



Kitui Flour Mills Ltd v New Generation Self Service Stores Ltd; Bhandarid (Sued as the administrators New Generation Self Service Stores Ltd) (Interested Party) (Commercial Suit E009 of 2022) [2024] KEHC 10285 (KLR) (1 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL SUIT E009 OF 2022
F WANGARI, J
AUGUST 1, 2024**

BETWEEN

KITUI FLOUR MILLS LTD PLAINTIFF

AND

NEW GENERATION SELF SERVICE STORES LTD DEFENDANT

AND

MADHAV SUDHIR BHANDARID (SUED AS THE ADMINISTRATORS NEW GENERATION SELF SERVICE STORES LTD) INTERESTED PARTY

RULING

1. The application dated July 4, 2022 was filed on July 5, 2022. It seeks the following orders
 - a. spent
 - b. That a temporary injunction do issue to restrain Defendant and the Interested Party whether by themselves, their servants and /or agents from auctioning transferring alienating disposing of or in any other way dealing with the Defendant's assets pending the hearing of this application interpartes.
 - c. That a temporary injunction do issue to restrain Defendant and the Interested Party whether by themselves, their servants and/or agents from auctioning transferring alienating disposing of or in any other way dealing with the Defendant's assets pending the hearing and determination of this suit.
 - d. That the Honourable Court be pleased to grant leave to the plaintiff to proceed with the suit herein in the current application against the defendant and he interested party and upon such



leave being granted the plaintiff be allowed to amend the pleadings to include the Interested Party as the 2nd defendant.

- e. That the costs of this application be provided for.
2. Parties filed submission on all aspects of the application. However, it is a composite application. It is not possible to deal with prayers 4 with the rest of the prayers. The Plaintiff states that they are creditors of the Respondent for sum of Ksh 103,537,292.
 3. They state that the NCBA Bank Kenya Plc placed the Respondent under administration pursuant to relevant provisions of Section 560 (1) (d) of the *Insolvency Act*, 2015. The rest of the prayers seek injunction against the party intended to be joined to the suit.
 4. Given the said facts, if we allow the entire application in limine one party will have stolen a march against a party not yet to be joined. The right to a fair hearing is a fundamental principle of law that cannot be derogated from.
 5. On the other hand, the Interested Party does not have full powers in the suit to be heard. This is on the basis of the Supreme Court decision of *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, where the supreme court held as doth: -

53. What should we make of a cross-petition fashioned as such. Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Kariuki Muruatetu & Another v. Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

“Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties’ before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court” [emphasis supplied].

54. In like terms we thus observed in *Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others*, Civil Appeal No. 290 of 2012 (paragraph 24):

“A suit in Court is a ‘solemn’ process, ‘owned’ solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined



as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings.”

55. Against such a background, the trial Court ought not to have entertained issues arising from the cross-petition by the interested party, especially in view of Article 163 (7) of the Constitution which provides that ‘All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.’ Moreover, this cross-petition did not comply with Rule 15 (3) of the Mutunga Rules which speaks to a respondent filing a cross-petition; and it was also not in conformity with Rule 10 (2) of these Rules. Rule 10(3) cannot also be invoked as the replying affidavit of the interested party does not fit any of the descriptions contained therein.”
6. Therefore, I cannot fully address the issue of injunction in the absence of the Interested Party as a Defendant. The suit truly speaking belongs to the parties and not the Interested Party.
7. I shall not address the submissions comprehensively because of the nature of orders about to be issued. The plaintiff states that due to the amount of money in issue, it is important that the Interested Party be therefore joined as a 2nd defendant.
8. I shall not touch the issue for temporary injunction now. The plaintiff contends that they have met the requirements of Section 560 (1) (d) of the Insolvency Act. They rely on the case of Owiti Otiemo Ragot Advocates v Mumias Sugar Co. Limited (Under Administration) [2020] eKLR, where the court stated as follows;
- “Be that as it may, the court needs to take into consideration a number of factors as laid down under section 560 A of the Insolvency Act as follows;
- “when considering whether to grant approval under section 560, the court may in particular take into consideration –
- (a) the statutory purpose of the administration:
 - (b) the impact of the approval on the applicant particularly whether the applicant is likely to suffer significant loss;
 - (c) the legitimate interests of the applicant and the legitimate interest of the creditors of the company, giving the right of priority to the proprietary interest of the applicant; and
 - (d) the conduct of the parties.”
9. The Respondent was of the view that the Applicant has not met the requirements for grant of injunction. They have not addressed the other issues. In particular, they have not address the issue of Section 560 of the Insolvency Act.
10. I have considered the application and not that the application is not ideal. The amount in dispute is Ksh 103,537,292. The Administrator is a necessary party to enable parties determine the dispute herein.

Determination

11. The application dated 4/7/2022 and filed on 5/7/2022 has merit and as such, I allow the same partly, on the following terms: -



- a. Leave is hereby granted to the Plaintiff to proceed with the suit herein as against the Defendant and the Interested Party as the 2nd Defendant. The Plaintiff to amend the Plaintiff to include the Interested Party as a Defendant.
- b. The orders that have been sought against the Administrator cannot be granted before he has been joined to the suit and as such any adverse orders can only be sought after has been allowed into the suit.
- c. The prayers 2 and 3 shall be determined upon the amendment being carried out as the court cannot issue orders against a party not yet party to the suit.
- d. Interim orders extended
- e. Costs in the cause

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 1ST DAY OF AUGUST, 2023

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F. WANGARI

JUDGE

