REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
CIVIL SUIT NO. 1 OF 2014

BUSIA OUGROWERS COMPANY LIMITED……. PLAINTIFF

VERSUS

NILE HAULIERS LIMITED……DEFENDANT

AND

KENYA SUGAR BOARD……INTERESTED PARTY

RULING

1. The application, that I am called upon to determine, is dated 4th April 2025. It is at the instance of the plaintiff, and it seeks the joinder of the Kenya Sugar Board, for the purposes of determination of the primary prayer sought in the application. That principal prayer is the release, to the Advocates for the plaintiff, as sum of Kshs. 5,000,000.00; being a deposit, and interest that has accrued on that amount, since 26th January 2012, and that the release of that deposit sum be treated as part-settlement of the decretal amount.

2. The grounds, on the face of the Motion, are that the defendant had only paid Kshs. 4,000,000.00, out of the total decretal sum of Kshs. 22,840,169.00; the decree of the court was that the deposit, of Kshs. 5,000,000.00, was to be available to the defendant only if there were no liabilities; the plaintiff would be prejudiced, should the said amount be released to the defendant, given that the appeal, which arose from the judgement of the trial court, has since been concluded; and there was no appeal, against the rulings of 28th July 2014 and 1st October 2015, which ordered deposit of the said amount.

3. The affidavit, in support of the Motion, was sworn by Erick Jumba, the Advocate for the plaintiff, on 4th April 2025. The deponent gives the factual background to the matter, and places on record several documents. It is averred that the said deposit was by agreement of the parties, and the money was a sort of caution money. He avers that the status of the deposit was disputed, and the court had to rule, on 1st October 2015, on what the deposit was meant for, and when it was to be utilised or released. He asserts that the interpretation of what the deposit was about, in the ruling of 1st October 2015, was not

disputed. A judgement was delivered, in the suit, on 28th March 2019, which decree was subsequently upheld on appeal, by the Court of Appeal. In execution of the decree, passed on 28th March 2019, Kshs. 4,000,000.00 was recovered, but a huge balance, in excess of Kshs. 18,000,000.00, was still outstanding. The deponent argues that, if the deposit is released to the defendant, prior to the decretal amount being settled, it would be prejudiced, for the defendant still owes the plaintiff a sum in excess of Kshs. 18,000,000.00.

4. There is a response to the application, by the defendant, vide grounds of opposition, dated 16th June 2025. It is argued that the affidavit in support was sworn by the Advocate, contrary to Rule 9 of the Advocates (Practice) Rules; the application also contravened Order 19 rule 3 of the Civil Procedure Rules; it was being prosecuted without leave, contrary to Order 9 rule 9 of the Civil Procedure Rules; and it was legally untenable, for it was brought under an unknown procedure of Order 22 of the Civil Procedure Rules.

5. In addition to the grounds of opposition, there is also an affidavit, sworn in support, by Benjamin Kigen, a director of the defendant, on 16th June 2025. He avers that the change of Advocates, after judgement, had to be with leave of court or by consent. He also avers that the deponent of the affidavit in support was an Advocate, for the plaintiff, who deposes to evidential matters, in paragraphs 3, 7 and 8 of the said affidavit, something which was not allowed in law. He further avers that the procedure adopted, for the purpose of the application, was unknown, under Order 22 of the Civil Procedure Rules. He points out that the proposed interested party was once a party to the matter, but it chose to withdraw from the proceedings, on 20th July 2016. He asserts that the plaintiff was seeking to make a discovery, as the deponent of the affidavit in support, has not provided proof of the connection between the funds and the proposed interested party. He argues that the application was in abuse of court.

6. Directions were taken, on 9th June 2025, for disposal of the application, by way of written submissions. The plaintiff and the defendant have filed written submissions.

7. The plaintiff has submitted on 5 issues, being failure by the defendant to indicate whether the decretal amount had been settled in full, and if efforts were being made to settle the balance; technicalities on

citation of the law being excusable, by dint of Article 159(2) of the Constitution; an Advocate swearing an affidavit on facts within his knowledge, and which are formal and non-contentious; contravention of Order 19 rule 3 of the Civil Procedure Rules, 2010; and joinder of a party at the execution stage of a decree.

8. On the first issue, the plaintiff cites the ruling of 1st October 2015, where the contentious amount was described as caution money, deposited by the defendant, with the proposed interested party, from which the plaintiff could draw any outstanding liability due to it from the defendant, at the end of the contract. It is argued that the defendant had failed to settle the decretal amount, and failed to file a reply to the application, which meant that the averments, in the supporting affidavit, were uncontroverted. *Faustina Njeru Njoka vs. Kimunye Tea Factory Limited* [2022] eKLR [2022] KEELC 491 (KLR) (Kaniaru, J) and *Kennedy Otieno Odiyo & 12 others vs. Kenya Electricity Generating Company Limited* [2010] eKLR [2010] KEHC 282 (KLR) (Makhandia, J) are cited.

9. On the second issue, on technicalities of procedure, it is submitted that the court has jurisdiction, over the execution of a decree, and it was from that background that the instant application was brought under section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya. It is argued that failure to cite specific rules or sections, under which an application is brought, is not fatal, in view of Article 159(2) of the Constitution.

10. On the third issue, on an Advocate swearing an affidavit, in matters where it is acting for a party, it is submitted that the facts deposed to, in that affidavit, were facts that were known to the parties, and to the court, and that they were formal and non-contentious. *Ibrahim & another vs. Zumzum Investment Limited & another* [2024] KECA 862 (KLR) (Odunga, J) is cited in support. On the fourth issue, the appointment of Erick Jumba & Company, Advocates, as the Advocates for the plaintiff, it is submitted that the firm of Balongo & Company, Advocates, was still on record, as it has been re-appointed. It is pointed out the that defendant never filed any papers, and Mr. Jumba Eric was formerly working in Balongo & Company, Advocates. On the fifth, and last issue, of joinder of a party after judgement and execution proceedings, it is submitted that nothing barred it, and it is pointed out that garnishee proceedings are a good example.

11. The defendant submits on only 2 issues: whether the application contravened Rule 9 of the Advocates (Practice) Rules and whether there was threshold for joinder of an interested party.

12. On the first issue, it is conceded that the issues deponed to by Mr. Jumba were non-contentious, but that the issue, at paragraph 11 of his affidavit, could only be proved by the plaintiff, with respect to the prejudice to be suffered by it, should the deposited amount be released to the defendant. It is argued that, to show prejudice, there would be requirement of proving, orally or vide documents, the prejudice to be suffered. It is submitted that Order 9 rule 3 of the Civil Procedure Rules and Rule 9 of the Advocates (Practice) Rules requires Advocates to refrain from swearing affidavits, on behalf of their clients, on matters that belong to the parties. It is also submitted that the issue around the agreement to deposit the amount in question also required proof, which could only come from the party itself. It is argued that the affidavit was defective, and ought to be struck out. *Matuu High School vs. Kitema* [2022] KEHC 194 (KLR) (Muigai, J) and *City Gas East Africa Limited vs. Omagwa* [2024] KEHC 4918 (KLR) (Odera, J) are cited.

13. On the second issue, that around joinder at execution stage, it is pointed out that the proposed interested party had been made a 1st defendant in the initial stages of the suit, and had filed a defence, acknowledging that it had received a sum of Kshs. 5,000,000.00, as deposit, to be reimbursed to the 2nd defendant, the current sole defendant, upon settlement of any outstanding damages, loss or liabilities to the 1st defendant. It is further pointed out that the proposed interested party withdrew from the suit, which denied the current defendant opportunity to be heard on the defence that the proposed interested party had filed, with respect to the Kshs. 5,000,000.00.

14. It is submitted that having not been heard on that defence, it would be prejudicial, to the defendant, to have the proposed interested party joined, with respect to issues that it ought to have litigated at the trial, and it would condemn the defendant unheard at execution stage. *Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 others* [2014] eKLR [2014] KESC 32 (KLR) (Ibrahim & Wanjala, SCJJ) is cited. It is submitted that the provisions of the Civil Procedure Rules, on execution, do not provide for joinder of parties

for the sole purpose of settling the decree. There is citation of *Njau vs. Muiruri Kambo (intended interested party)* [2023] KEELC 21696 (KLR) (Omolo, J) and *Bellevue Development Company Limited vs. Vinayak Builders Limited & another* [2014] eKLR [2014] KEHC 6228 (KLR) (Gikonyo, J). It is argued that the proceedings were neither garnishee nor objection proceedings.

15. The application, dated 4th April 2025, has 2 aspects. There is part of it which seeks joinder of the proposed interested party, and the other which seeks release of the deposit to the Advocate for the plaintiff, and the treatment or deeming of the release of that money as payment of the decretal amount. These 2 aspects are different. The second aspect of the application, the prayer on the release of the money and its deeming, can only be made upon the joinder of the proposed interested party as such. It would be foolhardy to collapse the 2 aspects in one application, for joinder of that party would necessitate that it be heard on the substantive prayer, that the release of the funds it is holding to the Advocates for the plaintiff.

16. The person or entity that seeks joinder, under prayer (b) of the Motion, is the Busia Outgrowers Company Limited. That is the applicant. The affidavit in support of the Motion is sworn by Mr. Eric Jumba. That person is not a member of the Busia Outgrowers Company Limited, either as a member of its Board of Directors, or as its employee. He is the Advocate for the plaintiff. Mr. Jumba cannot possibly swear an affidavit for the joinder of the Kenya Sugar Board as a party to the suit herein, unless at the behest of his client. An application for joinder can only be by the party seeking the joinder of the other, and the affidavit, in support of the application, must be by the party itself, if a natural person, or by its principals, in the case of an artificial person, who ought to explain why they seek the joinder. The deposit was made for the benefit of the parties, not their Advocates, and any issue, about its release, should be raised in an application by the parties themselves, e Busia Outgrowers Company Limited and not by their Advocates, including an application for joinder of a party to facilitate that release.

17. The reasons for which a client may wish to have a party joined or added should only be within the knowledge of the client, and the Advocate cannot articulate them as his own, for they can only come from the Advocate by way of instructions from his client. It would not be a case of the Advocate having personal knowledge of those facts or

reasons, but by way of the Advocate being informed of them by his client. After the joinder, the Advocate may, if at all, swear affidavits, in the matter, on interlocutory proceedings, turning on non-contentious matter, that may have come to their knowledge, in the course of the proceedings, and which are not contested.

18. An Advocate is not a party to the court proceedings, where he is on record as acting for any of the parties. He is not in the proceedings as a party, but as a spokesperson for the party instructing him. For that reason, he is not competent to swear affidavits on evidential matters, touching on issues that can only be within the personal knowledge of the party for whom he acts. The Advocate is not a party to the dispute in court. He only articulates issues on behalf of the parties, who are the actual combatants. He should, in the circumstances, avoid getting drawn into the conflict, and should limit himself to offering legal assistance to those engaged in the conflict. Facts and evidence should be channelled to the court directly by the parties, either orally or by way of affidavits, sworn by the parties themselves.

19. The Advocate should not allow himself to become the conduit for channelling that evidence or facts to court, either by testifying in the case, in which he is himself an Advocate, or swearing affidavits in such a case. If he does so, he would be descending into the arena of conflict, and he would be losing sight of his role as an Advocate in the matter. That is what Rule 9 of the Advocates (Practice) Rules is all about. The Advocate ought to stick to his role as an Advocate in a matter, and stay clear of doing things that ought to be done by the parties themselves. Doing otherwise would expose the Advocate to being dragged into the conflict, by being required to appear in the matter as a witness, to be cross-examined on the contents of an affidavit, that he should have avoided swearing in the first place. Such an eventuality would deprive the client the services of the Advocate, for the Advocate, who has been reduced to a witness, by the opposite side, cannot, once he takes the witness stand, possibly cross-examine himself, on behalf of his client.

20. Even where an Advocate has to swear an affidavit, in a matter where he appears for a party in the proceedings, he should do so only on the instructions of his client, and he should disclose the source of his authority to make and swear the affidavit. He should also disclose the source of his knowledge and information, on the facts or matters

that he deposes, and, if he deposes on account of his belief, he should state that he verily believes what he deposes, on belief, to be true. The Advocate does not own the case, the same belongs to the party, and where the Advocate has to swear an affidavit, he must disclose the authority of he who has authorised him to swear it on his behalf. He must also disclose the sources of the information that he depones to, because he does not own the knowledge and information that he purports to share in the affidavit. Those are the preserve of the client, and that is the more the reasons an Advocate should avoid making and swearing affidavits on behalf of clients, in matters that the Advocate is actively prosecuting in court on behalf of the same client. The opinions, he expresses, in the affidavit, in the matter of his client, are his own, not his client's, and, therefore, he must express that he believes them to be true.

21. Prayer (b) of the application, dated 4th April 2025, is by a party who seeks joinder of another party to the matter. The applicant is not Mr. Jumba, for he is neither a member of the board of the Busia Outgrowers Company Limited nor an employee or officer of that company. He is an Advocate acting for the Busia Outgrowers Company Limited. He should not act as if he is the Busia Outgrowers Company Limited, by swearing an affidavit, which the Busia Outgrowers Company Limited or its officers should be swearing, for it is them who are seeking the joinder sought in the application. In that affidavit of 4th April 2025, Mr. Jumba does not purport to have had been authorised by the Busia Outgrowers Company Limited to make and swear that affidavit, for the joinder of the Kenya Sugar Board, and there is no knowing whether the application was not made by Mr. Jumba on his own initiative, upon coming to the wisdom that the Kenya Sugar Board ought to be joined to the cause, since he has not indicated that he had the authority of the plaintiff to make that affidavit on their behalf.

22. The application seeks release of moneys to a firm of Advocates where Mr Jumba is practising as an Advocate. The deposit was meant to benefit the party and not the Advocate, and, in the circumstances, it would be awkward for such moneys to be released to the Advocate for the party, rather than to the party itself. The usual way to apply for release of such moneys is to request that the moneys be released to the party, through their Advocates, or for the moneys to be released to the Advocates on behalf of the party, for the Advocate is but just an agent for the party. The prayer, in this case, does not make

such a request, it simply asks that the money be released to the Advocate for the applicant, there is no mention that the Advocates are to receive the money on behalf of the applicant. That then makes it critical, that the affidavit be sworn by an officer of the party, rather than the Advocate who is praying that the money be released to him. I see no authority from the party that the money be released to the Advocate. I have no evidence that the party is aware of the making of this application, or has sanctioned it. It could very well be the case that the Advocate is seeking release of the moneys to himself, for his own good, with no reference whatsoever to the good of the party.

23. On the joinder of the Kenya Sugar Board, I do note that that entity was once a party in these proceedings. That may be of little relevance. What I understand is that the said entity is sought to be joined solely because it is holding the funds, the subject of this application. I agree with the respondent, there would be no need to join the Kenya Sugar Board for that reason alone. It does not have to be a party to the proceedings for an order to be directed to it, requiring it to release the money, it is holding, to whoever the court may order. That order can still be made even when it is not a party.

24. Various other arguments have been made, but I think they are not particularly critical to the determination of the application, dated 4th April 2025.

25. In view of everything that I have said above, it should be clear that the said application is not merited. I hereby dismiss it, and award costs to the defendant. Orders accordingly.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, ON THIS 27TH DAY OF OCTOBER 2025.

W MUSYOKA
JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates
Mr. Jumba, instructed by Erick Jumba & Company, Advocates for the plaintiff.
Mr. Mwangi, instructed by Arthur Ingutya & Company, Advocates for the defendant.