



Ondiek v Invesco Assurance Company Limited; Muindi & another (Proposed Interested Parties) (As Legal Representatives of the Estate of Manaseh Guya Mwale, Deceased) (Civil Case E056 of 2021) [2023] KEHC 23771 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23771 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E056 OF 2021
OA SEWE, J
SEPTEMBER 21, 2023**

BETWEEN

DETAN ONDIEK ALIAS DEDAN ONDIEKI PLAINTIFF

AND

INVESCO ASSURANCE COMPANY LIMITED DEFENDANT

AND

JOSEPH MWALE MUINDI PROPOSED INTERESTED PARTY

MBUVE KIMWELE PROPOSED INTERESTED PARTY

**AS LEGAL REPRESENTATIVES OF THE ESTATE OF MANASEH GUYA
MWALE, DECEASED**

RULING

1. Before the Court for determination is the Chamber Summons dated 20th December 2021. It was filed on behalf of the proposed interested parties (hereinafter, “the applicants”) by M/s Mutunga & Muindi Advocates under Section 1A, 1B and 3A of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 1 Rule 10 and 14 of the Civil Procedure Rules for the following orders:
 - (a) That Joseph Mwale Muindi and Mbuve Kimwele, being the administrators of the estate of the late Manaseh Guya Mwale, (Deceased) be enjoyed to this suit as interested parties.
 - (b) That the ex parte orders issued by this Court on 15th June 2021 be stayed pending the hearing and determination of this application.
 - (c) That, in the alternative to Prayer [b] above, the plaintiff do deposit in this Court the amount of Kshs. 1,125,114/= decreed in Makindu PMCC No. 182 of 2013 within the next 7 days as security pending the hearing and determination of the application and this suit.



- (d) That the ex parte orders issued by this Court on 15th June 2021 be set aside.
- (e) That the costs of the application be met by the plaintiff
2. The application was predicated on the affidavit of Joseph Mwale Muindi, sworn on 20th December 2021 in which he averred that he is one of the plaintiffs in Makindu PMCC No. 182 of 2013: Joseph Mwale Muindi & Another v P.N. Mashru Limited and Dedan Ondieki (the Makindu suit); and that judgment has already been passed in the said matter in their favour for Kshs. 1,125,114.20. He further deposed that it is well within the knowledge of the plaintiff herein that Warrants of Attachment and Sale have been issued in the Makindu suit; and that an application for stay pending appeal was dismissed by the High Court at Makueni in HCCA No. 32 of 2017: Dedan Ondieki v Joseph Mwale Muindi & Another. Accordingly, the applicants prayed that they be enjoined to these proceedings to enable them champion the interests of the beneficiaries of the estate of the deceased. Mr. Muindi was particularly concerned about the failure by the defendant to respond to the plaintiff's application dated 2nd June 2021; and suspected collusion between the plaintiff and the defendant with a view of frustrating the realization of the decree.
 3. To buttress his averments, Mr. Muindi annexed copies of the Warrants of Attachment and Sale to his affidavit as well as copies of the Memorandum of Appeal filed in Makueni HCCA No. 32 of 2017 and the ruling by Hon. Dulu, J. in respect of the plaintiff's application for leave to appeal out of time. He accordingly prayed in the alternative that the plaintiff be ordered to deposit the decretal sum as a condition, if he is to be given audience in this suit. Otherwise, the applicant's prayed that their application be allowed and the orders sought granted.
 4. In response to the application, the plaintiff relied on his Replying Affidavit sworn on 15th February 2022. He contended that the applicants have no locus standi to file or prosecute the instant application in so far as the Limited Grant of Letters of Administration issued to them on 21st January 2013 was limited to filing the Makindu suit. He annexed the said document to his affidavit as Annexure "DO-1". He added that the bottom-line of this suit is not to adversely affect the applicants' rights but to ensure the defendant honours its statutory mandate of paying the decretal sum in all matters arising out of the accident that was the subject matter of the Makindu suit.
 5. The plaintiff further averred that he has made full and frank disclosure of all the material facts as per the List and Bundle of Documents filed herein; and hence it is in the interest of justice and fairness that he be allowed to freely prosecute this matter to conclusion. He pointed out that the contractual relationship between him and the defendant was entered into in Mombasa; and that it has nothing to do with the proposed interested parties, other than the payment of the decretal sum. Moreover, the plaintiff resisted the applicants' prayer that he be ordered to deposit the decretal sum if he is to be given audience. He posited instead that it is the defendant who has the legal obligation to deposit or pay the decretal sum. He consequently prayed that the application dated 20th December 2021 be dismissed with costs.
 6. Pursuant to the directions given herein on 15th February 2022, the application was canvassed by way of written submissions. Accordingly, Mr. Muindi for the applicants relied on his written submissions dated 11th March 2022. He reiterated the assertions made by the 1st applicant in his Supporting Affidavit and added that this suit is nothing but a ploy to delay the payment of the decretal sum; and is therefore an abuse of the process of the Court. He pointed out that the accident in question occurred way back on 11th August 2012 and that reparation therefor is long overdue.
 7. Mr. Muindi further submitted, on the authority of Muthoni Ntara & Another v Francis Mworira Igweta [2016] eKLR, that the decree in favour of the interested parties is independent of whether or



not the judgment debtor was insured; and that the correct approach would have been for the plaintiff to pay the decretal sum as ordered in the Makindu suit and thereafter pursue his insurers for indemnity under their insurance contract. Thus, counsel submitted that it is necessary for the proposed interested parties to be enjoined to this suit to enable them protect their interests.

8. On behalf of the plaintiff, written submissions were filed herein on 3rd June 2022 by Mr. Omwenga, Advocate. He reiterated the plaintiff's assertion that the applicants lack the necessary locus standi to present or argue the instant application. He relied on *Julian Adoyo Ongunga v Francis Kiberenge Abano*, Migori HCCA No. 119 of 2015 and *Francis K. Muruatetu & Another v Republic* [2016] eKLR, among others, and argued that the applicants' situation can be equated with a court acting without jurisdiction; and therefore that the instant application is a nullity. Mr. Omwenga pointed out that, at this stage the suit only intends to have the defendant pay all the decretal sums due in respect of Makindu PMCC No. 182 of 2013 and Mombasa CMCC No. 244 of 2019. He therefore submitted that the applicants' allegations of collusion to defeat the decree are baseless and ought to be disregarded.
9. On whether the plaintiff should be ordered to deposit the decretal sum in Court, it was the submission of Mr. Omwenga that the prayer has been made against the wrong party. In his view, the proper party to look to for security for the payment of the lower court's decree is the defendant. He added that, in any event, the applicants did not prove that the plaintiff is a man of straw or that he will not be able to pay the decretal in the event of dismissal of his suit. Counsel relied on *Kenya Education Trust v Katherine S.M. Whitton*, Civil Appeal No. 310 of 2009. Thus, Mr. Omwenga prayed for the dismissal of the application with costs.
10. In the light of the foregoing, two issues arise for determination in respect of the Chamber Summons dated 20th December 2021, namely:
 - (a) Whether the applicants have the requisite locus standi to approach the Court as they have done; and if so,
 - (b) Whether the applicants have made out a good case to warrant their joinder herein as interested parties.

A. On Locus Standi:

11. Locus standi was aptly defined in *Alfred Njau v City Council of Nairobi* [1983] eKLR to mean:

“...the right to appear or be heard in Court or other proceedings and to say that a person has no locus standi means that he has no right to appear or be heard in such a proceeding.”
12. Whereas the applicants did not see the need to avail proof of their appointment as the legal representatives of the estate of deceased, Manaseh Guya Mwale, the plaintiff annexed a copy of the Limited Grant of Letters of Administration Ad Litem, issued on 29th January 2013 by the High Court at Machakos as Annexure D0-1. They utilized that document to file a suit, being Makindu PMCC No. 182 of 2013 in which a decree has been issued in their favour. By seeking joinder, the applicants are not out to file a separate suit or to distribute the estate of the deceased. It is therefore my considered finding that the case of *Lidya Ntembi Kairanya & Another v Attorney General* [2009] eKLR is distinguishable from the facts hereof; and is no basis for the submission that the applicants herein lack locus standi.



B. On Joinder By The Proposed Interested Parties:

13. The instant application was essentially hinged on Order 1 Rules 10 and 14 of the Civil Procedure Rules. Since it is not the applicant's case that this suit was instituted in the name of the wrong persons as the plaintiff, the more apt provision would be Sub-rule (2) of Rule 10, which provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, 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 defendant, 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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”(Emphasis added)

14. It is manifest therefore that any person who wishes to be enjoined as one "whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit" can only join the suit as either a plaintiff or defendant on the basis of a demonstrable personal stake. Thus, I would agree with the viewpoint taken by Hon.Muriithi, J. in the case of Brek Sulum Hemed v Constituency Development Fund Board & Another [2014] eKLR, when he observed that:

“To be sure there is no procedure under the *Civil Procedure Act* and Rules for the joinder of interested parties and the practice of application for [by] interested parties must have been developed by necessary implication...”

15. Nevertheless, I take the view that, in appropriate cases, joinder of interested parties would be permissible under the inherent jurisdiction of the Court where sufficient cause has been made for such joinder. Accordingly, I have resorted to Rule 1 of the Mutunga Rules for a definition of an interested party; and it states:

“interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”

16. In respect to the provision the following principles were enunciated in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others* [2014] eKLR by the Supreme Court, which were later reaffirmed in *Francis Kariuki Muruatetu & Another v Republic & 5 Others* (supra) thus:

“(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..."

17. In the instant case, the applicants have complied and moved the Court by way of a formal application, albeit by way of Chamber Summons instead of a Notice of Motion. Granted the provisions of Article 159(2)(d) of *the Constitution*, not much turns on that anomaly. It is also plain that the decree on account of which the plaintiff seeks indemnity from the defendant is in favour of the applicants; and therefore they are keenly interested in the outcome of this suit. Besides, the 1st applicant pointed out, at paragraphs 9, 10 and 11 of his Supporting Affidavit, that already the plaintiff has obtained favourable orders herein staying the execution of that decree without any reference to them; and that they are aggrieved by the said order dated 15th June 2021 and would want to challenge that order.
18. I am therefore satisfied that the applicants have demonstrated sufficient interest in this suit to warrant their joinder as well as the prejudice they stand to suffer in the event of non-joinder. Moreover, as was pointed out in *Judicial Service Commission v Speaker of the National Assembly (supra)*, unlike an *amicus curiae*, an interested party "...may not be wholly indifferent to the outcome of the proceedings in question...he may not be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."
19. I am further satisfied that the applicants have given an overview of their case paragraphs 6 to 10 of the Supporting Affidavit and demonstrated that the issues are indeed germane to the dispute. Thus, I am convinced that they have satisfied the conditions for joinder.
20. As interested parties, the role of the applicants is fairly circumscribed; and therefore there is no basis for the prayers sought at paragraphs 2, 3 and 4 of the Chamber Summons dated 20th December 2021. They ought to know by now that, as interested parties, they cannot seek to hijack the suit and overturn orders that were made by a court of concurrent jurisdiction to preserve the status quo pending the hearing and determination of this suit; or ask for drastic orders such as the depositing of the decretal sum as a precondition for audience. In this regard, I find apposite the expressions of the Supreme Court in *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR* that:
- "A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."
21. In the result, the orders that commend themselves to the Court and which I hereby grant in respect of the application dated 20th December 2021 are as hereunder:



- (a) That Joseph Mwale Muindi and Mbuve Kimwele, being the administrators of the estate of the late Manaseh Guya Mwale, (Deceased) and the decree holders in Makindu PMCC No. 182 of 2013 be and are hereby enjoined to this suit as interested parties.
- (b) That each party shall bear own costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF SEPTEMBER, 2023

OLGA SEWE

JUDGE

