



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION-MILIMANI**  
**CIVIL CASE NO.128 OF 2017**

**PRIME STEEL MILLS LTD.....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**ABYSSINIA IRON & STEEL LTD.....2<sup>ND</sup> PLAINTIFF/RESPONDENT**

**WESTERN STEEL MILLS LTD.....3<sup>RD</sup> PLAINTIFF/RESPONDENT**

**VERSUS**

**BLUE NILE (EA) LTD.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**MIDROC WATER DRILLING COMPANY LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This is a ruling on the 2<sup>nd</sup> Defendant's application dated 22<sup>nd</sup> June, 2017. It seeks the following orders:-

1. That execution of default judgment entered on the 24<sup>th</sup> April 2017 be stayed.
2. That orders granted on 5<sup>th</sup> April 2017 for deposit with the Court of **Kshs. 20,000,000** by the Defendants be set aside and that the name of the Applicant herein **Midroc Water Drilling Company Ltd** be struck out from this suit.

**Grounds On The Face Of the Application are as follows:-**

1. **THAT** the Plaintiff/Respondents enjoined the Applicant as parties to the suit herein without any justification or cause of action.
2. **THAT** Plaintiffs allegation that the Applicant and the 1<sup>st</sup> Defendant/Respondent are associated companies does not in itself form a cause of action.
3. **THAT** the Plaintiff only made a claim that the 1<sup>st</sup> Defendant had committed to settling its contractual obligation against the Plaintiffs Courtesy of a perceived expected decretal sum due to the Applicant herein which claim is false.
4. **THAT** the Applicant is a stranger to the averments and claims by the Plaintiff on the relationship between 1<sup>st</sup> and 2<sup>nd</sup> Defendant and or the decretal sums if any.
5. **THAT** the Applicant was never a party to the contractual relationship between the Plaintiffs and the 1<sup>st</sup> Defendant, neither does ant party have any right to levy lien to the Applicants assets, if at all.
6. **THAT** the Court entered an Ex-parte order for the deposit of a security of **Kshs.20,000,000** with the Court on 5<sup>th</sup> April 2017 affecting the Applicant without being heard and that the Applicant runs the risk of being cited for contempt for not observing the above order if it remains on record.
7. **THAT** the Plaintiffs have a judgment in default entered on 24<sup>th</sup> April 2017 by the Court which the Plaintiff applied for the extraction of a decree on or about 6<sup>th</sup> May 2017 and that the Applicant runs the risk of having its assets attached and or wasted by the Plaintiff for a cause of action unknown to it unless this Honorable Court intervenes.

The application is supported by Affidavit sworn by John Kendagor Rotich who is the General Manager of the 2<sup>nd</sup> Defendant's herein dated 22<sup>nd</sup> June, 2017. He averred that the Applicants have been greatly prejudiced and inconvenienced for having to defend a suit wherein they have been wrongly sued, occasioning loss of time and costs.

He restated grounds set out above.

In response the Plaintiff/Respondents filed a Replying Affidavit sworn by Joan Misere, an advocate of the High Court of Kenya. She averred that the Plaintiffs instituted a suit against the Defendants seeking payment of the principal amount totaling **Kshs. 49,930,098.48** plus interest in the sum of **Kshs. 7,828,888.56** owing and due to the Plaintiffs. She averred that the Defendants were supposed to deposit **Kshs. 20,000,000** in Court pending hearing and determination of the suit and in addition they were to enter appearance and file their defence which they neglected to do either. The Defendants later entered their joint defence and response on the 4<sup>th</sup> May 2017 days after the judgment in default had been entered.

She averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had similar directors being Mohammed Said Chute and Lidia Gode Yussuf and that vide a letter dated 15<sup>th</sup> December 2016, the 1<sup>st</sup> Defendant through its Director Mr. Mohammed Said Chute undertook to settle the debt upon receipt of the proceeds of the judgment delivered in favor of the 2<sup>nd</sup> Defendant against National Water Conservation & Pipeline Corporation. She averred that in addition, Lidia Gode Yussuf a Director in both Defendant companies issued the 1<sup>st</sup> Plaintiff with postdated cheques totaling sum of **Kshs. 20,000,000** which upon presentation was dishonored.

She averred that the security for payments of sums owed to the Plaintiff Property **L.R. No. Dagoretti/Ruthimitu/661** Dagoretti area in Nairobi County could only secure **Kshs. 1,500,000** which is not sufficient to satisfy payment of the sums owing and due to the Plaintiff.

Further, in response the 1<sup>st</sup> Defendant/Respondent filed a Replying Affidavit sworn by Wangira Okoba, Advocate who averred that she was instructed by the 1<sup>st</sup> Defendant to file an application dated 3<sup>rd</sup> May 2017 for review of the Court order and a further application dated 9<sup>th</sup> May 2017 for a stay of execution of the Court order dated 5<sup>th</sup> April 2017 but the Court file went missing and later learnt that the same had been irregularly transferred to the family division for purposed of entering a judgment in default thus denying the 1<sup>st</sup> Defendant a chance to defend itself. This was done despite the Deputy Registrar of commercial division being on duty. She averred that initially one of the directors of the 1<sup>st</sup> Defendant assumed that proceeds from the judgment expected for the benefit of the 2<sup>nd</sup> Defendant could be used to repay part of the Plaintiffs claim but later on learnt that the money from the said judgement belonged to the Kenya Commercial Bank which had financed the operations of the 2<sup>nd</sup> Defendant.

She further averred that the Plaintiffs owe the 1<sup>st</sup> Defendant over **Kshs. 17,000,000** for transport services rendered which the Plaintiffs have failed and or refused to pay and the 1<sup>st</sup> Defendant is in the process of raising a counter claim or filing a separate suit if necessary.

## **2<sup>ND</sup> DEFENDANT/ APPLICANT'S SUBMISSIONS**

Counsel for the 2<sup>nd</sup> Defendant restated the grounds on the Notice of Motion and the Supporting Affidavits and raised two issue one is argued is whether the 2<sup>nd</sup> Defendant is a necessary party and whether default judgment was a fraud

Counsel submitted that Justice (Retired) Havelock in the case of *Pizza Harvest Ltd Vs. Felix Midigo(2013)eKLR* cited with approval the words of Devlin J in *Amon Vs. Raphael Tuck & Sons 1956 1 ALL ER 273*, in reference to who is a necessary party wherein the good judge held at Paragraph 286-287:-

*“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 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 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.”*

## **PLAINTIFF/ RESPONDENTS SUBMISSIONS**

Counsel for the Plaintiff restated the grounds on Replying Affidavit and submitted as to whether the 2<sup>nd</sup> Defendant was rightly enjoined as a party to this suit and whether the default judgment was regularly entered.

Counsel submitted that he would like to rely on the authority cited by Justice (Retired) Havelock in the case of *Sameer Africa Limited Vs. Aggarwal & Sons Limited (2013)eKLR* which he relied on the Court of Appeal decision in *Shanzu Investments Ltd Vs. The Commissioner of Lands Civil Appeal No.100 of 1993* as follows;

*“Now, in this instance the judgment was regularly obtained in such circumstances the Court will not interfere unless satisfied that there is a Defence on the merits.”*

## **ANALYSIS AND DETERMINATION**

I have considered arguments by parties herein. The issue as to whether *ex parte* judgment was regularly entered has been raised in this application. On perusal of the record I note that on 28<sup>th</sup> may 2018 this Court found that *ex parte* judgment was properly entered. I will not go back to the issue again.

I wish to consider the remaining issue set out hereunder:-

1. Whether the 2<sup>nd</sup> Defendant was wrongly joined in this suit and name of the 2<sup>nd</sup> Defendant should therefore be struck out.
2. Whether orders for deposit of Kshs. 20,000,000 by Defendants should be stayed.

On the first issue the 2<sup>nd</sup> Defendant argue that there is no cause of action against them as they were wrongly sued and that the 2<sup>nd</sup> Defendant was condemned to jointly deposit security of Kshs. 20,000 together with the 1<sup>st</sup> Defendant without being heard. That a mere association of parties do not raise an actionable claim when it is owing to the other. That the only claim is the 1<sup>st</sup> Defendant committed to settle Plaintiffs claim from expected decretal amount due to the Applicant; allegation which is denied by the 2<sup>nd</sup> Defendant

On perusal of the Plaint filed, I note that in paragraph 7 the Plaintiff has indicated that the 2<sup>nd</sup> Defendant is associate to 1<sup>st</sup> Defendant. That pursuant to an oral agreement the Plaintiff agreed to provide credit facilities to the 1<sup>st</sup> Defendant and associate companies. Paragraph 13 clearly indicate that the credit facilities were provided to the 1<sup>st</sup> Defendant.

Paragraph 15 of the Plaint indicate that the 1<sup>st</sup> Defendant promised to settle the amount owing upon receipts of judgment in favour of the 2<sup>nd</sup> Defendant.

There is no indication to the effect that the 2<sup>nd</sup> Defendant was provided credit facility to the 2<sup>nd</sup> Defendant nor is there any guarantee undertaken by the 2<sup>nd</sup> Defendant for facility or commitment to pay on behalf of the 1<sup>st</sup> Defendant. The cheque that was dishonored was issued by the 1<sup>st</sup> Defendant. The Plaintiff has not demonstrated any claim against the 2<sup>nd</sup> Defendant. I do not see any remote connection between the credit facilities advanced to 1<sup>st</sup> Defendant with the 2<sup>nd</sup> Defendant.

From the foregoing I find that the 2<sup>nd</sup> Defendant was wrongfully joined in this suit.

#### **FINAL ORDERS**

The claim against the 2<sup>nd</sup> Defendant is hereby struck out. 2<sup>nd</sup> Defendant's name be struck out of this suit according. Costs to the 2<sup>nd</sup> Defendant.

**Dated and Delivered at Nairobi this 20<sup>th</sup> day of July, 2018**

.....

**RACHEL NGETICH**

**JUDGE**

**IN THE PRESENCE OF:**

GRACE : COURT ASSISTANT

WAKOKO : COUNSEL FOR 2<sup>ND</sup> DEFENDANT/APPLICANT

MISERE : COUNSEL FOR PLAINTIFFS/RESPONDENTS

WANGIRA: COUNSEL FOR 1<sup>ST</sup> DEFENDANT