REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HIGH COURT COMMERCIAL DIVISION

CIVIL APPEAL NO. E076 OF 2024

OXX ENERGY LIMITED.....APPELLANT

VERSUS

EXCELLENT LOGISTICS LIMITED.....RESPONDENT

AND

ENERGY DEALERS ASSOCIATION.....INTENDED INTERESTED PARTY

RULING

1. Before me is a Notice of Motion dated 4th November 2024. The application is supported by the affidavit of *Kepher Ojil Odongo*, Secretary General of the Energy Dealers Association (EDA), sworn on the even date.
2. The Respondent opposes the application through the Replying Affidavit of *Fred Ngugi Ndung'u*, sworn on 25th April 2025.
3. The Application was canvassed by way of written submissions which parties duly filed.
4. Having considered the Application, the opposition and the parties' respective submissions, the sole issue that falls for this Court's determination is whether the application is merited.

5. The primary issue for determination is whether a party can be enjoined at the appeal stage, and if so, what criteria apply. While Order 1 Rule 10(2) of the Civil Procedure Rules is the general portal for joinder, its application at the appellate level is guided by the Court of Appeal decision in **Meme v Republic [2004] EA 124** and later affirmed in **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others [2014] eKLR**.
6. The law is settled that a court's power to join a party is discretionary and aimed at ensuring all necessary parties are before the court to avoid a multiplicity of suits. Nevertheless, at the appellate stage, I am not conducting a trial. I am reviewing what happened below. I examine the record, read the evidence already taken, consider the judgment of the tribunal, and decide whether that judgment was right or wrong. I do not hear fresh evidence except in exceptional circumstances, nor do I bring in new parties unless the circumstances are truly exceptional. My business is to determine this appeal on the record from the Energy and Petroleum Tribunal, not to turn back the clock and start over with new parties and new evidence.
7. That said, I acknowledge that joinder is possible at the appellate stage. In this regard, I associate myself with the decision of the Court of Appeal in Tanzania in **Tang Gas Distributors Ltd v Said & Others [2014] EA 448** to the effect 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."

8. This Court has inherent power under Section 3A of the Civil Procedure Act to make orders for the ends of justice, and the Supreme Court in **Francis Karioki Muruatetu & another v Republic & 5 others [2016] eKLR** made it clear that joinder can be permitted at any stage of proceedings. However, the Supreme Court also emphasised that courts become more circumspect the later the application is made. By the time a case reaches the appellate stage, the applicant must demonstrate something approaching exceptional circumstances.
9. The ***Muruatetu case*** *(supra)* established four key questions that a court must ask when considering a joinder application: first, whether the applicant has an identifiable legal interest in the subject matter of the proceedings; second, whether that interest will be adequately articulated by the existing parties; third, whether the applicant will suffer prejudice if not joined; and fourth, whether the joinder will introduce new issues or cause undue delay.
10. I shall evaluate this application against those four questions. On whether the applicant has an identifiable legal interest in the subject matter of the proceedings, I have

carefully examined the Applicant's supporting affidavit. The interest described appears to be a commercial expectation rather than a vested legal right. In my considered view, the Applicant has not crossed the threshold of a "necessary party." The dispute between the Appellant and the Respondent can be fully and effectually adjudicated without the Applicant's presence. This Court can determine whether the lower court erred in law or fact based solely on the record of the original parties. The Applicant's claimed interest, while perhaps real in a general sense, is not so proximate to the appeal as to make its joinder indispensable. This ground therefore fails.

11. On the second issue of whether that interest will be adequately articulated by the existing parties, the Respondent contends that the Appellant remains a member of the applicant and is already before this Court. The Respondent argues that the Appellant shares the Association's interests and can adequately advance the arguments that the applicant wishes to make. I find this argument persuasive.

12. The Applicant has not demonstrated that the Appellant would fail to advance arguments that the Association considers important. There is no allegation of collusion between the Appellant and the Respondent, nor any conflict of interest between OXX Energy and EDA. In fact, they are on the same side of this dispute, as the Association's Secretary-General, Mr. Kepher Ojil Odongo, was a witness before the Tribunal. His witness statement, dated 30th January 2024, is already part of the record of appeal. Everything EDA wishes

to say about the formation of the agreement, the withdrawal procedures, the transition period following Legal Notice No. 100 of 2019, and the dealings between the parties is already before this Court through the sworn testimony of its own officer.

13. The Supreme Court in ***Muruatetu*** *(supra)* held that a proposed interested party must show that the existing parties will not adequately represent its interest. In these circumstances, it is difficult to see what argument EDA would make that the Appellant cannot make just as effectively. This ground also fails.

14. Third, whether the applicant will suffer prejudice if not joined. As I have already noted, the Applicant gave evidence before the Tribunal, and that evidence is on the record. The Association's views are therefore before this Court. If the Association believes that the Tribunal misapprehended that evidence or gave it insufficient weight, that is an argument that can be advanced by the Appellant in the appeal. No prejudice will therefore accrue to EDA if joinder is refused.

15. Lastly, whether the joinder will introduce new issues or cause undue delay. The Applicant seeks leave to file a replying affidavit in this matter. According to the Supporting Affidavit of Mr. Odongo, the Association wishes to explain the formation and purpose of the Reciprocal Agreement, clarify the procedures for withdrawal from the Association, provide context regarding the transition period following Legal Notice No. 100 of 2019, and generally shed light on the dealings between the Appellant and the Respondent. With respect, that is new evidence.

16. The law is well settled that appellate courts do not receive new evidence except in very narrow circumstances under Order 42 Rule 27 of the Civil Procedure Rules. The Applicant has not invoked that rule, nor has it satisfied the stringent conditions for admitting additional evidence (namely, that the evidence was not available despite due diligence, that it is relevant and credible, and that it would not have changed the outcome of the trial). The Applicant has not even attempted to meet that standard. To allow joinder as a backdoor means of introducing fresh evidence would be a subversion of the appellate process. This ground fails decisively.

17. Beyond the four *Muruatetu* factors, I must also consider whether the Applicant has demonstrated the exceptional circumstances required for joinder at the appellate stage. The Court of Appeal in **Independent Electoral and Boundaries Commission v National Super Alliance Kenya & 6 Others [2017] eKLR** held that for joinder on appeal, there must be exceptional circumstances demonstrating that the party's presence is indispensable for the just determination of the appeal. That is a high bar, and the Applicant has not cleared it.

18. As previously noted, the Appellant is already before the Court. The Appellant's interests align with the Applicants. The Association's Secretary-General already testified, and his evidence is on the record. This Court can review that evidence, consider the Tribunal's findings, and reach a just determination without making EDA a formal party.

19. For the foregoing reasons, I find that the application dated 4th November 2024 is without merit. It is hereby dismissed with costs to the Respondent.

RULING delivered virtually, dated and signed at **NAIROBI**

This **30th** day of **April** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Kamau h/b for Mr. Gathu for Appellant

Ms. Mitei h/b for Mr. Kisaka for Respondent

Mr. Aira hb for Mr. Madowo for Interested Party

Court Assistant*: Lispa*