



**Mayfair Insurance Company Limited v Khushi Motors Limited & another; Jillo & 3 others
(Applicant) (Civil Suit E013 of 2021) [2023] KEHC 21654 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21654 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT E013 OF 2021
SM GITHINJI, J
JULY 17, 2023**

BETWEEN

MAYFAIR INSURANCE COMPANY LIMITED PLAINTIFF

AND

KHUSHI MOTORS LIMITED 1ST DEFENDANT

HENRY WAIRUA GICHUKI 2ND DEFENDANT

AND

KERNA SAKUTI JILLO & 3 OTHERS APPLICANT

RULING

1. For determination before this court is the applicants' chamber summons dated April 26, 2022 seeking the following orders:
 - a. This honourable court be pleased to direct that KSJ; SM (Suing through mother and next friend LWN); EM and EW (Minors suing through mother and next friend LWN) be joined as interested parties in these proceedings.
 - b. This honourable court be pleased to set aside its order dated 21/9/2021 staying proceedings in Malindi CMCC No. 105 of 2021; Malindi CMCC No. 97 of 2021;-Malindi CMCC No. 97 of 2021 and Malindi CMCC No. 96 of 2021.
 - c. This honourable court be pleased to order that the plaintiff and the defendants do serve the applicants with all the respective pleadings to date touching on this suit.
 - d. The costs of this applications be in the cause.
2. The application is founded on the grounds set out on the face of it and the sworn affidavit of Mercy Nyabuto who deponed that the plaintiff filed an application dated 3/9/2021 seeking to stay



proceedings in Malindi CMCC No. 105 of 2021; Malindi CMCC No. 97 of 2021; Malindi CMCC No. 97 of 2021 and Malindi CMCC No. 96 of 2021 pending the hearing and determination of the suit and since obtaining the order, in its favour, the plaintiff has refused to prosecute the case thus derailing the Applicants' case and hence the instant application.

The plaintiff filed a replying affidavit sworn by Consolata Kiura the legal manager of the plaintiff company stating that the instant application is an abuse of the court process as the subsequent suit can be stayed until the suit that deals with substantial issues which directly affect the other suit is determined and thus the lower court proceedings need to be stayed until the issue in the present suit are heard and determined.

The application was canvassed by way of written submission which I have taken into account and the issues arising for determination are;

1. Whether the applicants should be enjoined as interested parties to this suit.
2. Whether the order for stay of proceedings should be granted?
3. The *Black's Law Dictionary*, 9th Edition at page 1232 defines an interested party as;
"A party who has a recognizable stake (and therefore standing) in the matter"
4. While the *Civil Procedure Act*, cap 21 is silent on the concept of "interested party", order 41 rule 5 of the *Civil Procedure Rules* 2010, make a reference to the term "interested party" and states;
"The court either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit"
5. The "Mutunga Rules", *the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, Legal Notice No. 117 of 2013, defines an interested party as;
"A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation"
6. The Rules further at Part II Clause 7 provides that, a person with leave of the Court may make an oral or written application to be joined as an interested party or the Court, on its own motion, may also join an interested party to the proceedings before it.
The *Black's Law Dictionary*, 9th Edition defines a "Necessary Party" as being
"A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings"
7. In *Kenya Medical Laboratory Technicians and Technologists Board & 6 others v Attorney General & 4 others* [2017] eKLR, Mativo. J. explained when an interested party ought to be enjoined in a proceeding. He stated: -

"A person is legally interested in the proceedings only if he can say that it may lead to a result that will affect him legally that is by curtailing his legal rights. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established. It is apparent that a party



claiming to be enjoined in proceedings must have an interest in the pending litigation, but the interest must be legal, identifiable or demonstrate a duty”.

8. In the case of *Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others* [2014] eKLR the Supreme Court of Kenya held that;

(22) In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this court’s ruling in the Mumo Matemo case where the court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

(23) Similarly, in the case of *Meme v. Republic*, [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:

- i. “Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. joinder to prevent a likely course of proliferated litigation.”

9. The instant suit herein emanates from the lower court aforesaid in which the interested parties are part of. In this case, any outcome will affect them and thus they have identifiable stake. In my view then, the interested parties have earned a right to be enjoined in these proceedings. Their prayer is allowed.

On setting aside of judgment or orders, order 12 rule 7 of the *Civil Procedure Rules* provides: -

“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”

10. Further the provision is buttressed by order 51 rule 15 of the *Civil Procedure Rules* which provides: -

“The court may set aside an order made ex parte.”

11. The discretionary power to set aside an ex parte judgment or order does not cease to apply simply because a decree has been extracted. Unfairly obtained ex parte judgment or order should not be allowed to stand once the applicant has demonstrated lack of service or having not been a party to the suit, adverse orders has been issued affecting him or her, having not been involved. In this instance, there is no evidence of service to the interested parties and thus in the circumstances I allow the prayer for setting aside the orders of the lower court with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 17TH DAY OF JULY, 2023.

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S.M. GITHINJI

JUDGE

In the Presence of; -



Mr. Kilonzo for 1st and 2nd Interested Parties.

Ms Mwangi holding brief for Mr. Omwacha for the Plaintiff

Ms Adi holding brief for Mr. Adoch for the 1st Respondent.

