



REPUBLIC OF KENYA



**Kiplagat v Northwest Holdings Limited & 2 others (Civil Case E345 of 2020)
[2021] KEHC 379 (KLR) (Commercial and Tax) (9 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E345 OF 2020
WA OKWANY, J
DECEMBER 9, 2021**

BETWEEN

**JOAN CATHERINE KIPLAGAT AND MOSES KIPLAGAT (SUING AS THE
ADMINISTRATIX/ADMINISTRATOR OF THE ESTATE OF ISAAH FUNDI
KIPLAGAT PLAINTIFF**

AND

**NORTHWEST HOLDINGS LIMITED 1ST DEFENDANT
JANE WANJIKU MUKABI 2ND DEFENDANT
GEORGE RUITIYU MUKABI 3RD DEFENDANT**

RULING

1. This ruling determines two applications filed by the defendants, to wit, the applications dated 7th December 2020 and 28th January 2021.

Application dated 7th December 2020

2. Through this application, the 2nd and 3rd defendants seek order to be struck out from this suit as defendants.
3. The application is brought under Order I rule 14 of the Civil Procedure Rules. It is supported by the affidavit sworn by Jane Wanjiku Mukabi and is based on the grounds that: -
 - a) The 2nd and 3rd Defendants are directors of the 1st Defendant.
 - b) The lease that is the subject of this suit was signed between the Plaintiffs and the 1st Defendant.
 - c) That there is no privity of contract between the Plaintiffs and the 2nd and 3rd Defendants.



- d) That there is no cause of action between the Plaintiffs and the 2nd and 3rd Defendant's herein.
 - e) The corporate veil between the 1st Defendant and the 2nd and 3rd Defendants is being breached by the sustenance of this suit against the 2nd and 3rd Defendants.
 - f) The said corporate veil has not been lifted to warrant the sustenance of this suit against the 2nd and 3rd Defendants.
 - g) That it is in the interest of justice that this application be allowed.
4. The respondent opposed the application through the replying affidavit sworn by Joan Catherine Kiplagat who states that the 2nd and 3rd defendants are the directors of the 1st defendant and that they signed the lease agreement dated 31st December 2013 as guarantors of the 1st defendant. She states that the 1st defendant has no known assets registered in its name and that it is therefore necessary to include the 2nd and 3rd defendants in the suit in the event that judgment is entered in favour of the plaintiffs.

Application dated 28th January 2021

5. Through the application dated 28th January 2021 the 1st defendant seeks the following orders: -
- 1) Spent.
 - 2) That time for seeking leave to institute an application for third Party Notice be extended.
 - 3) Leave be and is hereby granted to the Applicant/ 1st Defendant to issue Third Party Notice to Royale Health and Fitness Club Limited.
 - 4) Costs for the Application be provided for.
6. The application is brought under Order I Rule 15 and Order 50 Rule 6 of the Civil Procedure Rules. It is supported by the affidavit of the 1st defendant's director Ms. Jane Wanjiku Mukabi who states that the 1st defendant made payments to Royale Health and Fitness Club on the instructions of one Isaiah Fundi Kiplagat (deceased) but that some of the invoices issued by the Club were unilateral and incorrect. She further states that Royale Health and Fitness Club instructed auctioneers to levy distress against the 1st defendant's assets, stock and goods and have failed to account for the said items. She states that the 1st defendant seeks indemnity and contribution from the Club which should therefore be enjoined in the proceedings as a third party.
7. The respondent opposed the application through the replying affidavit sworn by Joan Catherine Kiplagat who states that the application is premature as the pleadings are yet to close and that the defendants have failed to adduce evidence of full payment of rent. She further states that the defendants should stick to their counterclaim without having the Club as a third party.
8. The applications were canvassed by way of written submissions which I have considered. I find that the first issue for determination is whether the 2nd and 3rd defendant should be struck out of the suit. The applicant invoked Order 1 Rule 14 of the Civil Procedure Rules provides that: -
- Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by chamber summons or at the trial of the suit in a summary manner.
9. The applicant contended that there is no privity of contract between the plaintiff and the 2nd and 3rd defendants as the subject of the suit is between the plaintiff and the 1st defendant. The 2nd and 3rd



defendant further contended that allowing the suit, as it is, will be tantamount to breaching the 1st defendant's corporate veil.

10. In a rejoinder, the plaintiff stated that the 2nd and 3rd defendants are the directors of the 1st defendant and they acted as guarantors to the lease signed between the 1st defendant and the plaintiff.
11. In the case of *Amon vs Raphael Tuck & Sons Ltd (1956) 1 All ER 273*, cited in *Pizza Harvest Limited v Felix Midigo [2013] eKLR* the court rendered itself on the issue of a necessary party to the proceedings as follows: -

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

12. The plaintiffs claim is with regard to rent arrears incurred by the 1st defendant arising from the lease agreement between the parties. It was not disputed that the 2nd and 3rd defendants guaranteed the lease agreement in question. I therefore find that the plaintiff has made out a case for the inclusion of the 2nd and 3rd defendants in this suit so that the court can determine the dispute between all the parties.
13. The 2nd issue is whether Third Party Notice should be issued to Royale Health and Fitness Club Limited. The 1st defendant's case was that it intends to seek indemnity from the Club thus making the said club a necessary party to these proceedings.
14. The plaintiff however termed the application as premature because the pleadings have not closed. She argued that it was not necessary for the third party to be enjoined in the suit.
15. Order 1 Rule 10(2) of the *Civil Procedure Rules* stipulates as follows on joinder of parties: -

“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.”

16. The principles applicable to an application for joinder were set out by the Court of Appeal in *JMK vs MWM & Another [2015] eKLR* as follows: -

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the



suit, to be added as a party. Commenting on this provision, the learned authors of Sarkar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P. 887), state that:

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties."

17. The same approach was adopted in *Central Kenya Ltd. vs Trust Bank & 4 others*, CA No. 222 of 1998, where the court held that: -

"all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in *TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS* [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."

18. Having regard to the findings and observation that I have made in this ruling, I find that the 1st defendant's application meets the requirements for joinder of the intended 3rd party to these proceedings. In the premises I issue the following final orders: -
- a. That the application dated 7th December 2021 is hereby dismissed.
 - b. Leave is hereby granted to the 1st Defendant to issue third party notice to Royale Health and Fitness Club Limited.
 - c. The costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 9th day of December 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Kabura for Enonda for Defendants/Applicants

Ms Awuor for the Plaintiffs.

Court Assistant: Margaret

