



REPUBLIC OF KENYA



**Mithamo & 3 others v Wahome & 3 others (Civil Appeal E036 of 2023)
[2024] KEHC 16278 (KLR) (17 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E036 OF 2023
PN GICHOHI, J
DECEMBER 17, 2024**

BETWEEN

**MAUREEN MUTHONI MITHAMO 1ST APPELLANT
MARION JEBET ROTICH 2ND APPELLANT
PRISCILLA SARANGI MOMANYI 3RD APPELLANT
GLORIA NASIMIYU NEKESA 4TH APPELLANT**

AND

**SIMON MAINA WAHOME 1ST RESPONDENT
BOOT CAMP KE 2ND RESPONDENT
JAMES MUCHEREU KAGUOKA 3RD RESPONDENT
HISIA SAFARIS 4TH RESPONDENT**

RULING

1. The background of this ruling is that on 19/10/ 2022, the Appellants herein filed a suit against the 1st and 2nd Respondents in the Small Claims Court at Nakuru Case No. E 569 of 2022 seeking damages of Kshs. 430,000/= owed to them by the 1st and 2nd Respondents. The 1st and 2nd Respondents denied the claim through the response dated 22/11/2022 and urged the court to dismiss the claim with costs.
2. Upon being served, the Appellants filed a Notice of Motion dated 9/01/2023 under a certificate of urgency seeking orders: -
 1. That the application be certified as urgent and service of the same be dispense with in the first instance.



2. That there be a stay of further proceedings pending hearing and determination of the application or further Orders of the court.
 3. That leave be granted to the Claimants to join James Mucheru Kaguoka and Hisia Safaris as 3rd and 4th Respondents in the matter.
 4. That consequent to grant of prayer 3 above, leave be granted to the Claimants to amend the Claimants' statement of claim in the manner set in the Draft Memorandum of Appeal annexed.
 5. That Claimants' amended statement of defence be deemed to have been duly filed upon payment of the requisite fees.
 6. That the costs of the application be provided for.
3. It is on record that the 1st and 2nd Respondents filed a Replying Affidavit and opposed the application on the ground that the breached contract was between them and the Appellants and therefore , the intended 3rd and 4th Respondents were not subject to the said contract.
 4. The intended 3rd and 4th intended Respondents also filed their Replying Affidavit denying privity of contract.
 5. Like the 1st and 2nd Respondents, the 3rd and 4th Respondents urged the trial court to dismiss the application with costs.
 6. Upon hearing the parties in their affidavits, the trial court delivered its ruling on 27/02/2023 dismissing the application with costs to the Respondents.
 7. The Appellants were aggrieved by that decision. As can be discerned from the Memorandum of Appeal dated 1/03/2023, they moved this Court under Section 65 of the *Civil Procedure Act* and Order 42 Rule 1 of the Civil Procedure Rules and the appeal is on six (6) grounds framed as follows: -
 - a. That the learned Resident Magistrate erred in law and in fact in dismissing the Appellants' application and holding that the 1st Respondent took away blame for the intended 3rd and 4th Respondents in his affidavit and therefore there was no reason to enjoin them when their statement of defence fully blames the intended 3rd and 4th Respondents.
 - b. That the learned Resident Magistrate erred in law and in fact in finding that blame had been taken away from the intended proposed 3rd and 4th Respondents through an affidavit instead of a fair trial to determine the culpability of each of the parties in the suit.
 - c. That the learned magistrate erred in law and in fact in failing to analytically consider the facts on record specifically that the 1st and 2nd Respondents wholly blame the proposed 3rd and 4th Respondents in their statement of defence and claim to have been acting as their agent.
 - d. That the learned Resident Magistrate relied on extraneous matter in arriving at the decision to dismiss the Appellants' application.
 - e. That the learned Magistrate erred in fact and in law in failing to appreciate the principle governing joinder of parties to a suit namely Order 1 Rule 10 (2) and various case laws on the matter and completely ignored the Appellants' grounds on the face of the application, Supporting Affidavit, further affidavit and submission.



- f. That the learned Resident Magistrate erred in law and in fact in dismissing the Appellants' application which effectively locks out a crucial party to the suit and amounts to gross miscarriage of justice.
8. It is upon those grounds that the Appellants urged this Court to review and/or set aside the ruling / order dated 27/02/2023 and that the Respondents bear the costs of this Appeal.
9. Parties agreed and directions were given that the Appeal be canvassed by way of written submissions. Consequently, the Appellants filed theirs dated 19/02/2024 while the Respondents filed theirs dated 9/04/2024. Compliance was ultimately confirmed by this Court on 15/07/2024 and the matter set for ruling.

Appellants' Submissions

10. They relied on several cases including the Court of Appeal decision in Pravin Bowry vs John Ward & another [2015] eKLR on when a court can decline to enjoin a party to a suit. They therefore submitted that there is a difference when a party who seeks to enjoin an interested party and when one is joining a defendant.
11. In the circumstances, the Appellants submitted that the decision in Raila Amollo Odinga & Another vs. Independent Electoral & Boundaries Commission & 2 others & Michael Wainaina Mwaura (as amicus curiae) (2017) eKLR cited by the Respondents before the trial court was irrelevant as the facts in the suit before the trial court were completely different from those in the cited case.
12. It was their submissions that even though the trial court seemed to have taken note of the decision in Civicon Limited vs. Kivuwatt Limited & 2 others (2015) eKLR quoted by the Appellants on which party can be enjoined in a suit, the trial still ignored the requirements in the said case and made its final decision that the 1st Respondent had taken away blame from the intended 3rd and 4th Respondents for the reason that the contract if at all was between himself and the claimants.
13. It was the Appellants' contention that since the 1st Respondent's response to claim fully blamed the intended Respondents and clearly alleged agency relationship, it was necessary for the court to determine whether or not there indeed exists any agency and where the liability actually lies.
14. In the circumstances, the Appellants submitted that by using an affidavit in response to the application as conclusive evidence and going ahead to absolve the intended parties from liability, the trial court erred as it decided on matters in the suit before hearing the suit thus effectively shutting the door to all the issues to such suit and this was prejudicial to the Appellants.
15. The Appellants therefore contended that the trial court failed to follow the principles laid down by the Court of Appeal in Pravin Bowry (supra) and instead restricted itself to grounds that were highly prejudicial to the Appellants. Lastly, they submitted that dismissal of their application was a miscarriage of justice against the Appellants. They therefore reiterated their prayer that the Appeal be allowed with costs to them.

Respondents' Submissions

16. While emphasising the applicable law on joinder of parties as provided for under Order 1 Rule 10 (2) of the Civil Procedure Rules, the Respondent submitted that a party or even the court may on its own motion order for the joinder of a party who is deemed necessary for effectively and completely determining the issues in controversy in a suit.



17. They therefore submitted that a party seeking to be joined in the suit has to demonstrate three components being; sufficient interest in the matter; the value they add to the matter must be very clear and; reasonable apprehension of being affected by execution should the Plaintiff succeed in the orders sought in the claim.
18. The Respondents submitted that it was the Appellants' contention in their statement of claim that they had engaged the 1st Respondent to secure for them a holiday package during the Easter holiday in the year 2022; that the 1st Respondent subsequently informed the Appellants that he had secured a holiday package for them at Mahali Mzuri Safari Camp at Maasai Mara at a sum of Kshs. 675,000/=; that the Appellants sent the 1st Respondent the said money but instead, the 1st Respondent took them to a two-star hotel called Base Camp at Maasai Mara which was charging about 70% less than what they had paid for as a result of which the Appellants filed the suit before the trial court seeking for refund of Kshs.430, 000/= out of their holiday package.
19. The Respondents therefore submitted that in his defence to the claim, the 1st Respondent had contended that since he was not into tours and safaris which deals with holiday vacations, he engaged the 3rd Respondent who assisted him to procure a holiday package for the Appellants at Base Camp in Maasai Mara at Kshs. 575,000/=; that the package was inclusive of accommodation for four days and three nights, food, game drive and transportation from Nakuru to Maasai Mara and back to Nakuru; that the Appellants were satisfied with that package and that; since the package did not cater for drinks, the Appellants sent 1st Respondent a further sum of Kshs.100,000/= to cater for the same thus the total sum of the package was Kshs. 675,000/=.
20. They submitted that it was the 1st Respondent's case that he took the Appellants to the Base Camp Explorer at Maasai Mara for Easter Holiday where they lodged for four days and three nights and utilized the entire sum of Kshs. 675,000/= that 3rd and 4th Respondents were not privy to any transaction entered into between him and the appellants over the holiday package save that he engaged their services to transport the Appellants from Nakuru to Maasai Mara and back to Nakuru and during game drive.
21. In the circumstances, the Respondents submitted that since the 3rd and 4th Respondent were neither privy to any transaction entered into between the Appellants and the 1st Respondent for the said holiday package nor received any money from them, then the Appellants did not demonstrate any sufficient interest to warrant joinder of the 3rd and 4th Respondents in the suit.
22. The Respondents further submitted that the Appellants did not demonstrate how the 3rd and 4th Respondents would be affected by the execution of the judgment of Kshs. 430, 000/= if it was to be entered in their (Appellants') favour as prayed in the claim.
23. Arguing that the 1st and 2nd Respondents did not blame the 3rd and 4th Respondents in their defence as alleged by the Appellants, the Respondents urged this Court to disregard that allegation. Further, they argued that the 1st and 2nd Respondents did not file a Counter -Claim and/or a Third-Party Notice against the 3rd and 4th Respondents for any damages if they had any cause of action against them.
24. In the circumstances, the Respondents submitted that no evidence was adduced by the Appellants to prove the value that the 3rd and 4th Respondents would have added if they were to be enjoined. They therefore urged this Court to dismiss the Appeal with costs.



Analysis And Determination

25. This Court has accessed the proceedings before the trial court and confirms that the court issued orders in terms of prayer 1 and 2 pending inter-partes hearing of the application. The Respondents also filed their Replying Affidavits and the application was canvassed by way of written submissions.
26. In this Appeal, this Court has heard the parties on the application, the Affidavits, submissions and from the record of appeal, it discerned from the Memorandum of Appeal dated 1/03/2023 that the Appellants moved this Court under Section 65 of the Civil Procedure Act and Order 42 Rule 1 of the Civil Procedure Rules.
27. Section 65 provides that: -
1. Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court-
 - a. Deleted...;
 - b. from any original decree or part of a decree of a subordinate court, other than a magistrate's court of the third class, on a question of law or fact;
 - c. from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.
 2. (deleted...).
28. The Appellant has not indicated what subsection of Section 65 he is relying on but a look at the said Section shows that Section 1(a) and (2) were deleted. It is therefore clear to this Court that he could only have implied Section 65 (1) (b) as the impugned ruling is not from Kadhi's Court so as to fall under 1 (b).
29. In this matter, the ruling dated 27/02/2023 did not determine the suit before the trial court and therefore, what was extracted was an Order dismissing the Appellants' application. There is no issue of security here and neither has any been raised by the parties.
30. Flowing from there then, Order 42 Rule I of the Civil Procedure Rules provides that: -
- “Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading.”
31. In the circumstances, the issues for determination are: -
1. Whether the trial magistrate erred in dismissing the Appellants' application.
 2. Who should bear the costs of this appeal.
32. Regarding joinder of parties, Order 1 Rule 10 (2) of the Civil Procedure Rules provides that: -
- “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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”



33. In the matter, it was the Claimant (who is considered a Plaintiff for purposes of the Civil Procedure Rule above) who was applying for leave to join other parties, that is the 3rd and 4th Respondents (Defendants).

34. It is towards that end that the Court of Appeal in Pravin Bowry (supra) emphasised on the provisions of Order 1 Rule 10 (2) as follows: -

“There is no requirement under the said provisions for a draft of the pleading to be amended to be included as is the procedure in an ordinary application for amendment of pleadings. There is no requirement as there is in an ordinary application to join a third party for leave of the court to be sought. An applicant need only file the application and there is no requirement to serve that application upon the party intended to be joined as a co-defendant. Indeed, the court itself may add such a party to the suit so that such addition will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”

35. From the above, the power of the court in regard to joinder of parties need not be overemphasised. In this case, the court did not act on its own motion. As earlier stated in this ruling, it is the Appellants/ Claimants who moved the court through an application.

36. What was critical in that application were grounds thereof supported by the Affidavit sworn by Gloria Nasimiyu Wekesa in her capacity as the 4th Claimant and with authority of her co- Claimants to swear on their behalf. It was deponed that from the responses by the 1st and 2nd Respondents, she learnt that the 1st Respondent transferred all the money to the proposed 3rd and 4th Respondents and further claimed that he had nothing to do with the payment, booking or any other arrangements on the trip.

37. It was further deponed that they reported the matter to the Director of Criminal Investigations and investigations are ongoing in regard to the 1st Respondent as the suspect in a case of obtaining money by false pretences.

38. The Appellants further deponed that the investigating officer had informed the 4th Appellant that upon being summoned, the 1st Respondent had indicated that he was not to blame as he had transferred all the money to the 3rd and 4th Respondents. That this had prompted the issuance of warrant of arrest against the 3rd and 4th Respondents who subsequently recorded statements and availed copies of receipts of payment made by them on behalf of the Appellants/Claimants.

39. In the circumstances, the Appellants deponed that the role of the intended 3rd and 4th Respondent in the procurement and payment in regard to the trip in question is central to the suit in question which cannot be left out in the suit and therefore, it is imperative that they be joined in the suit as to enable the court determine as to who is liable as between the Respondents and to which extent.

40. In its ruling, the trial court held: -

“The principle of joinder is premised upon the difficulties a claim is likely to face should other parties be left out of proceedings. This is correctly argued by the applicants. That fact notwithstanding, it is required of any party seeking joinder to demonstrate the interest if at all those intended to be joined have in a matter. The value they add to the dispute must be very clear. The other test is whether they are likely to be affected by the final determination of the dispute.”



41. Further, while quoting the High Court decision in *Gladys Nduku Nthuki v Letsbengo Kenya Ltd & another Civil Appeal No. 7 of 2021*, the trial court went on to say while dismissing the Appellants' application: -

“So as stated above by the superior court, one of the tests for joinder is whether the party seeking joinder has a legitimate right against the intended party to the claim. The other test is whether the suit is likely to be prejudiced without the participation of the party intended to be joined.

The contract has been admitted by the 1st and 2nd Respondent. Through the affidavit of the 1st and 2nd Respondent, he takes away blame from the intended 3rd and 4th Respondents for reason that the contract if at all was between himself and the Claimants. He essentially saying, that I should be pursued for the said reliefs and not the parties intended to be joined. I cannot discern any relationship obtaining between the claimants and the intended 3rd and 4th respondents. They have deponed which facts are corroborated by 1st respondent and not the applicants. They also aver that they were not privy to the contract and the money consideration involved so that theirs was limited to transporting the applicants to a safari having been outsourced by the 1st Respondent. For those reasons, it is apparent that the claim cannot be prejudiced in absence of the intended 3rd and 4th Respondent.”

42. In the case of Nduku Nthuku (supra), the Applicant therein was seeking either to be joined in the suit either as a Plaintiff or as an interested party. His property was used to guarantee the facility that advanced to the Plaintiff by the Defendant and the property was at risk of being sold so as to recover the amount owed by the Plaintiff to the Defendant.
43. It was however alleged that the notice was not served. In the circumstances the Court found that the Applicant was the only one who could clarify whether notice was served or not. While allowing the Applicant to be enjoined, Odunga J (as he then was) held: -

“...his presence in these proceedings is not only necessary in order to enable this court effectually and completely adjudicate upon and settle all the questions involved in this cause, but the orders that this Court may issue in this Cause are likely to affect the interest of the said intended party. Further, taking into account the relationship between the parties herein as well as the intended party to the transaction, the subject of this suit, I find that it is desirable, for avoidance of multiplicity of suits, to have the said person joined so that he can be bound by the decision of this Court.”

44. It is clear that despite having relied on the above decision though circumstance therein slightly different, the trial court narrowly applied guiding principles set out by superior courts in regard to joinder of parties in the circumstances before it. The relationship between the Appellants and 1st and 2nd Respondents looped in the 3rd and 4th intended Respondents as far as the dispute before it was concerned.
45. The issues that were raised could not be determined technically through the 1st Respondent's Affidavit purporting to take away blame in regard to the intended Respondents. It is clear from the material before the trial court that the 3rd and 4th Respondents were necessary parties to the suit. Their presence would certainly enable the trial court to effectually and completely adjudicate upon and settle all the questions involved in the suit.



46. In the circumstances, this Court finds merit in the Appeal. The trial court did not properly exercise its discretionary powers when it dismissed the application before it.
47. In conclusion, this Court the following Orders: -
1. The appeal is allowed.
 2. The Order dated 27/2/2023 dismissing the Appellants application dated 9/1/2023 be and is hereby set aside.
 3. Leave is hereby granted to the Appellants to enjoin the intended the 3rd and 4th Respondents to the Claim.
 4. The Appellants shall amend and serve their statement of Claim within 30 days from the date of this ruling.
 5. The Respondents are at liberty to amend and file their Responses within 14 days of service by the Claimants.
 6. Each party will bear his own costs of this appeal.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF DECEMBER, 2024.

PATRICIA GICHOHI

JUDGE

N/ A for Mr. Lungwe for Appellants

& Mr. Opar for Respondents (both duly notified)

Ruto, Court Assistant

