



**Swaleh, Mwangi & Co. Advocates v Maina & 2 others; Llyod Masika Limited & another  
(Proposed Interested Parties) (Commercial Miscellaneous Application 200 of 2017)  
[2024] KEHC 11586 (KLR) (Commercial and Tax) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11586 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL MISCELLANEOUS APPLICATION 200 OF 2017**

**MN MWANGI, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**SWALEH, MWANGI & CO. ADVOCATES ..... ADVOCATE**

**AND**

**JOHN KAGUMA MAINA ..... 1<sup>ST</sup> APPLICANT**

**STANLEY KARIUKI MAINA ..... 2<sup>ND</sup> APPLICANT**

**CHARLES KANYUNGA MAINA ..... 3<sup>RD</sup> APPLICANT**

**AND**

**LLYOD MASIKA LIMITED ..... PROPOSED INTERESTED PARTY**

**KENYA LIMITED ..... PROPOSED INTERESTED PARTY**

**RULING**

1. The applicants filed a Notice of Motion application dated 17<sup>th</sup> March, 2023 which was subsequently amended on 4<sup>th</sup> July, 2023, pursuant to the provisions of Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 1 Rule 10(2), Order 51 Rule 1 of the Civil Procedure Rules, 2010, Article 159 (2)(b) of the Constitution of Kenya and all other enabling provisions of the law. The applicants seeks orders that; the 1<sup>st</sup> & 2<sup>nd</sup> proposed interested parties be joined to these proceedings, an order of injunction be granted staying the Notice to Show Cause dated 9<sup>th</sup> March, 2023 issued to the applicants pending the hearing and determination of this suit, and the 1<sup>st</sup> interested party be directed to release the funds collected on behalf of the 2<sup>nd</sup> interested party, and in particular the share belonging to the applicants herein for purposes of settling the decretal amount plus costs owed to the Advocate/ respondent.



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 John Kaguma Maina, the 1<sup>st</sup> applicant herein. Mr. Maina averred that the applicants were sued in their capacity as Shareholders and Directors of the 2<sup>nd</sup> interested party in Nairobi HCCOMM No. 394 of 2011; Francis Chege Maina & 4 others v John Kaguma Maina & 2 others, thus the funds collected by the 1<sup>st</sup> proposed interested party on behalf of the 2<sup>nd</sup> proposed interested party can be used to settle the decretal sum in issue. He further averred that the 1<sup>st</sup> proposed interested party is a Property Manager appointed by the Court in the aforesaid suit vide a Court Order dated 4<sup>th</sup> June, 2012 to manage the 2<sup>nd</sup> proposed interested party.
3. He claimed that the 1<sup>st</sup> proposed interested party is holding a substantial amount of money in the form of rental income collected from the 2<sup>nd</sup> proposed interested party, which money can be used to adequately settle the decretal sum in issue, plus interest which currently stands at Kshs.62,220,990.58. He argued that the Notice to Show Cause issued against the applicants can be dispensed with if the 1<sup>st</sup> proposed interested party releases the funds collected from the 2<sup>nd</sup> proposed interested party to the applicants for purposes of settling the said decretal sum plus costs.
4. In opposition to the application, the Advocate filed a replying affidavit sworn on 16<sup>th</sup> May, 2023 by Mwangi Gathuri, an Advocate of the High Court of Kenya and the Managing Partner of the Swaleh, Mwangi & Co. Advocates, the respondent herein.
5. Mr. Gathuri pointed out that the Notice to Show Cause served on the applicants is intended to compel them to settle the decree issued against them individually, based on a ruling dated 4<sup>th</sup> July, 2018, arising from a bill of costs for professional services rendered in Nairobi HCCOMM NO. 394 of 2011. He contended that the Advocate has no claim against the proposed interested parties. Additionally, the funds held by the 1<sup>st</sup> proposed interested party on behalf of the 2<sup>nd</sup> proposed interested party are subject to a dispute between the applicants and their siblings, who are not part of these proceedings. He stated that the applicants can only access the said funds through a Court order for distribution or with the consent of their siblings. He argued that the instant application is an attempt by the applicants to delay fulfilling the decree to the detriment of the Advocate. He urged that the Advocate should be allowed to proceed with the execution without obstruction. He expressed the view that the application herein was not filed in good faith, having been filed four (4) years after the decree was issued.
6. The application herein was canvassed by way of written submissions. The applicants' submissions were filed on 29<sup>th</sup> September, 2023 by the law firm of Muchemi & Co. Advocates, whereas the Advocate's submissions were filed by the law firm of Swaleh, Mwangi & Company Advocates on 3<sup>rd</sup> October, 2023.
7. Mr. Bakaya, learned Counsel for the applicants relied on the decisions in *Judicial Service Commission v Speaker of The National Assembly & another* [2013] eKLR and *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, where Courts defined who an interested party is. He referred to the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and the case of *Central Kenya Ltd. v Trust Bank & 4 others*, CA NO. 222 of 1998 cited by the Court in *Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure and others (Applicants/Intended Interested Parties)* [2021] eKLR, and submitted that an application for joinder of an interested party should be made during the pendency of a suit or proceedings, as is the case herein.
8. Counsel referred to the case of *Leonard Kimeu Mwanthi v Rukaria M'twerandu M'iringu; Nathaniel Kithinji Ikiugu & 4 others (Intended Interested Parties)* [2021] eKLR, and argued that the 2<sup>nd</sup> proposed interested party has an interest in this matter since the applicants were sued in their capacity as its Directors, whereas the 1<sup>st</sup> proposed interested party's interest in this matter is limited to collection of money on behalf of the 2<sup>nd</sup> proposed interested party, thus capable of settling the decretal sum in issue.



9. Mr. Bakaya cited the provisions of Order 40 Rules (1)(a) and (b) of the Civil Procedure Rules, 2010, and the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358, where the Court laid down the conditions precedent to a party being granted an order of temporary injunction. He also relied on the case of *Mrao Ltd v First American Bank of Kenya & 2 others* [2003] KLR 125, where the Court defined what constitutes a prima facie case. He submitted that the applicants herein have made out a case for being granted an order of injunction. He stated that the joinder of the proposed interested parties seeks to provide an avenue for payment of the sums sought by the Advocate, thereby preventing committal of the applicants to civil jail. He argued that if the orders for an injunction are not granted, the applicants will suffer irreparable damage since they will be committed to civil jail
10. Mr. Mwangi Gathuri, learned Counsel for the Advocate submitted that the current proceedings involve the execution of a bill of costs for professional services rendered to the applicants in their personal capacity. He stated that while the applicants may have an interest in the funds held by the 1<sup>st</sup> proposed interested party on behalf of the 2<sup>nd</sup> proposed interested party, the said parties have no stake in the said execution proceedings since they face no threat of execution. He emphasized that in the ongoing Nairobi HCCOMM No. 394 of 2011, the applicants were sued in their personal capacity, with the 2<sup>nd</sup> proposed interested party as the 5<sup>th</sup> plaintiff, and that the 1<sup>st</sup> proposed interested party was appointed to collect rent on behalf of the 2<sup>nd</sup> proposed interested party, as such, any request for releasing the funds should be made in that case.
11. Counsel contended that the applicants have not made out a case for being granted an order of temporary injunction since the Notice to Show Cause in issue is meant to give them an opportunity to explain to this Court why they have not satisfied the decree in issue and how they plan to satisfy it, and if their explanation will be satisfactory, the Court will grant them more time, but if not, the Court will take appropriate action to enforce compliance. He added that the applicants do not dispute the decretal sum, and there is no pending appeal against it.

### **Analysis and Determination.**

12. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the Advocate and the written submissions by Counsel for the parties. The issues that arise for determination are –
  - i. Whether the proposed interested parties should be joined as parties to this suit; and
  - ii. Whether the applicants have satisfied the conditions to warrant being granted an order for temporary injunction.

Whether the proposed interested parties should be joined as parties to this suit.

13. Joinder of parties is provided for under Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 which states 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”.



14. In *Civicon Limited v Kivuwatt Limited & 2 Others* [2015] eKLR, the Court when dealing with an application similar to the instant one made the following observation -

“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.”

15. In the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR Odunga J., (as he then was), in allowing an application similar to the instant one held as follows –

“The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of *Kingori vs. Chege & 3 Others* [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.”

16. Applying the facts of this case to the applicable law and bearing in mind the decided cases I have referred to, it is evident that in order for a party to be joined as an interested party to a suit, the said party must demonstrate that it is a necessary and/or proper party to the suit, and that he/she has an identifiable interest or stake in the suit they seek to be joined. The proceedings in this case commenced with the Advocate filing an Advocate/Client bill of costs against the applicants for services rendered to them in Nairobi HCCOMM No.394 of 2011. Upon perusal of the proceedings in Nairobi HCCOMM No. 394 of 2011 annexed to the applicants’ affidavit in support of the instant application, it is evident that the applicants herein were sued as defendants in their personal capacity, by among others, the 2<sup>nd</sup> proposed interested party as the 5<sup>th</sup> plaintiff. Therefore, it cannot be true that in Nairobi HCCOMM No. 394 of 2011 the applicants have been sued in their capacity as Directors and Shareholders of the 2<sup>nd</sup> proposed interested party.



17. I agree with Counsel for the Advocate/respondent that in as much as the applicants may have a stake in the funds being held by the 1<sup>st</sup> proposed interested party on behalf of the 2<sup>nd</sup> proposed interested party, the said proposed interested parties have no interest in these proceedings since the bill of costs filed in this suit was against the applicants in their personal capacity. The taxation ruling and the resultant decree was against the applicants in their personal capacity, and the Notice to Show Cause issued is also against the applicants in the same capacity. The funds sought to be released by the applicants are not the subject of these proceedings, and there is no risk and/or threat of execution against the proposed interested parties as a result of the proceedings herein.
18. The applicants have failed to demonstrate what, if any identifiable interest or stake the proposed interested parties have in this suit. I am as such not persuaded that the proposed interested parties are necessary parties to these proceedings. This Court therefore finds that the presence of the proposed interested parties is not necessary to enable this Court effectively and completely enforce the Advocates decree herein against the applicants. Further, the ultimate order that will be issued by this Court can be enforced without the presence of the proposed interested parties in this matter.

**Whether the applicants have satisfied the conditions to warrant being granted an order for temporary injunction.**

19. Temporary injunctions are provided for under Order 40 Rule 1 of the Civil Procedure Rules, 2010 which states that –

Where in any suit it is proved by affidavit or otherwise -

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b. that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit,

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

20. From the above provisions, an application seeking orders for a temporary injunction can only be made in cases where there is a risk and/or threat of wasting, damaging, alienation, sale, removal, or disposition of a property in dispute in a suit. As explained hereinbefore, there is no property that is at the risk of being wasted, damaged, alienated, sold, removed, or disposed of, that needs to be preserved by this Court pending further orders or until determination of the suit. All that is pending in this suit is the Notice to Show Cause dated 9<sup>th</sup> March, 2023 issued for the applicants to Show Cause why they should not be committed to civil jail for failure to satisfy the decree in favour of the Advocate.
21. Having found that the application for joinder of the proposed interested parties is not merited, I find that this is not a proper case to grant of an order for temporary injunction as contemplated under the provisions of Order 40 Rule 1 of the Civil Procedure Rules, 2010.
22. I find that the amended Notice of Motion dated July 4, 2023 is bereft of merits. It is hereby dismissed with costs to the Advocate/respondent.

It is so ordered.



**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Mwangi for the Advocate/respondent

No appearance for the applicants

Ms B. Wokabi – Court Assistant.

**NJOKI MWANGI, J.**

