



**Zubeidi v Active Partners Group Limited & 2 others; Mungu and  
Company Advocates (Interested Party) (Commercial Case 475 of 2016)  
[2023] KEHC 2446 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2446 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 475 OF 2016  
DAS MAJANJA, J  
MARCH 17, 2023**

**BETWEEN**

**HASSAN ZUBEIDI ..... PLAINTIFF**

**AND**

**ACTIVE PARTNERS GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MOHAMED FAGIR ..... 2<sup>ND</sup> DEFENDANT**

**DUBAI BANK LIMITED (IN LIQUIDATION) ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**MUNGU AND COMPANY ADVOCATES ..... INTERESTED PARTY**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Interested Party have moved the court by the Notice of Motion dated November 2, 2020 made, *inter alia*, under Order 2 Rule 15(1) (d) of the [Civil Procedure Rules](#) (“the Rules”) where it seeks to strike out the Plaintiff’s suit against them and also the Counterclaim by the 3<sup>rd</sup> Defendant against them.
2. The application is supported by the Interested Party’s affidavit sworn on October 23, 2020. It is opposed by the Plaintiff through his replying affidavit sworn on February 28, 2023. The parties’ respective advocates made brief submissions in support of their respective positions.
3. The facts leading rise to the application are not in dispute and are as follows. The Plaintiff sued the Defendants for an aggregate sum of USD 110,070,000.00, he also sought, *inter alia*, to restrain the Interest Party from releasing any monies held or received by him, documents and other records received



- by him on behalf of the 1<sup>st</sup> Defendant on account of certain arbitral proceedings between 1<sup>st</sup> Defendant and the Government of South Sudan in respect of an agreement dated June 16, 2015. It also sought an order to compel the Interested Party to release the said monies to him or in the alternative deposit the same in a joint account held between his advocates and the Interested Party.
4. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants challenged the jurisdiction of the court to adjudicate the dispute on the basis that the agreements upon which the dispute was based had an exclusive jurisdiction clause which provided that the dispute be resolved by the court in Sudan. Tuiyott J, heard the application to strike out the suit and by a ruling dated May 29, 2018, declined to strike out the suit. While the application to strike out the suit was pending, the Plaintiff applied for and the court entered default judgment against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant. The learned Judge therefore dealt with 1<sup>st</sup> and 2<sup>nd</sup> Defendants' application to set aside default judgment. On November 1, 2017, the court set aside the default judgment.
  5. The two rulings precipitated two appeals; NRB CA Civil Appeal No 395 of 2018 filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and NRB CA Civil Appeal No 414 of 2018 filed by the Plaintiff. The appeals were consolidated and by a judgment dated November 8, 2019, the Court of Appeal allowed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' appeal and dismissed the Plaintiff's appeal (see [Active Partners Group Limited and Another v Hassan Zubeidi; Dubai Bank Kenya Limited and Another](#) [2019] eKLR. The Plaintiff's petition to the Supreme Court, Petition No 44 of 2019, was struck out by a ruling dated 4<sup>th</sup> August 2020 (see [Hassan Zubeidi v Active Partners Group Limited and Others](#) [2020] eKLR).
  6. It is the appellate proceedings that have set the stage for the application before this court. The Applicants urge that the effect of the decision of the Court of Appeal is to effectively hold that this court lacks jurisdiction and that the suit should be struck out. It also seeks to strike out the counterclaim filed by the 3<sup>rd</sup> Defendant and further seeks costs of the suit. The Plaintiff takes the position that the application before the court is *res judicata* and an abuse of the court process, that the court is *functus officio* and lacks jurisdiction to determine the application and that it frivolous and without merit. The 3<sup>rd</sup> Defendant has not opposed the application by filing grounds of opposition and a replying affidavit. Its counsel however submits that it should be absolved from paying costs of the counterclaim.
  7. I have considered the uncontested facts which I have outlined above and I hold that the Court of Appeal by allowing the appeal came to the conclusion that this court lacked jurisdiction to entertain the Plaintiff's claim on account of the exclusive jurisdiction clause contained in the contracts subject of this suit. Having reached that conclusion, the only option for this court is to give effect to the judgment of the Court of Appeal. I reject the Plaintiff's argument that the application is *res judicata* or that this court is *functus officio* as what the Defendants seek is to actualize the decision of the Court of Appeal by formally striking out the suit against them. This court has a duty to give effect to the decision of the Court of Appeal. I therefore allow the application, strike out the suit and since costs follow the event, order that the Plaintiff pay the costs of the application and the suit.
  8. Turning to the issue of the 3<sup>rd</sup> Defendant and the issue of its counterclaim, I am guided by the observation of the Court of Appeal which stated as follows:

Additionally, and as urged by the appellants, the Bank had asserted that Mr Zubeidi had entered into the agreements as its agent. The action of Mr Zubeidi of being an agent of the Bank bound the Bank, hence the jurisdictional clause submitting to the exclusive jurisdiction of Sudan bound the Bank .....
  9. Since the jurisdictional clause binds the 3<sup>rd</sup> Defendant, its Counterclaim must suffer the same fate as the Plaintiff's suit. Its Counterclaim is therefore struck out. There is no reason why the costs should not follow the event since the 3<sup>rd</sup> Defendant elected to file the Counterclaim.



10. For the reasons I have set out, I allow the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's and Interested Party's application dated November 2, 2022 on the following terms:
- a. The Plaintiff's suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Interested Party is struck out with costs to be paid by the Plaintiff.
  - b. The 3<sup>rd</sup> Defendant's Counterclaim against the Plaintiff is struck out with costs.
  - c. The Plaintiff and 3<sup>rd</sup> Defendant shall bear the costs of the application.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF MARCH 2023.**

**D S MAJANJA**

**JUDGE**

**Court of Assistant: Mr M Onyango**

**Mr Kiplagat instructed by Wagara, Koyokko and Company Advocates for the Plaintiff.**

**Mr Mungu instructed by Mungu and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and Interested Party.**

**Mr Obuya instructed by TripleOKLaw LLP Advocates for the 3<sup>rd</sup> Defendant.**

