



Konnexion Systems Ltd & another v Independent Elections and Boundaries Commission (IEBC); Credit Bank Limited (Interested Party) (Civil Case 163 of 2014) [2023] KEHC 20108 (KLR) (Commercial and Tax) (10 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20108 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 163 OF 2014
JWW MONG'ARE, J
JULY 10, 2023**

BETWEEN

KONNEXION SYSTEMS LTD 1ST PLAINTIFF

ROBERT MATUMBI MWORIA 2ND PLAINTIFF

AND

**INDEPENDENT ELECTIONS AND BOUNDARIES COMMISSION
(IEBC DEFENDANT**

AND

CREDIT BANK LIMITED INTERESTED PARTY

RULING

1. Before this court are two applications both brought by the Plaintiffs seeking various reliefs. The first one was filed on 14/6/2022 and amended on 3/2/202. In the said application, the Plaintiffs by a Notice Motion brought under Section 1A, 1B,1C and 3A, 80(a) of the [Civil Procedure Act](#) and Orders 45(a) and, (b) of the [Civil Procedure Rules](#), is seeking the following orders;
 1. Spent
 2. That the Honourable Court be pleased to renew and/ or set aside the Orders and/or directions and/or observations on record as made on 15/5/2019 by this Honourable Court (Hon. Kasango, J.M) to the following words or effect; “Court; after off court discussion, I note this suit has been withdrawn by notice dated 28th April,2017. Accordingly, this matter is adjourned for any party to move the court appropriately.”



3. In the Alternative and/or without prejudice, there be an order to strike out/ or expunge from the record hereof, the following offensive documents, as improperly filed;
 - i. Notice of Appointment of Advocates dated 7th July 2015 filed by Messrs David Mutunga & Company Advocates.
 - ii. Notice of Withdrawal dated 28th April 2017, purportedly filed under Order 25 Rule of the Civil Procedure Rules.
 - iii. Affidavit sworn to by one Stephen Omare Nyagaka worn on 7th July 2015 and filed on 14th July 2015.
 - iv. Affidavit Sworn by Stephen Omare Nyagaka on 27th April 2017 and any other document/proceedings held subsequent thereto.
 4. A. In further alternative and without prejudice and in addition thereto, the Honourable Court do review, vary, set aside and/or expunge, the purported Order extracted, wrongly as being extracted from the proceedings of 15th May, 2019, and alleged to be pursuant of a hearing of an application dated 15th December, 2019.
 - a. 4.B. That Further and in the Alternative and/ or in addition and without prejudice thereto, The Honourable Court be pleased to grant an Order for leave to the Plaintiffs s, to amend the Plaint dated 28/4/2014, in terms of the draft Amended Plaint dated 14/6/2022, (a copy of which is annexed hereto and marked as RMM3”) on such terms as the Honourable Court may find fair and just to grant the said orders.
 - b. 4.C. That on the grant of the above order for leave the annexed draft Amended Plaint dated 14/6/2022 be deemed as duly filed and served, on the payment of any additional court filing fees, if required.
 5. The Honourable Court may make any further Orders, directions as it deem fit or as may meet the interests of justice including summoning the said Stephen Omare Nyagaka for cross-examination, should he contest the supporting affidavit of Robert Matumbi Mworira.
 6. The costs of this application be provided for.
2. The second application also filed by the Plaintiffs/Applicants dated 22nd September, 2022 brought under Articles 35(b), 48 and 159 of *the Constitution* of Kenya, Sections 1A, 1B,3A & 63(e) of the of the *Civil Procedure Act*, Cap 21 laws of Kenya, Order 51 Rules 1 & 4 of the *Civil Procedure Rules 2010* seeking the following Orders;
1. Spent
 2. That the proposed interested party herein, Credit Bank Limited be enjoined to this suit as an interested party in this suit on such terms as this Honourable Court may deem fit.
 3. That an interlocutory mandatory injunction be and is hereby issued compelling the proposed interested party together and/or severally with one Stephen Omare Nyagaka to furnish the Plaintiffs herein within the next fifteen (15) days upon issuance of the sought orders, with the following material documents/information and / or evidence;
 - a. The letters that nominated Frankline Robert Matumbi Mworira as a signatory to Konnexion Systems Limited Account No. 0021006000204 held at Credit Bank Limited.



- b. Documents that removed Frankline Robert Matumbi Mworia as a signatory to Konnexion Systems Limited Account No. 0021006000204 held at Credit Bank Limited.
 - c. Any other relevant documents and / or evidence that shows that Frankline Robert Matumbi Mworia and/or all the names of the persons who were signatories and operated the above bank accounts at the material times or years 2012, 2013 and 2014, operated Konnexion Systems Limited Bank Account.
4. That in the alternative, the current directors of the 1st Plaintiff's company furnish the 2nd Plaintiff and/or file and/or produce to this Honourable Court aforementioned material documents/ information and/ or evidence within fifteen (15) days and / or such time as may be found suitable of the service of the Order being effected.
 5. That this Honourable Court may grant and / or issue any further directions as it may deem fair and just, including punishing for contempt of Court any of the parties responding to the Orders issued hereof.
 6. That the costs of this application be in the cause.
3. Both Applications are supported by the grounds set within them and a Supporting Affidavit sworn by Robert Matumbi Mworia in each of the application respectively on 14/6/2022 and 22/9/2022. Both applications are opposed and the Respondent has filed 3 sets of grounds of oppositions dated 22/9/2022, 22/10/2022 and 20/4/2023. The Plaintiffs and the Defendants have each filed their written submission and list and bundles of documents. Through their respective counsels, the parties appeared before me to orally highlight their submissions.
 4. In the application filed by the Plaintiffs on 14/6/2022 the Plaintiffs/Applicants have moved the court seeking for orders to reinstate the suit. The plaintiffs argue that there is an error on the face of the record occasioned by misinterpretation of an off the cuff observation by the court while giving directions in the matter. The Plaintiffs argue that the court, the court(Hon Justice Kasango) observed on an off the cuff comment as follows "that since a Notice to withdraw the suit had been filed, the parties to move the court substantively on the way forward". It is the position taken by the Plaintiffs that the same did not amount to an order of the court to mark the matter as withdrawn and that the Respondents wrongly extracted the same as such. The position put forward by the Plaintiffs is that this was an observation made to the parties by the court and inviting them to move the court appropriately in light of the said Notice. The Plaintiffs argue that the observation of the court did not amount to an order of withdrawal as has been misconstrued by the defence. Accordingly, the Plaintiffs are asking the court to correct the said error and expunge the impugned Notice of Withdrawal as it was filed without leave of the court and while the Plaintiffs were properly represented by Counsel.
 5. Further, the Plaintiffs contend that the purported Notice of withdrawal was filed by an Advocate who had not properly come on record and who had no Locus since the Plaintiffs were all along represented by the firm of C.N Kihara & Company Advocates and the purported law firm did not seek leave to take over the matter properly an in accordance with Order 9 of the *Civil Procedure Rules*.
 6. The second application by the Plaintiffs dated 21/9/2022 seeks to enjoin a proposed interested party, Credit Bank Limited, as custodian of banking records of the first Plaintiff, to provide evidence to clarify or shed light to the nexus between the 1st and 2nd Plaintiffs, since the same had been challenged in the affidavits filed in support of the Notice to withdraw the current suit through an affidavit sworn by



- one Stephen Omare Nyagaka. The 2nd Plaintiff argues that the said orders are necessary as they shall demonstrate that he all along has authority of the 1st Plaintiff to bring the suit before the court.
7. The Respondent on its part has opposed the two applications. In response to the first application of 14/6/2022, the Respondent argues that the court is functus officio pursuant to the said Withdrawal of the Suit, and that there is nothing upon which the court is to decide the current application as the suit no longer exists. The Respondent argues that the documents filed by the said Advocate, M/S David Mutunga & Company Advocates were proper and that the actions of the Advocate as an agent of the Plaintiffs are lawful and do bind the Plaintiffs. Similarly, the Notice of Withdrawal filed in this matter by the said firm of Advocates had the same effect as if it was filed by the Plaintiffs, since parties are bound by their pleadings. Subsequently, the Respondent contend that the court is bereft of any jurisdiction to make any orders in this matter.
 8. Secondly, the Respondent argues that the Plaintiffs' waited for 3 years before making the said application and hence the application was brought as an afterthought, an indicator that the Plaintiffs are not keen in prosecuting the matter. The Respondent further argue, that the second Plaintiffs is a not a director of the Plaintiffs and has no capacity or the requisite authority to bring the current suit hence the withdrawal was proper as the same was instituted at the behest of the correct directors and owners of the 1st Plaintiffs.
 9. In response to the Application for Joinder of an Interested Party, Credit Bank Limited, the Respondent argues that the 2nd Plaintiffs has admittedly confirmed that he is not a director or shareholder of the 1st Plaintiffs and therefore lacks the requisite capacity to institute this suit. It is the position taken by the Respondent that the Plaintiffs has not exhibited authority to prosecute this suit for and on behalf of the 1st Plaintiffs and cannot therefore be allowed to amend the pleadings and enjoin the Interested party. Subsequently, the verifying affidavit annexed to the pleadings violate the provisions of Order 4 Rule 1(4) of the Civil Procedure Rules.
 10. The Respondent urges the Court to dismiss the two set of application as lacking in merit and award costs to the Respondent.

Analysis and Determination:-

11. I have considered the pleadings in the two applications and the submissions and bundle and list of authorities filed by the parties thereto and I have identified 2 issues for determination; -
 - i. Whether the Notice of Withdrawal filed by the firm of David Mutunga & Company Advocates properly terminated the suit before, it and hence rendering this court as functus officio?
 - ii. Whether the Plaintiffs has established a cause of action against the Intended Interested Party necessitating their joinder as parties to the suit?
12. As to "Whether the Notice of Withdrawal filed by the firm of David Mutunga & Company Advocates properly terminated the suit before, it and hence rendering this court as functus officio?" The Civil Procedure Rules under Order 9, Rules 5, 6 & 9. Envisions that where there is an intended change of Advocates in a matter where an advocate has been appointed to represent either party, the said change is to be affected by order of court or consent of parties. Order 9, Rule 5,6 & 9 provides as follows;
 5. A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former



advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.

6. The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).
9. “When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be affected by order of the court —
 - a. upon an application with notice to all the parties; or
 - b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”
13. The Rules cited above are meant, in my view, to prepare the Advocate currently appearing for a party to prepare to hand over the brief to the new Advocate and also collect his fees if still unpaid. In the matter before the court and from a perusal of the court record, it appears to me that upon instructions by a person purporting to represent the 1st Plaintiff, the firm of David Mutunga & Company Advocates proceeded to file a Notice of Appointment of Advocates and simultaneously file the Notice to withdrawal the suit. There is no material on record to confirm if the then Advocate appearing in the matter for the Plaintiffs was made aware of the intention to remove him as an agent of the Plaintiffs and neither was it demonstrated that he was served with the said Notice of Change of Advocates.
14. Secondly, and more important, the second Plaintiff has brought this case as a party in his own right. Even if it were correct to hold that the new firm was instructed by a director of the 1st Plaintiff to withdraw the suit on its behalf, there is nothing placed before me to demonstrate that the 2nd plaintiff was in agreement with the said notice or was also represented by the said firm of David Mutunga & Company Advocates. To my mind, a blanket withdrawal of the suit without the consent of the 2nd Plaintiff would greatly prejudice him. I am persuaded therefore that there was mischief on the party of the said Advocates Notice to withdraw the suit without involving the 2nd Plaintiff who was a party in their own right. I further note that the observation by the Court was to invite that parties to confirm if indeed the suit had been withdrawn and if that was the intention of the parties then the court file would have been closed. I am therefore persuaded that the Notice to withdraw was not properly filed since there was no proper representation of the Plaintiffs s by the said David Mutunga & Company Advocates. Having not served his Notice of Appointment on the Advocate at the time representing the 1st Plaintiff or on the second Plaintiff herein, in my view, the said Notice did not, meet the requirements of the law as per Order 9 of the *Civil Procedure Rules*. I therefore find and hold that the application seeking to strike out the suit vide the Notice of Withdrawal is invalid and unlawful and hereby expunge both the Notice of Withdrawal and the Notice of Change of Advocates from the record. The Plaintiffs suit is reinstated and the Plaintiffs are at liberty to prosecute their suit to its logical conclusion.
15. On the second Application filed on 22/9/2022 seeking to enjoin Credit Bank Limited as an Interested Party in the current suit. I have considered the reasons adduced by the 2nd Plaintiff for the said application and I have also considered the proposed Amended Plaint to this effect and the arguments



adduced by the Defendants in opposition. I am not persuaded that there is a cause of action disclosed with material facts to enjoin the Proposed Interested Party to this suit. I have also noted that the reason for the same relates to production of documents in the custody of the bank emanating from the 1st Plaintiffs. To my mind, the said information can be accessed through an application for summons to produce the same as evidence before the Court during trial, upon application by the party seeking to rely on the same. As such, I find no good reason to allow the prayers sought. My finding on the second issue is that the same lacks merit and is dismissed.

16. In conclusion, the court will allow the suit to proceed to its logical conclusion as filed by the parties. Since the two applications are brought by the Plaintiffs and challenge actions by 3rd parties not represented in the suit herein, the court will make no orders as to costs.

17. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 10TH DAY OF JULY 2023

J. W. W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Wendo for the Plaintiffs.

Ms. Karita holding brief Mr. Kihara for the Defendant.

Sylvia- Court Assistant.

