



**Erdemann Property Limited v Co-operative Bank (K) Limited; Lake Basin
Development Authority (Intended Interested Party) (Civil Case E271 of 2022)
[2024] KEHC 10187 (KLR) (Commercial & Admiralty) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
CIVIL CASE E271 OF 2022
DO CHEPKWONY, J
JULY 11, 2024**

BETWEEN

ERDEMANN PROPERTY LIMITED PLAINTIFF

AND

CO-OPERATIVE BANK (K) LIMITED DEFENDANT

AND

**LAKE BASIN DEVELOPMENT AUTHORITY INTENDED INTERESTED
PARTY**

RULING

1. The application before court is a Notice of Motion dated 23rd November, 2022 expressed to be filed under Sections 1A, 3 and 3A all of the *Civil Procedure Act* and Order 1 Rule 10, Order 51 Rules 1 all of the Civil Procedure Rules and Rule 2 and 7 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013. The prayers in the Motion have been expressed in the following terms:-
 - a. Spent.
 - b. That leave be granted to Lake Basin Development Authority to be admitted as interested party in the above suit filed in this Honourable Court.
 - c. That the Intended Interested Party be granted an opportunity to submit written and oral arguments in the above Petition.



- d. That the Intended Interested Party be allowed to submit with leave of court any other information it may deem important and relevant to allow for the just disposition of this matter.
 - e. That costs in relation to this application be in the cause.
2. The application is anchored on the grounds on its face and supported by the affidavit of Dr. Raymond Omollo sworn on 23rd November, 2022. He deposes that he the Managing Director of the Applicant and that the Applicant is a state corporation with a duty to serve the interests of the public and is established to plan and co-ordinate the implementation of development projects in Lake Victoria Catchment Area and part of Lake Kyoga.
 3. According to the Applicant's Managing Director, the authority in a bid to deliver on its mandate initiated the Lake Basin Complex Project (the Mall) to be constructed on Land Reference No. 15239 in Kanyakwar within Kisumu County in January, 2013. In a bid to actualize the construction of the Mall, the Authority invited bids by way of a tender between January and February, 2013.
 4. He avers that upon completion of the tendering process, the 1st Respondent Company emerged as the successful bidder and on 8th May, 2013, the 1st Respondent Company and the Authority proceeded to enter a Form of Agreement for the construction of the Mall at a contract sum of Kshs. 2,451,035,643.00.
 5. It was deposed that on 17th February, 2015, the Authority and the 1st Respondent Company purportedly signed a Deed of Variation increasing the contract sum to Kshs. 3,860,000,000.00. The variation was a sum of Kshs. 1,408,963,357.00 which constituted an increment of the contract by 57% and inconsistent with the *Public Procurement and Asset Disposal Act*.
 6. The contract was in the nature of a Contractor Financed Project and the 1st Respondent Company as a Co-Developer was required to finance 80% of the project and payment to the Claimant was upon completion and handing over of the Mall to the Applicant.
 7. He stated that pursuant to Clause 5 of the Form of Agreement as security for payment of the contract sum to the claimant, the authority executed and created various legal charges in favour of the 2nd Respondent. The charges were created over Land Reference No. L. R No. 15239 and 150443 to secure the principal loan amount of Kshs. 2,500,000,000.00 advanced to the 1st Respondent Company for construction of a Mall on the property.
 8. He deposed that it was a term of the charges that the Chargor, the Authority would only be responsible for the Principal sum and the Borrower, the 1st Respondent Company would be responsible for interest and or other costs and incidentals.
 9. According to him he was aware that the 1st Respondent Company did not conform to the terms of the Form tender, Form agreement and Form Variation and more specifically failed to establish an escrow account to deposit the financed contract sums and breached Clause 36 of Section III by engaging in ethics and or corruption or criminal conduct leading to Milimani Criminal Case No. 26 of 2019 where the Claimant and its Directors were charged with Conspiracy to commit an offence of corruption, unlawful charging of public property, corruptly giving a benefit, unlawful charging of public property and fraudulent acquisition of public property.
 10. The Applicant avers that on 18th August, 2016, the Ministry of Transport, Infrastructure Housing and Urban Development carried out an inspection and had several recommendations that the Authority seeks legal opinion from the Office of the Attorney General regarding the use of the Authority's property as security by the Claimant, take over the responsibility of repaying the loan by the Authority



from the 1st Respondent Company, authority to seek opinion of Public Procurement Regulatory Authority regarding 57% variation and the buildup area of the Mall ought not to have exceeded Kshs. 3,860,000,000.

11. Vide a letter dated 10th July, 2018, the Authority informed the 1st Respondent Company that the Finance cost of Kshs. 550,000,000 had been included in the contract agreement and any additional costs was to be met by the 1st Respondent Company.
12. The 1st Respondent Company opposed the application by way of a Replying affidavit of Zeyun Yang dated 24th January, 2024. The 1st Respondent Company through its Managing Director deposes that the application is mischievous, bad in law, an abuse of the court process, misconceived and ought to be struck out or dismissed.
13. According to the 1st Respondent Company, the Intended Interested Party is the legal charger of all the legal charges registered in favour of the Defendant, and hence risks losing the suit property through a statutory sale by the Defendant, the Plaintiff violated the terms of the bid contract and the Procurement and Disposal Act and the orders sought would adversely affect the interests of the Intended Interested Party.
14. He avers that the Applicant has failed to disclose that there is an ongoing arbitration between it and the Plaintiff in which it has raised all the issues raised in its application.
15. He further avers that if the Applicant is allowed to join these proceedings and raise the same issues for determination, there is a danger that there might be conflicting decisions which will embarrass the adjudication process and the Judiciary at large.
16. It was deposed that the dispute between the Applicant and the Plaintiff can only be solved through arbitration. The Applicant intends to import the dispute in arbitration for determination by this Honourable Court.
17. According to the 1st Respondent Company, the dispute herein is between the Plaintiff and the Defendant on illegal demands for payment of a debt and negative listing of the Plaintiff by the Defendant with the Credit Reference Bureau. The Applicant lacks any interest in illegal demands made by the Defendant in the illegal negative listing of the Plaintiff by the Defendant.
18. On the reasons for joinder, the 1st Respondent Company deposed that if the Applicant intends to enforce any of its rights as a Chargor against the Defendant it is at liberty to move the court appropriately to enforce those rights. Otherwise, there is no relationship or relevance of the suit property to these proceedings.
19. Lastly, the 1st Respondent Company stated that there is no interest of the Applicant that would be affected if this Honourable Court restrains the Defendant from making illegal demands for payment or negatively listing the Plaintiff. The dispute is specific to the Plaintiff and the Defendant and the Applicant's participation is unnecessary.
20. The 1st Respondent through its Managing Director deposed that the application lacks merit and the same be dismissed with costs to the Plaintiff.
21. On 26th January, 2024 both parties agreed to dispose of the application by way of written submissions. Both parties complied and filed their respective submissions with the Intended Interested Party/Applicant filing submissions dated 10th February, 2023 whilst the Plaintiff/1st Respondent's submissions are dated 23rd February, 2023. There are no submissions on record on behalf of the



Defendant. I have read through the written submissions by both parties and since they are a reiteration of the grounds in the affidavits filed by the parties, will consider them in my analysis and determination.

Analysis and Determination

22. This Court has considered the application, the affidavit in response and the written submissions filed by both parties as well as the authorities relied upon and finds the following issue arises for determination:-

a. Whether the application for joinder of the Intended Interested Party is merited.

23. Joinder of parties is governed by Order 1 Rule 10 (2) of the Civil Procedure Rules which provides as follows:-

“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.”

24. In law, the court may at any stage of the proceedings either on application by a party or on its own motion add a party to the suit if such party is necessary for the determination of the issues in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, the issue of joinder of parties is allowed in law and can be done at any state of the proceedings. However, joinder of parties is declined where the cause of action being proposed or the relief being sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in an application for joinder is that a common question of fact or law would arise between the existing and the intended parties.

25. In the case of Joseph Njau Kingori –vs- Robert Maina Chege & 3 Others [2002] eKLR, Nambuye, J (as she then was) set out the guiding principles applications seeking for joinder of parties as follows:-

“...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to *the constitution* of the suit without whom no decree at all can be passed. Therefore in case of a Defendant two conditions must be met: (1) There must be a right to some relief against him in respect of the matter involved in the suit. (2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings. A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognizable in the Court of law being an interest, which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a Defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a Defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own



formally. The use of the words “either party” denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants.”

26. It is the Intended Interested Party’s case that it is a necessary party to these proceedings for the reason that it entered into a Form of Agreement with the 1st Respondent Company for the construction of the Mall at a contract sum of Kshs. 2,451,035,643.00. Further, the Intended Interested Party executed and created various legal charges in favour of the 2nd Respondent. The charges were created over Land reference No. L. R No. 15239 and 150443 to secure the principal loan amount of Kshs. 2,500,000,000.00 advanced to the 1st Respondent Company for construction of a Mall on the property. On the other hand the 1st Respondent Company urge that there is a pending suit before the Arbitral Tribunal where the Intended Interested Party has raised all the issues raised in this application. Further, joinder of the Intended Interested Party to these proceedings there is a danger that there might be conflicting decisions which will embarrass the adjudication process.
27. The question this Court needs to answer is whether the Intended Interested Party is a necessary party to this suit and whether the final decree cannot be enforced without its presence in the matter.
28. Before answering the aforementioned question, it is important to note that in its pleadings, the Plaintiff/Respondent has acknowledged the existence of a contract between it and the Intended Interested Party. For instance prayer No.5 of its application dated 19th July, 2022 is couched as follows:-

“Pending hearing and determination of this suit, there be an order of temporary injunction restraining the Defendant/ Respondent, its agents, employees, servants or any other person or entity claiming through it from demanding any payments with respect to the credit facility advanced to the Plaintiff by the Defendant for the contract finance (including principal and interest) for performing the contract with the Lake Basin Development Authority Lower Kanyakwar Phase 1 which currently stands at Kshs. 4,401,149, 525.24.”
29. On the question of whether the Intended Interested Party is a necessary party, this Court relies on the case of Civicon Limited –vs- Kivuwatt Limited and 2 Others [2015] eKLR, where the Court 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.”
30. It is clear that the Intended Interested Party executed and created various legal charges in favour of the 2nd Respondent. The charges were created over Land Reference No. L. R No. 15239 and



150443 to secure the principal loan amount of Kshs. 2,500,000,000.00 advanced to the 1st Respondent Company for construction of a Mall on the property. The Intended Interested Party is necessary in these proceedings to enable this court to effectively and completely adjudicate this matter. In the Court's view, sufficient interest has been proved to warrant joinder as an Interested Party.

31. Based on the analysis above, this Court finds merit in the application for joinder of the Intended Interested Party and the same is allowed as prayed.
32. I proceed to make further orders as follows:-
 - a. The Plaintiff/Respondent is granted seven (7) days to serve the Interested Party with its pleadings.
 - b. The Interested Party is granted fourteen (14) days to file and serve its responses.
 - c. The matter shall be mentioned before the Presiding Judge Commercial and Tax Division on.....for directions on hearing of the pending application.

It is so ordered.

DATED AND SIGNED AT KIAMBU THIS 8TH DAY OF JULY 2024.

D.O CHEPKWONY

JUDGE

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 11TH DAY OF JULY 2024.

JOSEPHINE MONG'ARE

JUDGE

In the presence of:

For Plaintiff/1st Respondent

For Defendant/2nd Respondent

For Intended Interested Party

