



**Ethics and Anti-Corruption Commission v Kinyae & 5 others (Anti-Corruption and Economic Crimes Civil Suit E027 of 2022) [2023] KEHC 20110 (KLR)
(Anti-Corruption and Economic Crimes) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20110 (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 E027 OF 2022**

EN MAINA, J

JULY 13, 2023

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

DAVID ISIKA KINYAE 1ST DEFENDANT

JOYCE WAIRIMU 2ND DEFENDANT

URBANUS KIOKO MBITHI 3RD DEFENDANT

WANGA-TECH GENERAL ENTERPRISES 4TH DEFENDANT

GENERAL MERCHANTS LIMITED 5TH DEFENDANT

BRYCEN SMART INNOVATIONS 6TH DEFENDANT

RULING

1. This Ruling is in respect of the 3rd Defendant's Chamber Summons Application dated 6th March 2023, supported by an affidavit sworn by the 3rd Defendant/Applicant on an even date. The Application is made under Order 1 Rule 10 and 14, Order 2 Rule 15 and Sections 1A and 1B of the *Civil Procedure Act* and seeks the following orders:

- a) That this Honourable court be pleased to strike out the Plaintiff's suit against the 3rd Defendant/Applicant and the 3rd Defendant's name be and is hereby expunged from these proceedings.
- b) That the costs of this Application be provided for."



2. The Application is premised on the following grounds and on the Supporting Affidavit of Urbanus Kioko Mbithi dated 6th March 2023 :

- a. That the Applicant has been improperly joined as a party to this suit and is not a necessary party for the determination of the real matter in dispute.
- b. That the Applicant has never worked with the 1st Defendant whom it is alleged irregularly procured tenders from the Government of Kenya.
- c. That the Applicant is not a Director of 4th to 6th Defendants which are the entities irregularly awarded tenders.
- d. That the Applicant did not benefit from the Award of tenders to the 4th to 6th Defendants.
- e. That the only relationship subsisting between the 1st and 3rd Defendants is uncle and nephew relationship.
- f. That Plaintiff orders are principally against the 1st Defendants and his Companies.
- g. That No prejudice will be occasioned to the Plaintiff herein if this Application is allowed.”

3. The 3rd Defendant/Applicant also relied further on his Further Affidavit and written submissions both dated 9th May 2023.

Response by the Plaintiff and the 1st, 2nd, 4th, 5th and 6th Defendants

4. The Plaintiff opposed the Application through a Replying affidavit sworn by Margaret Wambeti Ngari on 20th March 2023 while the 1st, 2nd, 4th, 5th and 6th Defendants filed Grounds of Opposition dated 27th April 2023.
5. The Plaintiff/Respondent contended that its investigations established the culpability of the 3rd Defendant for being a director, shareholder and signatory to the 5th Defendant’s bank account and that he knowingly signed cheques for the withdrawal of public funds amounting to Kshs 102, 175,003.05; that the denial by the 3rd Defendant that he was not a director of the 4th to 6th Defendants and that he did not benefit from the award of tenders is spurious as by his own admission in a witness statement dated 9th September 2022, he admits that he was a director and signatory to the 5th Defendant’s bank account held at ABSA Bank. The Plaintiff also avers that he 3rd Defendant/Applicant was a Director during the period of investigation, to wit, January 2014 to April 2021 as evidenced by records obtained from the Registrar of Companies; that his application to resign as director was made on 10th May 2019 and effected on 28th May 2021.
6. The Plaintiff asserts that this Application is a poor attempt to exonerate the 3rd Defendant from answering to the claim raised by the Plaintiff; that, the Application is misconceived and mischievous and an intended diversionary from the real issues in dispute; that it is without merit and should therefore be dismissed. The Plaintiff/Respondent further avers that the Application is calculated to circumvent and subvert the interests of justice and public interest; it is frivolous, vexatious, without merit and an abuse of the court process and therefore should be dismissed with costs.



Response by the 1st, 2nd, 4th, 5th and 6th Defendants

7. On their part, the 1st, 2nd, 4th, 5th and 6th Defendants opposed the Application on four grounds to wit; that the nature of the prayers in the application cannot be granted at an interlocutory stage because there are legal and factual issues which require hearing; that the application advances the 3rd Defendant's defence and ought to be determined following a full hearing of the suit; the application is an abuse of the court process and is fatally defective.
8. The Application was canvassed by way of written submissions; the Plaintiff and the 3rd Defendant/Applicant filed written submissions dated 23rd May 2023 and 9th May 2023 respectively.

Submissions

9. Learned Counsel for the 3rd Defendant/Applicant submitted that the Applicant is not a necessary party to the proceedings as the suit concerns the 1st, 2nd, 4th, 5th and 6th Defendants only; that none of the orders sought are against the 3rd Defendant; that the suit is primarily against the 4th Defendant which he has never been a director of; that a thorough scrutiny of the Plaintiff reveals that none of the assets were traced to the 3rd Defendant; that the Plaintiff only sued the Applicant to "widen their net" but unfairly so since he did not appropriate any property or funds and that although he is a nephew of the 1st Defendant, there is no evidence proving his involvement in any corruption. Counsel invoked the court's jurisdiction under Order 10 Rule 2 which makes provision for striking out a party improperly joined and also placed reliance on the case of *Simon Kirima Muraguri & another vs Equity Bank (Kenya) Limited & another* [2021] eKLR to support his submissions.
10. On her part, learned Counsel for the Plaintiff on its part submitted that in both its Plaintiff and the replying affidavit of Margaret Wambeli Ngari, the Plaintiff has established a nexus between the 3rd Defendant/Applicant and the 5th Defendant. That the Applicant was as a director, shareholder and a signatory of the bank accounts of the 5th Defendant.
11. Counsel argued that at this stage this court need not venture into whether or not the Plaintiff has a proper case against the 3rd Defendant; that it would be premature to do so as evidence can only be proffered at the hearing and the case cannot be summarily determined through the present application and the application should therefore be dismissed.

Issue for determination:

12. From the application, the grounds thereof, the supporting and further affidavits, the replying affidavit, the Grounds of Opposition and the rival submissions of learned Counsel the following issue arises for determination: Whether the 3rd Defendant/Applicant is properly enjoined to this case and whether he should be struck out as a party

Analysis and determination

13. The jurisdiction to strike out a party from a suit is provided for under Order 1 Rule 10 of the *Civil Procedure Rules* which states:

“Order 1 Rule 10 (2):

The court may at any stage of the proceedings, either upon or without the application of either part, 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 defendants, 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. A literal interpretation of the aforesaid rule is that the court may either on its own motion or on application of any party order the striking out of a party which is improperly joined to the proceedings. However, before deciding whether or not to strike out a party, the court must first consider all the facts in order to determine whether a cause of action is disclosed against the party. The court must however be careful not to delve into the merits of the case at this preliminary stage so as not to prejudice the fair trial of the suit. This as was stated by Madan J, in the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another* (1982) KLR 1:-

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

15. In Civil Appeal No. 35 of 2000 *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR the Court of Appeal cautioned that striking out a party from a suit is a jurisdiction that ought to be exercised sparingly and only in exceptional cases. The court stated:-

“Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...”

16. Without delving into the merits, the gist of the Plaintiff’s claim is that between the year 2014 and the year 2021, the 1st Defendant who was a Senior Deputy Director Supply Chain Management at the Nairobi Metropolitan and State Department of Housing and the beneficial owner of the 4th, 5th and 6th Defendant companies, in breach of his fiduciary duty and trust, illegally and corruptly entered into contracts and received public funds amounting to Kshs.233,486,767.95 from his employer,. It is alleged that the 1st Defendant used the 4th, 5th and 6th Defendants and his close relatives and associates to, in direct conflict of interest, illegally transact with the Nairobi Metropolitan and State Department of Housing without disclosing his beneficial interest in the said companies resulting in unjustly enriching himself to the tune of Kshs. 233,486,767.95.

17. The 3rd Defendant is joined to the suit by virtue of having been a Director of the 3rd and 5th Defendant companies during the period of interest. A perusal of paragraphs (7) to (10) of his Statement of Defense dated 9th September 2022 reveals that the 3rd Defendant admits to being a Director of the 3rd and 5th Defendants during the period of interest but denies having had knowledge of the businesses they were engaged in. He also denies receiving any monetary benefit from the two companies.

18. It is my finding that the issue of whether or not the Applicant was complicit to the actions of the 1st to 5th Defendants is a matter of fact to be determined during the hearing upon hearing evidence from both sides and at this stage it would be premature to arrive to the conclusion that the Applicant was not aware of the business the Defendant companies for which he was Director were engaged in. he is therefore a necessary party in the case.

19. In the premises I decline the application and dismiss it with costs to the Respondents. It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 13TH DAY OF JULY 2023.



E.N. MAINA
JUDGE

