitable in the interest of justice to so order since the Court has the power and discretion to allow amendments at any stage of the proceedings.
11. The application is supported by the affidavit of Faith Adhiambo Apuko sworn on 11<sup>th</sup> April 2024 which reiterates the grounds upon which the application is brought and deposes that the Applicant became an acting Clerk of Homa Bay Assembly (hereinafter referred to as "the Assembly") in July of 2021 before the allegations in the suit happened, but that she will need to lead evidence of those facts on facts which were not pleaded in the Defense on record.
  12. She further deposed that in the year 2018/2019, the assembly prepared a procurement plan and made budgetary allocation toward the construction of offices. The procurement proceedings were of a technical nature and the resultant payments made on the advice of the project manager which was the Chief Architect, Ministry of Transport Infrastructure, Public Works, Housing and Urban Development. He supervised the work and issued the 2<sup>nd</sup> Interim Certificate of Payment, yet the Plaintiff wants to recover those payments from the 5<sup>th</sup> Defendant and the Chief Architect has not been enjoined in the proceedings. She asserted that she pleads indemnity against the Chief Architect based on the Certificate of Payment, hence the need to enjoin him.
  13. She further deposed that as the accounting officer, her duty was to process payment as certified by the Certificate of Payment and could not process payment had the same not been certified.
  14. She contended that it is just that the amended defense be allowed so that she can bring on board the Project Manager as Defendant as he supervised the work, and whose presence is necessary to enable the Court make a determination.
  15. She further deposed that upon being added to the suit, she intends to claim indemnity against them.

### **The Respondent's case**

16. The Plaintiff filed Grounds of Opposition dated 17<sup>th</sup> April 2024 where it opposed the Application on the ground that it was made too late in the day after the suit has been certified for hearing following a rigorous pre-trial process, and no satisfactory explanation had been given as to why the application was not made at the earliest. The Plaintiff contended that the Application is intended to occasion inordinate delay in the disposal of these proceedings, and that the Court had already pronounced itself on the question of joinder where the Applicant had sought joinder of the County Assembly Service Board as an interested party.
17. The Plaintiff further contended that it reserves the right to determine who its Defendants are unless there is a counterclaim.



18. The Plaintiff also opposed the application in its replying affidavit sworn on 19<sup>th</sup> April 2024 by Evans Gitonga, who is a Forensic Investigator at the Plaintiff's South-Nyanza Branch. He deposed that the claim against the 5<sup>th</sup> Defendant arises from the Breach of fiduciary duty as the accounting officer of the Assembly when the impugned payment was made. He contended that the duty is not tied to the approval of the Interim Payment Certificate or lack of it by the Project Manager.
19. He further deposed that the Project Quantity Surveyor, who is the 6<sup>th</sup> Defendant herein, prepared the Interim Payment Certificate and was the responsible officer on site. He asserted that the application has not laid basis for joinder of the proposed Defendant.
20. He further deposed that the 5<sup>th</sup> Defendant has established a pattern with vexatious applications intended to scatter the expeditious disposal of this suit. He reiterated that the suit belongs to the Plaintiff who reserves the right as to who its Defendants are unless there is a counterclaim, which in this case, there was none.
21. He further deposed that the facts sought to be added by the Amended Defense have been in the knowledge of the Applicant all along and she has been represented by Counsel since inception of the suit. He contended that granting of the orders will re-open pleadings thus occasioning unnecessary delay.

### **The Applicant's further Affidavit**

22. The Applicant filed a further affidavit in response, sworn by the Applicant on 25<sup>th</sup> April 2024. She deposed that the orders sought are not in furtherance of the suit filed against her but in defense of it. She contended that the Plaintiff is opposed to the joinder because the suit against her is based on ill-will and a personal vendetta.
23. She also deposed that she is entitled to defend herself seeing that the decision to sue her was made against the provisions of the Fair Administrative Actions Act, a defense of which she is raising and wishes to lead evidence. She contended that the report received by the Plaintiff had not recommended that a suit be filed against her.
24. She further deposed that the Plaintiff has not controverted that she is a Public Officer or that the Chief Architect Supervised the work and his presence is necessary for the Court to make a fair determination.
25. She contended that all parties in civil proceedings should be allowed to have their day in Court and she is entitled to seek indemnity from the Chief Architect. She contended that the amendment and joinder sought will enable the Court to determine real questions in controversy, furthering the overriding objective of the Court facilitating her right of access to justice and fair trial.
26. She further deposed that the Plaintiff had not demonstrated any prejudice they would suffer if the application is allowed.

### **The Applicant's submissions**

27. Learned Counsel for the Applicant submitted that the filed Statement of Defense denied the claim, but failed to answer the allegations made against the 5<sup>th</sup> Defendant. He contended that the Plaintiff had not disputed that the proposed amendments shall enable the Court determine the real questions in controversy. He relied on Order 8 Rule 5(1) of the Civil Procedure Rules, 2010, which provides:-

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either of its own motion,



or in the application of any party order any document to be amended in such a manner as it directs and, on such terms, as to costs or otherwise as are just.”

28. He further submitted that the proposed amendments do not alter the cause of action of the suit or introduce a new cause of action.
29. He asserted that amendments of pleadings should be allowed freely as long as they can be made without prejudice to the other parties and if any prejudice is occasioned, the same can be compensated by costs. He contended that none of the parties in the suit would be prejudiced if the application is allowed as trial is yet to commence. He observed that the Plaintiff had not demonstrated the prejudice it would suffer if the application is allowed.
30. He further submitted that the proposed amendments are meant to assist the court to determine the matters in controversy. The Plaintiff can be allowed to file a reply to the amended Defense and set the record straight through Cross-examination, as well as call witnesses to rebut the 5<sup>th</sup> Defendant’s evidence.
31. On the necessity to enjoin the Chief Architect, Counsel for the Applicant submitted that the Plaintiff had not disputed that the current proceedings are technical in nature and the payments made dependent on the Certificate of Payment. He contended that the proposed joinder is necessary to enable the court determine the issues in controversy. He asserted that upon joinder, the 5<sup>th</sup> Defendant would be able to lead evidence and seek indemnity against the proposed Defendant.
32. He submitted that on the question of joinder, the Court needs to consider whether the proposed party is necessary. The Plaintiff had not denied his relevance or the prejudice to be suffered if he is enjoined. He contended that the rules of Court allow for amendment and joinder, and this court should not allow the rules to be rendered otiose to impede fair trial as guaranteed by *the Constitution*.
33. On the alternative prayer to issue a Third Party Notice, Counsel for the Applicant submitted that the Assembly procured the services of professionals to undertake the works in issue in the suit.
34. He further submitted that the Applicant having made a previous application to be struck out of the suit does not bar to the making of the present application. He clarified that the application to enjoin the County Assembly Board was not in the behest of the 5<sup>th</sup> Defendant.
35. He prayed that the Court allow the amended Defense and allow the joinder of the Chief Architect as sought, or as an alternative, allow the 5<sup>th</sup> Defendant to take out and serve Third Party Notice to allow the Applicant to seek indemnity from the proposed Defendant.
36. The Applicant relied on the following Authorities in his submissions: Easter Bakery –Vs- Castelino [1958] EA Eric Kennedy Okumu Ogola v Nation Madia Group & Anor [2021] eKLR, Joseph Ochieng’ & 2 Others -Vs- National Bank of Chicago, Civil Appeal No. 149 of 1991 J.C. Patel –Vs- D. Joshi 1952 19EACA 12 St. Patrick’s Hill School Ltd v. Bank of Africa Kenya Limited

### **The Plaintiff/Respondent’s submissions**

37. Counsel for the Plaintiff, Mr. Mbiti, submitted that the Applicant had not demonstrated how the current proceedings affect the intended Defendant or made any attempt to satisfy the guiding principles on joinder of parties. He urged the Court to find that the Applicant had not met the threshold for the intended Defendant.
38. He contended that delaying a suit that is ready for hearing is demonstration of prejudice. If the application is allowed, it will re-open pleadings leading to inordinate delay.



39. He submitted that the Applicant had not provided any reason why the amendment had not been done at pre-trial stage. The application thus came too late in the day and should be dismissed.
40. On the question of issuance of Third-Party Notice, Counsel for the Plaintiff submitted that the Applicant has not provided particulars of the nature of her claim against the intended third party and/or particulars of the question to be determined between the Plaintiff and Third Party. He asserted that the Applicant is inviting the Court to speculate on the nature of her claims against the third party, the relief sought, or how her claim against the third party may affect the Plaintiff's claim and action against the Defendant. He urged the Court to decline this invitation.
41. He concluded that the Applicant is not entitled to the reliefs sought in the Application and prayed that it be dismissed for lack of merit, with costs to the Plaintiff.
42. The Plaintiff relied on the following Authorities in their submissions: Joseph Njau Kingori – Vs- Robert Maina Chege & 3 Others [2002] eKLR Central Kenya Limited -v- Trust Bank Limited (2002)2 E.A 365
- The Issues for determination
- i. Whether the Applicant ought to be granted leave to amend her Statement of Defense.
  - ii. Whether the Applicant should be allowed to enjoin the proposed Defendant.
  - iii. Whether the 5<sup>th</sup> Defendants ought to be allowed to take out a Third Party Notice against the proposed defendant.
  - iv. Who should bear the costs of the Application.

#### Analysis and Determination

Issue No. (i):- Whether the Applicant ought to be granted leave to amend her Statement of Defense

43. The Applicant avers that the defense as filed only denies the allegations against the Applicant but does not provide answers and explanations to the allegations against her, which have now been provided in the Amended Defense. She contends that the Amended Defense if allowed, will allow her to lead evidence on the issues pleaded as well as enable to Court determine the issues in controversy.
44. The Plaintiff contends that the application was made very late in the day seeing that the matter is already scheduled for hearing on 22<sup>nd</sup> May 2024 yet the Applicant has not explained the reason for this delay. The Plaintiff observes that all the issues raised in the Amended Plaintiff were within the knowledge of the Applicant at the time of filing the Defense. It contends that allowing the application will re-open pleadings and inordinately delay the hearing and determination of this suit.
45. The Applicant's Statement of Defense dated 20<sup>th</sup> December 2022 and filed on 27<sup>th</sup> December 2022 indeed contains denials of the allegations against her as well as the intention to raise a Preliminary Objection.
46. The Amended Defense, dated 11<sup>th</sup> April 2024 and attached to the application, disputes the Applicant's involvement in entering into a fraudulent construction contract.
47. She denies exposure and loss of the County Assembly funds for lack of the requisite performance bond. She also denies having been the Accounting officer or the Clerk of the County Assembly of Homa Bay at the time when the issues of the suit arose. The Applicant also notes that there is on record a performance bond dated 5<sup>th</sup> September 2019, in force between 5<sup>th</sup> September 2019 to 13<sup>th</sup> February 2021 covering an aggregate of Kshs. 17,446,392.00.
48. The proposed amended Defense disputes the site handover and project commencement dates.



49. She claims that she is not privy to the ownership dispute between the County Assembly and the National Government.
50. The Applicant also avers in the amended Defense that the impugned payment was made well before she became the Clerk of the Assembly, and that the amount paid was different from that which has been indicated by the Plaintiff. She avers that she assumed office on 7<sup>th</sup> June 2021 and had no role in the negotiation, alteration or execution of the subject contract.
51. She further pleads that she had an obligation to process payment of the amounts as had been certified by the Project Manager within 30 days of the date of issuance of the second Certificate of payment, and did so as required by law. She denies that she was in any breach of her fiduciary duty.
52. The Applicant further avers that her joinder in the matter reeks of malice and unlawful exercise of power on the part of the Plaintiff as the parties that received the impugned payment are the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
53. She denied illegal transfer of funds from the Assembly's account, to that of the 1<sup>st</sup> Defendant's account.
54. She relies on the Principle of legitimacy of acts by public bodies and public officials.
55. She avers that the Plaint does not disclose any cause of action against the Applicant, and that the suit should be limited to the 1<sup>st</sup> Defendant and the Project Manager who has not been sued. Technical specifications for the works undertaken were provided by the technical department in the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development who were the project managers and the professionals engaged before the Applicant was appointed as Clerk to the Assembly.
56. The amended Defense prays that the Court declares that the works were of a technical nature, that the Applicant was obligated to pay against the Certificate of Payment, that the Plaintiff's investigation report dated 27<sup>th</sup> January 2022 did not make adverse findings against the Applicant, that the suit constitutes unfair administrative action against the Applicant.
57. She avers that the Plaintiff's prayer for forfeiture of funds in the 1<sup>st</sup> Defendant's account will be excessive if prayer (a) and (b) are allowed, as the Plaintiff will have recovered more than the amount alleged to have been misappropriated.
58. She further averred that the prayers for cost of the suit and interest ought not to issue against the Applicant as she never received the impugned payments.
59. Order 8 Rule 3 of the Civil Procedure Rules provides 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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
60. In the Court of Appeal case of Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365 the court held that:

“... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or



accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

61. The factors to be taken into account in the exercise of the court’s discretion were summarized in “Kassam – Versus - Bank of Baroda (Kenya) Limited (2002) 1 KLR 294. They are:-

- a) The party applying is not acting mala fides;
- b) The amendment will not cause some injury to the other side which cannot be compensated by costs;
- c) The amendment is not a device to abuse the court process;
- d) The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
- e) And that the amendment will not alter the character of the suit.

62. The rules regarding amendment of pleadings must be read together with Order 2 of the Civil Procedure Rules which sets out the formal requirements for pleadings. Order 2(3) states:-

“2(3)(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.

- (2) Without prejudice to subrule (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.
- (3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.
- (4) A statement that a thing has been done or that an event has occurred, being a thing or an event the doing or occurrence of which constitutes a condition precedent necessary for the case of a party shall be implied in his pleading.

63. Order 2 Rules 10 Sub-Rules (1) and (3) are also relevant and they state:-

“2(10) (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence other matter pleaded including, without prejudice to the generality of the foregoing—

- a. particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and
- b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

....



- (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party—
- a. where he alleges knowledge, particulars of the facts on which he relies; and
  - b. where he alleges notice, particulars of the notice.

64. Having perused the Amended Defence, I note that save for expounding her defence, there is nothing new or inconsistent with the defence first filed by this Defendant. The defence does not violate either the rule on amendment or the rule on what a pleading should contain as provided in Order 2 Rules 3 and 10 of the Civil Procedure Rules. The Plaintiff has also not demonstrated that he shall suffer prejudice should leave be granted and accordingly the prayer for amendment is granted. The Amended Defense shall be deemed as duly filed subject to payment of the requisite fees, if any.

65. As such, the Plaintiff is granted seven (7) days to file a reply to the amended Defense, if need be.

Issue No. (ii):- Whether the Applicant should be allowed to enjoin the proposed Defendant

66. The first question before this court is whether a Defendant may be allowed to enjoin another Defendant.

67. Order 1 Rule 10 (2) of the Civil Procedure Rules provides:-

“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.”

68. The above section of the Civil Procedure Rules anticipates an application for joinder by any of the parties of the suit. It is thus proper for the Defendant to apply to enjoin another Defendant.

69. The Applicant seeks to enjoin the proposed Defendant, who is the Chief Architect, on the claim that he was the supervisor of the works, who issued the impugned second Interim Certificate of Payment. She contends that it is based on the issuance of that Certificate, by the technical expert in charge of the project, that she processed the impugned payments.

70. The Plaintiff explained that the certificate referred to by the Applicant was signed by the 6<sup>th</sup> Defendant, the Quantity Surveyor, who is already a party to the suit. The Plaintiff further contends that the claim against the Applicant is based upon breach of her fiduciary duty. The Plaintiff further contended that it reserves the right to decide who are the Defendants in its case.

71. The Applicant filed a further Affidavit that neither controverted nor explained the insistence that the proposed Defendant was responsible for the Certificate of payment yet it was issued and signed by the 6<sup>th</sup> Defendant.

72. In the Court of Appeal case of Court of Appeal in the case of Civicon Ltd versus Kivu Watt Airlines Ltd (2015)eKLR, the Court stated:

“Again the power given under the Rules is discretionary which discretion must of necessity be exercised judicially. . . 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.”

73. In the case of *Prem Ramnath Gupta v Esther Kache & 2 others* [2019] eKLR the Court found that:

“But in the same breadth, joinder of parties may be refused where such joinder will lead into practical problems of handling the existing cause of action together with the one of the party being joined; or where it is unnecessary or will just occasion unnecessary delay or costs on the parties. . . . I am not persuaded that it has demonstrated any proper role(s) that the proposed parties would play in this dispute and how their joinder in particular would assist this Court to effectually determine the issues herein. . . . As it were, there is nothing in law that I am aware of that could stop the 2nd Defendant from calling as witnesses officers from the proposed 4th, 5th, 6th and 7th Defendants to come and produce the records they hold in regard to the suit property. They need not be parties in these proceedings to produce such records.”

74. For the court to exercise its discretion in the Applicant’s favour it must be convinced that the joinder is necessary to the Applicant’s defence and for the ends of justice to be achieved. The Applicant has not demonstrated the necessity of the proposed Defendant in this case, save for the insistence that he issued the Second Interim Certificate of Payment, which fact has been controverted by the Plaintiff. I am not convinced that the evidence that the Applicant seeks to have the proposed Defendant produce cannot be produced without that proposed defendant being enjoined as a party to the case. Moreover, Order 1 Rule 9 of the Civil Procedure Rules emphasizes that “no suit shall be defeated by reason of mis-joinder or non-joinder” and enjoins the court to “deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.” In my view this application for joinder of a defendant at this late stage is not made in good faith but is intended to scuttle the expeditious disposal of the suit and it is accordingly rejected. The 5<sup>th</sup> Defendant/Applicant all along knew of the existence of the case of the proposed Defendant and did not have to wait until the matter had been set down for hearing.

Issue No. (iii):- Whether the 5<sup>th</sup> Defendant ought to be allowed to take out a Third Party Notice against the proposed Defendant.

75. The Applicant prays, in the alternative, that if the prayer for joinder of the proposed defendant is declined, then she be allowed by the Court to issue a third-Party Notice to the proposed Defendant so as to seek indemnity against him.

76. The Plaintiff contends that the Applicant has failed to specify the nature of the claim against the intended Third Party, the issue to be determined between the Plaintiff and Third Party, and how the claims against the third party may affect the Plaintiff’s claim against the Defendant.

77. Order 1 Rule 15 of the Civil Procedure Rules provide as follows:-

“Where a defendant claims as against any other person not a party to the suit (hereinafter called the third party)—

- (a) that he is entitled to contribution or indemnity; or
- (b) he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or



- (c) that any question or issue relating to or connected with the subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit.
- (2) A copy of such notice shall be filed and shall be served on the third party according to the rules relating to the service of a summons.” (Underlining mine)
78. Under Order 1 rule 15 of the Civil Procedure Rules, leave to issue a Third Party Notice must be sought within 14 days after the close of pleadings. In this case pleadings closed in the year 2023. This application was made in April 2024, long after the lapse of the 14 days. The importance of rules of procedure and observation of statutory timelines was explained in the Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR where Ouko JA observed that:-
- “It ought to be clearly understood that the courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the court to suspend procedural rules. And while the court, in some instances, may allow the liberal application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why *the Constitution* and other statutes that promote substantive justice deliberately use the phrase that justice be done without “undue regard” to procedural technicalities....”
79. On the question of specificity of the claim against the proposed third party, I agree with the Plaintiff that the Applicant has failed to specify the claim against the proposed Third Party so as to satisfy this court that there is a proper question to be determined as between the Applicant and the Third Party. A third party cannot be added for the sake of it. There must be an issue in controversy between him and the Defendant and in this case none is disclosed. In the case of *Kenya Commercial Bank vs Suntra Investment Bank Ltd* (2015) eKLR, Court held that;
- “In law, a third party is enjoined in a suit at the instance of the Defendant and through the set procedure under Order 1 rule 15 – 22 of the Civil Procedure Rules. And, liability between the Defendant and the third party is determined between the Defendant and the third party, but of course, after the court is satisfied that there is a proper question to be tried as to liability of the third party and the Defendant, and has given directions under Order 1 rule 22 of the Civil Procedure Rules.
80. The case against the Applicant is breach of her fiduciary duty. She has not demonstrated the cause of action she has against the proposed third party as would entitle this court to find that the proposed Third Party is liable to her and so as to enjoin him to this case.
81. I find that apart from being filed out of time the application for leave to issue a Third Party Notice lacks merit and accordingly, I decline to grant it.



**Issue No. (iv):- Who should bear the Costs of the Application**

82. The application dated 11<sup>th</sup> April, 2024 is only partially successful and as the case is yet to be heard costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 9<sup>TH</sup> DAY OF MAY 2024.**

.....

**E.N. MAINA**

**JUDGE**

