



Black Sea Reasorts LLC v Diamond Trust Bank Kenya Limited & another (Commercial Case E436 of 2023) [2024] KEHC 7501 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7501 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E436 OF 2023**

MN MWANGI, J

JUNE 14, 2024

BETWEEN

BLACK SEA REASORTS LLC PLAINTIFF

AND

DIAMOND TRUST BANK KENYA LIMITED DEFENDANT

AND

COMARCO SUPPLY BASE (EPZ) LIMITED INTENDED DEFENDANT

RULING

1. The intended 2nd defendant filed a Notice of Motion application dated 28th September, 2023 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 1 Rules 3, 10 (2) & 14, Order 40 Rules 1, 2 & 4, and Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law, seeking the following orders –
 - i. Spent;
 - ii. That the intended 2nd defendant be and is hereby enjoined in the suit herein as the 2nd defendant;
 - iii. Spent;
 - iv. That the 1st defendant, their agents, employees and/ or servants be restrained by a temporary injunction from debiting any of the intended 2nd defendant’s accounts held by it of USD 500,000.00 or any sums whatsoever in favour of the plaintiff herein, pursuant to a guarantee dated 9th October, 2020 entered into between both defendants, pending the hearing and determination of this suit; and



- v. That the costs of this application be provided for.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Michael Tham, the General Manager of the intended 2nd defendant. In opposition thereto, the defendant filed a replying affidavit sworn on 11th October, 2023 by Natalie Hawala, the defendant's Legal Manager. The plaintiff filed Grounds of Opposition dated 11th October, 2023 raising the following grounds –
- i. That the orders sought by the applicant have been overtaken by events, the plaintiff and defendant having executed and filed a valid and binding consent which compromised the entire suit; and
- ii. That the application as filed is misconceived and has no merit.
3. The application herein was canvassed by way of written submissions. The intended 2nd defendant's submissions were filed on 17th November, 2023 by the law firm of Mwakireti & Asige Advocates. The defendant's submissions were filed on 18th January, 2024 by the law firm of Madhani Advocates LLP, whereas the plaintiff's submissions were filed on 19th January, 2024 by the law firm of Iseme Kamau & Maema Advocates.
4. Mr. Asige, learned Counsel for the intended 2nd defendant cited the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and submitted that from the consent dated 2nd October, 2023 between the plaintiff and the defendant, it is clear that the plaintiff and the defendant seek to obtain a Court order for the release of USD 500,000.00 from the intended 2nd defendant's account, without its inclusion and/or participation in this suit, which order is detrimental to the intended 2nd defendant. He relied on the case of *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR and submitted that the plaintiff's claim is for breach of contract, which claim the intended 2nd defendant intends to defend, and file a counter-claim as well, since its claim against the plaintiff arises from the same transactions as this suit. Counsel urged this Court to exercise its discretion and join the intended 2nd defendant to these proceedings, so that it can have its day in Court.
5. Counsel relied on the cases of *Giella v Cassman Brown and Co. Ltd* [1973] E A 358 and *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR and argued that the plaintiff failed to inform the Court that its demand issued to the defendant on 8th June, 2022 was over a year late since the guarantee in question expired on 22nd March, 2021. Further, that while the plaintiff may argue that their bank sent the liquidation instructions on time, the guarantee specifies that the crucial factor was when the instructions were received. Mr. Asige contended that the deponent to the defendant's replying affidavit failed to mention when the plaintiff's bank instruction was received, as she only stated that the plaintiff issued its demand on 19th March, 2023. Counsel contended that the said omission was deliberate and stated that the instructions were not received on time, thus explaining the delay from 21st March, 2021, until the date of filing this suit. Counsel invited this Court to make its own conclusion regarding the plaintiff's and the defendant's actions.
6. Mr. Asige referred to the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR and stated that the plaintiff herein is not a Kenyan entity, yet it seeks to have the defendant transfer USD 500,000.00 into a bank that does not operate in Kenya. He contended that such a transfer will cause significant prejudice and financial loss to the intended 2nd defendant, who will have no recourse available to it since the plaintiff's bank is in Georgia. He argued that in the said circumstances, damages will not be an adequate remedy for the intended 2nd defendant. In submitting that the balance of



- convenience tilts in favour of the intended 2nd defendant, Counsel cited the case of Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others [2016] eKLR.
7. Mr. Shah, learned Counsel for the defendant relied on the case of Sinohydro Corporation Ltd v GC Retail Ltd & another [2016] eKLR and submitted that the subject matter of this suit is an unconditional and irrevocable advance payment bank guarantee dated 9th October, 2020. He cited the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and further submitted that the plaintiff and the defendant have already agreed to settle this matter as is evident from the consent dated 2nd October, 2023, and there was nothing left to be determined by this Court as between the plaintiff and the defendant. Counsel pointed out that the intended 2nd defendant had neither filed nor annexed to its affidavit in support of the application herein, a draft defence and counter-claim, hence there are no questions that have been raised by the intended 2nd defendant for consideration by this Court. Mr. Shah expressed the view that the prayer for joinder has been overtaken by events.
 8. He cited the Court of Appeal case of Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR and the case of Sunrise Properties Limited v Fifty Investments Ltd & another [2007] eKLR, where the Court quoted the case of Kihara v Barclays Bank Ltd [2001] 2 EA. 420. He stated that a prayer for an interlocutory relief must be anchored on a plaint or primary pleading, but in this case, the interlocutory injunction sought by the intended 2nd defendant is incompetent as it is not anchored on any suit or main pleading like a defence and counter-claim. Mr. Shah relied on the Court of Appeal case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR and contended that the intended 2nd defendant is not entitled to any of the reliefs sought since it has not established that it has a prima facie case with a probability of success.
 9. He further stated that the intended 2nd defendant's claim for an injunction against the defendant is based in the manner in which the Bank Guarantee was called-in by the plaintiff, but the intended 2nd defendant has not alluded to and or made any allegations of fraud in respect of the Bank Guarantee, to warrant being granted the injunctive orders sought. In submitting that the only instance when a Bank Guarantee is not paid on demand is when there is fraud and the Bank has notice of such fraud. Mr. Shah referred to the case of Yogesh Pattni & 2 others v Mohammed Madhani & Co. Advocates & 3 others [2020] eKLR. Counsel asserted that the defendant herein had confirmed that the plaintiff's demand for payment was made on 19th March, 2021, but it was overlooked since a different format was used. The defendant clarified that it receives messages through MT700 series, whereas the said demand was made under MT999, and it duly informed the intended 2nd defendant that only a withdrawal notice or a recall notice would suffice to prevent it from honouring the Bank Guarantee in question.
 10. It was submitted by Mr. Shah that the intended 2nd defendant shall not suffer irreparable harm and damages since no evidence had been tendered to demonstrate that the amounts payable under the Bank Guarantee in question are being taken out of the country. Further, that the amounts payable are known and were defined in monetary terms, thus any loss suffered by the intended 2nd defendant can easily be calculated or measured with accuracy in the event that the intended 2nd defendant's claim is successful. Counsel submitted that in view of the above, the balance of convenience tilts in favour of the plaintiff and the defendant, since the intended 2nd defendant was aware of the plaintiff's demand to the defendant to honour the Bank Guarantee in question since 8th June, 2022, but failed to file suit seeking to restrain the enforcement of the said Bank Guarantee.
 11. Mr. Munyu, learned Counsel for the plaintiff cited the provisions of Order 1 Rules 3 & 10(2) of the Civil Procedure Rules, 2010 and the case of Geonet Communications Limited v Safaricom Plc [2021] eKLR and submitted that the intended 2nd defendant could not have been named as a defendant in the suit since the plaintiff's cause of action is solely against the defendant. It was also submitted



- that the plaintiff's agreement with the defendant is separate and distinct from its agreement with the defendant in relation to the guarantee in question. Counsel referred to the case of *Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another* [2015] eKLR and urged this Court not to join the intended 2nd defendant to this suit as its proposed cause of action is incompatible with the one in this suit. In addition, he argued that joining the intended 2nd defendant to this suit will cause unnecessary costs and delay in a suit that has already been settled by a consent between the plaintiff and the defendant.
12. It was Mr. Munyu's contention that the intended 2nd defendant's proposed inclusion in this suit is unnecessary because the case revolves around a performance guarantee between the plaintiff and the defendant, and in determining the suit, this Court will only be required to determine if the plaintiff is entitled to the guaranteed sum of USD 500,000.00 from the defendant, based on the available terms of contract. It was stated by Counsel that the intended 2nd defendant's claim about the improper call-up of the guarantee is irrelevant since the defendant has already confirmed the guarantee's validity. Counsel argued that the intended 2nd defendant's presence will not aid the Court in resolving the dispute in this suit. To buttress these submissions, Counsel relied on the case of *Edward Owen Engineering Ltd V. Barclays Bank International Ltd* [1978] 1 All ER. 976 quoted with authority by the Court of Appeal in the case of *Kenindia Assurance Company Limited v First National Finance Bank Limited* [2008] eKLR.
 13. Mr. Munyu contended that the intended 2nd defendant wishes to defend and file a counter-claim against allegations of breach of contract raised in the plaint, but breach of an agreement between the intended 2nd defendant and the plaintiff is not part of the present suit. He submitted that the plaintiff terminated its agreement with the intended 2nd defendant in March 2021 on account of breach on the part of the intended 2nd defendant, and to date, the said termination has not been challenged through arbitration as provided for in the said agreement. Counsel asserted that any claim for breach of contract by the intended 2nd defendant should be resolved through arbitration and not this Court.
 14. Counsel argued that the application for joinder is moot because a valid consent dated 2nd October, 2023 has already been executed and filed by the plaintiff and the defendant, effectively resolving the entire suit. Further, the intended 2nd defendant does not challenge the said consent which constitutes a binding contract between the plaintiff and the defendant, and the said consent can only be challenged on limited grounds, as established in the case of *Kenya Commercial Bank Ltd v Specialised Engineering Co. Ltd* [1982] KLR 485 and affirmed by the Court of Appeal in the case of *Board of Trustees National Social Security Fund v Michael Mwalo* [2015] eKLR.
 15. Mr. Munyu relied on the Court of Appeal decisions in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (supra) and *Mrao Ltd v First American Bank of Kenya Ltd and 2 others* (supra) and submitted that the guarantee in question expired on 22nd March, 2021, whereas the first demand was made to the defendant through the plaintiff's servicing bank, Cartu Bank, via a SWIFT message format MT999 on 19th March, 2021, thus meeting all the requirements of the guarantee and the relevant rules. He submitted that this Court has no jurisdiction to determine any dispute between the plaintiff and the intended 2nd defendant touching on breach of contract and by extension its intended counter-claim and that any dispute between the plaintiff and the intended 2nd defendant should not hinder the defendant from paying the guaranteed sum as was held by the Court in the case of *China Gansu International Corporation Case Economic & Technical Cooperation Kenya Company Limited v Golden Gulf International Limited & another (Commercial Case E679 of 2021)* [2022] KEHC 3165 (KLR).
 16. Mr. Munyu contended that the intended 2nd defendant has not established a prima facie case with the probability of success to warrant being granted a temporary injunction. He submitted that the



intended 2nd defendant has not contested that the plaintiff made an advance payment or that the agreement was terminated before the intended 2nd defendant fulfilled its obligations. Further, it is undisputed that the intended 2nd defendant failed to reimburse the advance payment to the plaintiff after the agreement was terminated thus warranting release of the guaranteed sum. Counsel submitted that payment of the guaranteed sum to the plaintiff was an expected outcome, hence the intended 2nd defendant cannot claim irreparable injury from the payment. He stated that the intended 2nd defendant still holds the advance payment hence release of the guaranteed sum will not cause it any irreparable loss that cannot be adequately compensated by an award of damages. Mr. Munyu asserted that in the said circumstances, the balance of convenience tilts in favour of the plaintiff.

17. In a rejoinder, Mr. Asige submitted that the terms of the guarantee in question were not complied with since the demand to liquidate the guarantee was received out of time. He further submitted that there has been a breach which should form the basis of being granted an order of injunction. He contended that failure to annex a draft defence and counter-claim to the instant application was occasioned by the fact that the intended 2nd defendant got wind of the consent between the plaintiff and the defendant and moved to Court within a short time to seek injunctive orders. Mr. Asige urged this Court to grant the orders sought since the plaintiff is a company registered in Georgia, and has no assets or bank accounts in Kenya.

ANALYSIS AND DETERMINATION.

18. I have considered the instant application, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the replying affidavit by the defendant and the grounds of opposition filed by the plaintiff, as well as the written submissions by Counsel for the parties. The issues that arise for determination are -
- i. Whether the intended 2nd defendant should be joined to this suit; and
 - ii. Whether an order for temporary injunction should issue against the defendant.
19. The intended 2nd defendant in its supporting affidavit sworn by Mr. Michael Tham deposed that it and the plaintiff entered into an agreement on 22nd September, 2020 for transporting baobab trees from Kenya to Georgia. That it was a term of the said agreement that the intended 2nd defendant would procure an unconditional guarantee in favour of the plaintiff.
20. Mr. Tham averred that in compliance with the terms of the said agreement, the intended 2nd defendant procured the said guarantee dated 9th October, 2020 from the defendant, with a guaranteed amount of up to USD 500,000.00. He further averred that the said guarantee was effective from 6th November, 2020 to 22nd March, 2021.
21. It was stated by Mr. Tham that the defendant was served with summons to enter appearance dated 13th September, 2023, which summons it sent to the intended 2nd defendant. That vide a letter dated 21st September, 2023, the defendant informed the intended 2nd defendant that it intends to debit USD 500,000.00 pursuant to the aforesaid guarantee and following receipt of demand letters dated 8th June, 2022 and 27th June, 2022 from the plaintiff's Advocates on record.
22. He further stated that that the plaintiff has failed to demonstrate that the guarantee in question was still valid as it does not state the specific date it unilaterally terminated its contract with the intended 2nd defendant. The intended 2nd defendant contended that demand to pay the guarantee having been made by the plaintiff's bank was not valid for it was not made by the beneficiary of the said guarantee.



23. Mr. Tham deposed that the guarantee in question was clear that in order for a demand of its payment to be valid, it must have been received by the defendant before the expiry date which was 22nd March, 2021, but in this case, the plaintiff's demand issued by its bank on 19th March, 2021 was not received by the defendant, a fact which was admitted by the plaintiff in its demand letter dated 8th June, 2022.
24. The intended 2nd defendant stated that the plaintiff's demand to the defendant to honour the guarantee herein was way out of time, having been issued after the expiry of the guarantee. It further stated that it intends to defend the plaintiff's claim of breach of contract and file a counter-claim as its claim against the plaintiff arises from the same transaction as this suit.
25. The defendant in its replying affidavit sworn by Natalie Hawala averred that it issued an advance payment guarantee dated 9th March, 2020 securing an amount of USD 500,000.00, and the said guarantee was valid until 22nd March, 2021. It deposed that on 19th March, 2021, the plaintiff issued a demand for payment of the said guarantee, which was within the timeline indicated in the advance payment guarantee.
26. Ms. Hawala further averred that on the same date, the plaintiff's bank which would be known as the beneficiary's servicing bank under the aforementioned guarantee also issued the defendant with a demand in accordance with the advance payment guarantee in the SWIFT message format MT999, although the defendant normally receives all messages through the MT700 series, thus it initially overlooked the MT999.
27. The defendant contended that it was later engaged by the beneficiary's servicing bank to establish what had gone wrong, and that is when it established where the problem had occurred. The defendant stated that the intended 2nd defendant was notified of the aforesaid demand to which it indicated that it was in discussions with the plaintiff on the matter and it would revert.
28. Ms Hawala stated that the defendant made several follow ups and informed the intended 2nd defendant that the only way it would not be compelled to pay was if the plaintiff and/or its servicing bank issued it with a withdrawal notice or a recall notice in the correct format, and a discharge of liability against the defendant. She contended that despite the foregoing, there was no concrete information that the demand had been withdrawn or that an agreement had been reached between the plaintiff and the intended 2nd defendant.
29. She averred that the defendant was issued with demand letters dated 8th June, 2022 and 27th June, 2022 which letters were copied to the intended 2nd defendant but the latter still failed to agree with the plaintiff and/or obtain a withdrawal of the demand on the Advance Payment Guarantee.
30. She further averred that the defendant was obligated to honour the Advance Payment Guarantee as it was considered a binding contract and/or undertaking. Further, the guarantee in question was a separate contract between the plaintiff and the defendant, that the intended 2nd defendant is neither privy nor a party to.
31. The defendant asserted that in the interim, this suit was filed and upon reviewing the matter, the defendant decided that it could no longer rely on the assurances made by the intended 2nd defendant, and has since agreed to make payment under the Advance Payment Guarantee. She stated that the defendant and the plaintiff have duly executed a consent compromising this suit, and there is nothing left for this Court to determine.



Whether the intended 2nd defendant should be joined to this suit.

32. Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 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.”

33. The tests for determining an application for joinder of parties were restated by the Court in the case of *Kingori v Chege & 3 others* [2002] 2 KLR 243, where Nambuye J., (as she then was) outlined the guiding principles when an intending party is to be joined to proceedings -

- “i) He must be a necessary party;
- ii) He must be a proper party;
- iii. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff;
- iv. The ultimate order or decree cannot be enforced without his presence in the matter; and
- v. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”

34. In *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR, the Court when dealing with a similar application stated as follows -

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

35. The plaintiff in its suit against the defendant seeks an order for this Court to compel the defendant to pay it USD 500,000.00 pursuant to an Advance Payment Guarantee dated 9th March, 2020 created in favour of the plaintiff by the intended 2nd defendant. The record reveals that the plaintiff and the intended 2nd defendant got into an agreement dated 22nd September, 2020 for transportation of baobab trees from Kenya to Georgia. It was a term of the said agreement that the intended 2nd defendant would



- procure an unconditional guarantee in favour of the plaintiff. This term of the agreement between the plaintiff and the intended 2nd defendant led to the creation of the guarantee dated 9th March, 2020 securing the sum of USD 500,000.00 in favour of the plaintiff.
36. The plaintiff's servicing bank issued the defendant with a demand for payment of the said guarantee and the defendant has agreed to pay, as in evident from the consent dated 2nd October, 2023 executed by the plaintiff and the defendant. The intended 2nd defendant contends that by filing this suit and excluding it, the plaintiff and the defendant intend to steal a match on it and deny it its day in Court. The intended 2nd defendant averred that the defendant should not be compelled to honour the plaintiff's demand to pay the guarantee in question since the plaintiff has not demonstrated whether the said guarantee was still valid in view of the fact that it terminated its agreement with the intended 2nd defendant, the demand for payment was not made by the beneficiary of the guarantee, and it was made after the guarantee had expired.
37. I have perused the guarantee dated 9th October, 2020 and I noted that it was created by the intended 2nd defendant in favour of the plaintiff to secure a sum of USD 500,000.00. The said guarantee was not only irrevocable and unconditional, but it was also an undertaking by the defendant to the plaintiff to pay the secured amount to the plaintiff on demand. The guarantee provides that it shall become effective upon receipt of the remaining part of the advance payment by the intended 2nd defendant and shall be valid until 22nd March, 2021. The said guarantee provides the plaintiff with several avenues to make the demand which include through its servicing bank via SWIFT message format MT999. All the parties herein agree that the aforesaid guarantee was to be valid from 6th November, 2020 to 22nd March, 2021.
38. The defendant in its replying affidavit confirmed that on 19th March, 2021 which is approximately two days before the guarantee in question expired, the plaintiff through its servicing bank issued a demand for payment of the said guarantee, via a SWIFT message format MT999. The defendant averred that in as much as it received the said message, it initially overlooked it since it normally receives all messages through the MT700 series. That it was only after it was contacted by the plaintiff's servicing bank to establish what had gone wrong that it found out where the problem had occurred. It was stated by the defendant that the intended 2nd defendant was duly notified of the aforesaid demand to which it indicated that it was in discussions with the plaintiff on the matter and it would revert to the defendant. In light of the foregoing, this Court's finding is that the demand for payment of the guaranteed sum was made and received by the defendant before the guarantee expired, and the said demand was in accordance with the terms of the guarantee dated 9th October, 2020.
39. From this Court's analysis of the facts, the subject matter in this suit is the guarantee dated 9th October, 2020 created by the intended 2nd defendant in favour of the plaintiff to secure a sum of USD 500,000.00. The said guarantee was between the plaintiff and the defendant, thus binding to the said parties. In as much as the intended 2nd defendant claims that the said guarantee was as a result of an agreement between it and the plaintiff, it is not disputed that the intended 2nd defendant is not a party to it, thus it is neither privy nor bound by the terms therein. For this reason, the intended 2nd defendant's allegation that it intends to defend the plaintiff's claim for breach of contract (if any), has little or no probative value to this suit. As was correctly submitted by Counsel for the defendant, the contract between the plaintiff and the intended 2nd defendant and the one between the plaintiff and the defendant are significantly different, thus if the intended 2nd defendant has a claim for breach of contract against the defendant, it should file a suit against it, independent of the present one.
40. On perusal of the guarantee in question, I note that it was securing an advance payment of USD 500,000.00 that the plaintiff had made to the intended 2nd defendant for transportation of baobab



trees from Kenya to Georgia, and it was unconditional and irrevocable. In the intended 2nd defendant's affidavit in support of the application herein, it neither disputes having received the sum of USD 500,000.00 from the plaintiff, nor does it allege that it transported baobab trees from Kenya to Georgia as provided for in its agreement with the plaintiff dated 22nd September, 2020.

41. Having analyzed the facts, I am not persuaded that the intended 2nd defendant is a necessary party to these proceedings since its presence is not necessary for the Court to effectively and completely adjudicate upon and settle all questions in controversy in this suit. Further, there are no reliefs flowing from the intended 2nd defendant to the plaintiff in this suit, and the ultimate order or decree that may be issued by this Court can be enforced without the presence of the intended 2nd defendant in this suit.
42. In the premise, I find that the intended 2nd defendant has not made out a case to warrant this Court to exercise its discretion in its favour to be joined to this suit.
43. In view of the above finding, I shall not determine whether an order of injunction against the defendant should issue as the intended 2nd defendant is not a party to this suit, and has no right and locus standi to seek for any injunctive reliefs before being joined as a party.
44. The upshot is that the instant application is devoid of merits. It is hereby dismissed with costs to the plaintiff and the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Ms Musyoka h/b for Mr. Munyu for the plaintiff

Mr. Shah for the defendant

Mr. Asige for the applicant/intended 2nd defendant

Mr. Luyai - Court Assistant.

