



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ethics and Anti-Corruption Commission v Karanja, Mango & Maundu t/a Kanyi and Company Advocates & 9 others; Kenya Ports Authority Retirement Benefits Scheme 2012 (Proposed Third Party); Kumaka & 4 others (Proposed Interested Parties); Kassim (Interested Party) (Suing as trustees of the Kenya Ports Authority Retirement Benefits Scheme 2012) (Anti-Corruption and Economic Crimes Civil Suit 16 of 2017) [2023] KEHC 1966 (KLR) (Anti-Corruption and Economic Crimes) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1966 (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 16 OF 2017**

**EN MAINA, J**

**MARCH 9, 2023**

**BETWEEN**

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

**AND**

**KANYI JOSEPH KARANJA, CECILIA FAITH MANGO AND MICHAEL KIOKO MAUNDU T/A KANYI AND COMPANY ADVOCATES ..... 1<sup>ST</sup> DEFENDANT**

**KIKAMBALA DEVELOPMENT COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EPHRAIM MAINA RWINGO ..... 3<sup>RD</sup> DEFENDANT**

**JANE NJERI KARANJA ..... 4<sup>TH</sup> DEFENDANT**

**SELINE CONSULTANTS LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**FREDRICK OTIENO OYUGI ..... 6<sup>TH</sup> DEFENDANT**

**JOY KAVUSTI ASIEMA ..... 7<sup>TH</sup> DEFENDANT**

**JOAN ZAWADI KAREMA ..... 8<sup>TH</sup> DEFENDANT**

**JUMA RENSON THOYA ..... 9<sup>TH</sup> DEFENDANT**

**HARRY JOHN PAU ARIGI ..... 10<sup>TH</sup> DEFENDANT**

**AND**

**KENYA PORTS AUTHORITY RETIREMENT BENEFITS SCHEME**

**2012 ..... PROPOSED THIRD PARTY**



AND

SALIM HAMISI KUMAKA ..... PROPOSED INTERESTED PARTY

EMMA SELINE OKELLO ..... PROPOSED INTERESTED PARTY

ABDI HUKA MUSA ..... PROPOSED INTERESTED PARTY

AND

ALI NILFAT KASSIM ..... INTERESTED PARTY

AND

FARIDA ABDALLA SOUD ..... PROPOSED INTERESTED PARTY

GEOFFREY KILONZO KAVATE ..... PROPOSED INTERESTED PARTY

SUING AS TRUSTEES OF THE KENYA PORTS AUTHORITY RETIREMENT  
BENEFITS SCHEME 2012

### RULING

1. This ruling pertains to two applications to wit, a notice of motion dated November 4, 2022 by the proposed interested parties seeking, *inter alia*, to be enjoined to these proceedings and a chamber summons application dated November 28, 2022 filed by the 1<sup>st</sup> to 5<sup>th</sup> defendants seeking leave to issue a third party notice to the Kenya Ports Authority Retirement Benefits Scheme 2012.
2. The 1<sup>st</sup> to 5<sup>th</sup> respondents opposed the proposed interested parties application through a replying affidavit of Ephraim Maina Rwingo sworn on December 8, 2022. The other parties did not file responses or submissions to this application.
3. The 1<sup>st</sup> to 5<sup>th</sup> defendant's application was opposed by the plaintiff *vide* grounds of opposition dated December 13, 2022 and submissions dated January 31, 2023.
4. The 1<sup>st</sup> to 5<sup>th</sup> defendants and the 6<sup>th</sup> to 10<sup>th</sup> defendants filed submissions dated December 23, 2022 and February 16, 2023 respectively.

#### Application by the Proposed Interested Parties

5. The proposed interested parties bring their application under order 1 rule 8, order 51 rules 1 and 10 of the [Civil Procedure Rules](#) and section 1A, 1B, 3A of the [Civil Procedure Act](#) and seeks the following orders:

- “ 1 Spent.
- 2 That the honourable court be pleased to grant leave to the proposed interested parties to be joined in this suit as interested parties.
3. That upon grant of order 2 above and pending the hearing and determination of the application, the honourable court be pleased to order the plaintiff/respondent herein and the 1<sup>st</sup> defendant/respondent to render accounts of the funds deposited in the joint accounts pursuant to the consent order entered on November 23, 2018.



4. That an order be issued directing the plaintiff/respondent and the 1<sup>st</sup> defendant/respondent to release the funds held in the joint account to the Trustees of the Kenya Ports Authority Retirement Benefits Scheme 2012.
  5. That in alternative to prayer 4 above, the consent order between the plaintiff/respondent and the 1<sup>st</sup> defendant/respondent herein be varied to include the counsels for the applicants herein as a signatory to the escrow account.
  6. That the costs of this application be in the cause.”
6. The application is made on the following grounds:
- “ 1 That the applicants are the current Trustees of the Kenya Ports Authority Retirement Benefits Scheme 2012 (hereinafter "the scheme"). for clarity, the 6<sup>th</sup> to 10<sup>th</sup> defendants/respondents are the previous trustees of the scheme.
  3. That in their capacity as the trustees, the applicants herein have a fiduciary duty to the membership of the scheme which duty includes collecting, preserving, and investing the funds on behalf of the membership.
  4. That the funds which are held in the joint account pursuant to the consent order entered on November 23, 2018 belong to the members of the scheme. The plaintiff as well as the 1<sup>st</sup> to 5<sup>th</sup> defendants do not have any pecuniary interest (in this suit) in the funds as the same belong to the membership of the scheme. The funds in question, together with any interest earned, form part of the retirement benefits of the members which according to the law should immediately vest upon the members.
  5. That the applicants herein have a duty in law to protect members benefits which is part of the subject matter in the suit. Such a duty can only be protected if the applicants are allowed to participate in such suits where the scheme funds are at stake.
  6. That the applicants have great interest with the subject matter and therefore it is only fair that they be joined in as a party. This is because failure to protect the benefits of the scheme members expose the applicants to the risk of breach of fiduciary duty and further expose them to criminal sanctions under the law.
  7. That none of the parties stand to suffer any prejudice if this application is allowed. On the contrary, the end of justice stands to be met if this application is allowed. This is on the following accounts:
    - a. The applicants being the trustees of the scheme have an interest (on behalf of the scheme's membership) in funds subject of this suit.
    - b. The funds subject of this suit belongs to the scheme and only trustees have the legal standing to hold the funds on behalf of the membership.
    - c. The applicants, being custodian of the scheme records, are in a position to assist the court in the determination of the real issues in controversy.



8. That there exists another suit being Mombasa ELC Case No 128 of 2018 between the scheme and the 2<sup>nd</sup> defendant herein. The plaintiff/respondent in this suit, EACC, has been enjoined as an interested party. The substantive parties to this suit are also the same parties in the Mombasa ELC case No 128 of 2018.
  9. That it follows therefore that the counsel for the plaintiff/respondent and the defendant/respondent cannot continue holding money belonging to the scheme at the expense of its (the scheme) membership.
  10. That this application is not only made in good faith but also in the interest of justice. None of the parties herein stand to be prejudiced.”
7. The 1<sup>st</sup> to 5<sup>th</sup> defendants responded to the application by stating that the proposed interested parties and the 2<sup>nd</sup> defendant are the main protagonists in this dispute and it is inevitable to have them as a party, but that however, they should be joined to these proceedings as a third party but not as interested parties. It is the 1<sup>st</sup> to 5<sup>th</sup> defendant’s contention that the consent orders entered on November 23, 2018 in Msa ELC case No 128/2020 are valid orders issued by a court of competent jurisdiction and cannot be varied, set aside or interfered with without due process. They urged this court to enjoin the intended interested parties to this case.

#### **Application by the 1<sup>st</sup> to 5<sup>th</sup> Defendants**

8. The 1<sup>st</sup> to 5<sup>th</sup> defendants chamber summons application dated November 28, 2022 seeks the following orders:
  - “ 1) That this honourable court be pleased to grant leave to the applicant to issue a third party notice to M/s Kenya Ports Authority Retirement Benefits Scheme 2012.
  2. That costs of this application be provided for.”
9. The application is premised on the grounds stated in the affidavit sworn by Ephraim Maina, as follows:
  - “ 1 That the crux of the dispute herein is an agreement of sale dated December 18, 2014 between the 2<sup>nd</sup> defendant herein and M/s Kenya Ports Authority Retirement Benefit Scheme 2012.
  2. That the conveyancing agreement was based on the principle of consensus ad idem.
  3. That each party to the agreement of sale was under an obligation to exercise its own due diligence.
  4. That the Kshs 70, 000,000/- deposit of the purchase was paid as per the agreed terms in the said agreement of sale.
  5. That it is just and expedient that the orders sought are granted.
  6. That the applicants shall be seeking for indemnity from the proposed third party arising from the said agreement for sale.”



10. It is the contention of learned counsel for the 1<sup>st</sup> to 5<sup>th</sup> defendants that the intended third party bears liability as against them (1<sup>st</sup> – 5<sup>th</sup> defendants) and that they are a necessary party to these proceedings. It is also their contention that the application to take out the third party proceedings is not opposed by the proposed third party and that the said party has not demonstrated any loss likely to be suffered by itself in assisting the court to reach a “justifiable decision” with her on board. Learned counsel for the 1<sup>st</sup> to 5<sup>th</sup> defendants also argued that the application can be granted even though it was filed out of time. Counsel placed reliance on the following case among others to support his submissions:-[Kenya Commercial Bank v Suntra Investment Bank Ltd](#) [2015] eKLR, [Mary Njeri v Aga Khan Health Services](#) [2008] eKLR, [Pravin Bowry v Job Ward and Another](#) [2015] eKLR, [Civicon Limited v Kivuwatt Limited and 2 others](#) [2015] eKLR.
11. The application is opposed by the plaintiff on the following grounds:
- “ 1 The agreement for sale dated December 18, 2014, between the 2<sup>nd</sup> defendant and the proposed third party, lays no basis for the enjoinder of the proposed third party to these proceedings;
  2. No liability attaches to the proposed third party for payment of the deposit of Kes 70,000,000.00 to the 2<sup>nd</sup> defendant;
  3. There lies no linkage between the claim for indemnity by the defendants from the proposed third party and the plaintiff’s cause of action;
  4. There is no basis for determination of liability between the defendants and the proposed third party in the suit herein;
  5. The enjoinder of the proposed third party shall only serve to delay the conclusion of the suit herein;
  6. The grounds on the face of the application and the evidence annexed therein does not warrant the exercise of the discretionary power of the honourable court to enjoin the proposed third party to the suit herein.
  7. The application is intended to waste judicial time, has no foundation in law and is an abuse of the court process and it ought to be struck out with costs.”
12. This application was supported by the 6<sup>th</sup> to 10<sup>th</sup> defendants through their submissions file herein on February 16, 2023.
13. Learned counsel for the parties consented to canvass the application by way of written submissions.

### **Analysis And Determination**

14. I shall consider the two applications separately. From the proposed interested parties application the issue that presents itself for determination is: whether the proposed interested party has an identifiable stake in the case as would warrant it to be joined to these proceedings.
15. It is trite law that enjoinder as an interested party is not as of right. The proposed interested party must in their application for joinder satisfy three key elements; prove their personal stake in the matter, the likely prejudice to be suffered in the event of non-joinder and that their case or submissions are not a replication of what the other parties will be making before the court. These key considerations in



joinder of interested parties were succinctly stated by the Supreme Court in the case of *Francis Kariuki Muruatetu & another v Republic* [2016] eKLR as follows:

“(37) From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the court; hence, sufficient grounds must be laid before the court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the court.”

16. I have considered the arguments by the proposed interested parties and the opposition thereto. The proposed interested parties are essentially laying a claim to the Kshs 70,000,000 that is the subject of these proceedings, on the ground that they are trustees and custodians of the Kenya Ports Authority Retirement Benefits Scheme 2012. They state that there is a pending suit between the scheme and the 2<sup>nd</sup> defendant being Mombasa ELC Case No 128 of 2018 in respect of the same funds. The suit before this court relates to the alleged illegal and fraudulent acquisition by the defendants of the same Kshs 70,000,000. The plaintiff has filed the suit to recover the funds, on behalf of the Kenya Ports Authority Retirement Benefits Scheme 2012 as it is a public entity and the funds are public funds. That being the position it is obvious that although the third parties may have an identifiable stake to the subject matter of the suit their case is covered by that of the plaintiff and they shall not be contributing anything different. Accordingly, I find their application not merited and it is dismissed.

17. The issue arising for determination in regard to the application of the 1<sup>st</sup> to 5<sup>th</sup> defendant’s chamber summons is:-

Whether there lies a linkage between the claim for indemnity by the defendants against the proposed third party.

18. The law on joinder of third parties is provided under order 1 rule 15 of the *Civil Procedure Rules* which states as follows:

“Notice to third and subsequent parties [order 1, rule 15]

- (1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
  - (a) that he is entitled to contribution or indemnity; or



- (b) that 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 said 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”.... underlining mine.

19. Order 2 rule 13 states that “the pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.” In the instant case the defendants filed their defenses in July 2017, while this application was filed on November 28, 2022, five years after the close of pleadings. The defendants have not explained the delay of more than 5 years which in my view is inordinate and would disentitle, without more, the 1<sup>st</sup> to 5<sup>th</sup> defendants to the leave sought.
20. Be that as it may in the case of *Leo Investment Ltd v Mau West Ltd and Anor* [2019], the court while citing the case of *E.K Kagwa v Costa* [1963] EA & *Sango Bay Ltd v Dresner Bank Ltd* [1971] EA 307 held and I fully agree, that the orders for joinder of a third party are discretionary, and the court ought to examine the claims by the defendants prior to its issuance. The court stated as follows:
- “ Before this court can exercise its discretion to issue third party notice it has to evaluate the allegations of the plaintiff in terms of his legal claim to the relief he is seeking. The court also has to evaluate the defendant’s allegations against the third party and has to be satisfied that the substance of each claim is the same and that there is a linkage between all the claims before issuing the notice.”
21. The burden lies with the defendants/applicants to demonstrate that there is a proper legal claim against the third party, or a question to be tried as to the liability of the third party to make a contribution to the defendant’s liability.
22. Having carefully perused the pleadings in this case it is clear that these are recovery proceedings of public funds brought by the plaintiff on behalf of the Kenya Ports Authority Benefits Scheme against the 1<sup>st</sup> to 5<sup>th</sup> defendants on account of fraud and illegality and the 6<sup>th</sup> to 10<sup>th</sup> defendants for breach of fiduciary duty. In its prayers, the plaintiff is seeking to recover Kshs 70 million paid to the 2<sup>nd</sup> defendant by the Kenya Ports Authority Retirement Benefits Scheme which is a public body. Clearly therefore the Ports Authority Retirement Benefits Scheme, is though not directly, already a party to the case as it is the public body on behalf of who the plaintiff has sued pursuant to its mandate under section 11(1) (j) of the *Ethics and Anti-Corruption Commission Act*.
23. In my view, the application to issue a third party notice to the Kenya Ports Retirement Benefits Scheme shall not merely obfuscate and convolute the real issues before this court but that it is an afterthought



intended to occasion delay of the hearing and determination of the case and this court ought not to allow it.

24. In the upshot the applications by the 1<sup>st</sup> to 5<sup>th</sup> defendants and the application of the intended interested parties are dismissed with costs to the plaintiff.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF MARCH 2023.**

**E N MAINA**

**JUDGE**

