



**Starryway Trading & Shipping Company Ltd v Et Timbers PTE Limited & another
(Civil Appeal E121 of 2022) [2023] KECA 1323 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1323 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E121 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 10, 2023**

BETWEEN

STARRYWAY TRADING & SHIPPING COMPANY LTD APPELLANT

AND

ET TIMBERS PTE LIMITED 1ST RESPONDENT

THE OWNERS OF MOTOR VESSEL 'DOLPHIN STAR' 2ND RESPONDENT

*(Appeal from the decision of the High Court delivered on the 18th day
of March, 2022 in Mombasa HC Admiralty Claim NO. E003 OF 2021)*

JUDGMENT

1. The background of the case is that on April 4, 2021, ET Timbers PTE Limited, the 1st respondent herein, commenced *in rem* proceedings before the Mombasa High Court in Admiralty Cause No E003 of 2021 against the Owners of Motor Vessel “Dolphin Star”, the 2nd respondent herein, for the cost and freight (C&F) value of the cargo at a sum of US \$ 2,000,000.00. The claim was based on alleged breach of a charter party entered into between the 1st respondent as charterers of the suit vessel, and Starryway Trading & Shipping Co Ltd, the disponent owners of the suit vessel, as evidenced by the Fixture Note dated January 19, 2021, the head owners of Motor Vessel “Dolphin Star” (hereinafter the suit vessel), being Defang Shipping Co. Ltd.
2. The 1st respondent’s claim was that the agreement was for direct carriage of solo cargo of 6,254.31 M³ timber logs to the discharge port of Chittagong, Bangladesh but the 2nd respondent went ahead and carried other cargo and also deviated from the load port of Greenville, Liberia by calling on other ports in Southern Africa. The 1st respondent also alleged that the owners of the said motor vessel failed to issue bills of lading for the cargo loaded at the Port of Greenville, Liberia and only issued a draft bill of lading which the 1st respondent claimed led to a loss of US \$ 2 million. The High Court issued a warrant of arrest against the vessel on the same day. On April 15, 2021, the 2nd respondent filed an



application challenging the jurisdiction of the court but the court upheld its jurisdiction to hear the dispute between the 1st and 2nd respondents herein. The High Court also dismissed the 2nd respondent's application seeking stay of the proceedings pending the hearing and determination of an appeal filed before this Court, a decision which was upheld by this Court.

3. By an application notice dated October 15, 2021 filed by the appellant, the appellant sought that it be joined to the said proceedings as an interested party; that after the interparte hearing, the court allows the appellant to exercise its right of lien over the 1st respondent's cargo on board the 2nd respondent vessel; that there be a stay of proceedings of the matter until the arbitration proceedings between the appellant and the 1st respondent ongoing in London are determined; and for the costs of the application.
4. The appellant's contention was premised on ground that in the application seeking for the arrest of the vessel, the 1st respondent wrongfully described the appellant as the owners of the vessel and 'relevant person' within the meaning of section 21(4) of the Senior's Court Act hence the appellant could not acknowledge service of the claim since it was neither the beneficial owner nor the charterer of the vessel under the charter by demise. According to the appellant, on January 19, 2021, it entered into a voyage charter with the 1st respondent evidence by a fixture note incorporating other terms from GENCOM 94 Form of voyage charterparty; that clause 8 of the fixture note specifically provided that the 1st respondent was to pay full freight; that the 1st respondent in violation of the terms of the fixture note failed, neglected or refused to pay the freight of USD 614,967.13; in addition to the freight, it also claimed for load port demurrage of USD 35,744.40 and damages for detention of the vessel by reason of arrest by the court; and that the total claim by the appellant against the 1st respondent was in the sum of USD 2,120,816.47 as at October 11, 2021.
5. The appellant further averred that under clause 21 of the fixture note, it instituted arbitral proceedings against the 1st respondent. According to the appellant, the 1st respondent had no known security for the satisfaction of any award that may be made against the 1st respondent in the said arbitral proceedings; that under the Kenyan and English law, a lien on cargo can only be exercised if the cargo is in the possession (actual or constructive) or control of the carrier; that as such, if the 1st respondent's application for judgement was allowed, the appellant would not only lose its right to exercise its lien over the 1st respondent's cargo, but it would also render the arbitration proceedings otiose.
6. As regards the prayer for stay of proceedings, the appellant averred that while the issues between the 1st respondent and the appellant were the subject of the arbitral proceedings, the issues between the 1st respondent and the head owners of the motor vessel, the 2nd respondent, were, pursuant to the provisions of the voyage charter, to which the 1st respondent is a party, in breach of the dispute resolution provisions.
7. The appellant, further denied that it was the 2nd respondent's agent and averred that the appellant's claim against the 1st respondent is for breach of the arbitral agreement and breach of the charterparty in detaining the vessel and preventing it from continuing with its voyage; and that freight is not payable until the bills of lading are released.
8. The appellant's application was supported by the 2nd respondent who averred that the appellant was not the 2nd respondent's agent since the appellant was a disponent owner; and that there was a time charter between the appellant and 2nd respondent.
9. In response to the appellant's application, the 1st respondent averred that the appellant was an agent of the 2nd respondent and that its name was surreptitiously and fraudulently inserted as the charterparty owner on the Fixture Note right at the outset in place of Fairwind International Shipping Company



Limited with whom all negotiations had been carried out by the 1st respondent; that having failed to secure a stay of proceedings from the High Court and this Court, the 2nd respondent was using its agent, the appellant, to ‘muddle’ the proceedings in a further attempt to obtain a stay of the proceedings; that the validity of the time charter was under challenge; that the appellant does not have any undeniable right of lien over the cargo; that a lien is only exercisable for sums due and payable as at the date of its exercise; that in the Arbitral Tribunal in London, the initial partial award stated that freight is not payable until 4 days after the release of the original negotiable signed bills of lading; that without release of the said bills of lading, the appellant has no right of lien; that the 2nd respondent is not a party to the arbitral proceedings which were commenced two weeks after the in rem proceedings hence the appellant cannot seek to intervene in these proceedings in order to ventilate a purported in personam right; and that the High Court did not have jurisdiction to entertain the in personam claim and that it would be tantamount to parallel proceedings and an abuse of the process of law and court.

10. In her ruling delivered on March 18, 2022, which is the subject of this appeal, the learned judge (Njoki Mwangi, J) while dismissing the application found that the essence of the arrest of the Vessel was for the purposes of the Vessel acting as a security if the 1st respondent’s claim was merited and if not, then the warrant of arrest would be lifted; that based on *Dr Donna Molavi v Guy Hibbert and another* (2020) EWHC 121 (Ch), for the appellant’s application to succeed, three conditions were to be met and these are: that an issue has been identified between the proposed new party and an existing party; that the issue must be connected to the matters already in dispute in the proceedings; and that it is desirable to add the new party so that the court can determine the issue identified in the first condition.
11. While finding that the first condition was satisfied, the learned Judge found that the second condition was not for the reasons that the claim in the proceedings before the court were *in rem* while the arbitral proceedings against the 1st respondent by the appellant were in personam; and that in the arbitral proceedings the appellant’s claim was against the 1st respondent’s exercise of the right of contractual lien and breach of voyage charter as opposed to the 1st respondent’s claim before the court which was seeking security from the vessel for unpaid freight. As regards the third condition, the learned Judge found that despite the appellant’s averments that it only wanted to be an interested party in the case for the purpose of maintenance of the *status quo*, there was nothing to show any respect in which the appellant would be desirable in assisting the court in determining the *in rem* claim against the 2nd respondent. Accordingly, the learned Judge held that the appellant’s application seeking to be joined as an interested party failed both under part 19.2(2) (a) and (b) of the [Civil Procedure Rules](#), England.
12. As to whether the appellant’s claim for the court proceedings ought to be stayed pending ongoing arbitral proceedings, the learned judge held that court proceedings were initiated before the arbitral proceedings hence under doctrine of *lis pendens* the court had jurisdiction to continue with the proceedings; that the appellant was not a party in the court proceedings while the 2nd respondent was not a party in the arbitral proceedings; and that since the appellant could not be joined in the proceedings, the appellant could not exercise a right to lien over the cargo on board the Vessel.
13. Aggrieved, the appellant has appealed against the decision on the grounds that the Superior Court erred in law and in fact in only considering Part 19.2(2) of the [Civil Procedure Rules of England](#) as the basis for determining the question whether the appellant could be joined in the proceedings in the Superior Court; in not appreciating and/or properly appreciating the principles of joinder of parties under part 19.2(2) of the [Civil Procedure Rules of England](#); in not properly appreciating the *ratio decidendi* of *Dr Donna Molavi v Guy Hibbert & another* (2020) EWHC 121 (Ch); in not considering the provisions of part 61.8(7) of the [Civil Procedure Rules of England](#) to determine whether the appellant could become a party to the said proceedings and thus failing to consider whether the appellant was a person whose interests were affected by an order sought or made in the said proceedings; in not considering



the provisions of section 4(3) of the *Judicature Act*, cap 8 as read with the provisions of order 1 rule 10 of the *Civil Procedure Rules*, Kenya to determine whether the appellant could become a party to the proceedings in the said proceedings; in not appreciating the nature of an *in rem* and *in personam* claim; in completely misapprehending decision of English House of Lords in the Indian Grace Case; in not placing any relevance as to whether the admiralty claim was instituted before the arbitral proceedings; in finding that the arbitral proceedings ought to be stayed; in finding that it had jurisdiction; and in finding that simply because the superior court had found (incorrectly) that the appellant could not exercise its right of lien over the 1st respondent's cargo, the appellant could not be joined to the proceedings.

14. The appellant therefore urges this court to allow the appeal, set aside the learned judge's decision and order that the appellant to be a party to the proceedings in the superior court; that the appellant be given an opportunity to protect its contractual lien over the first respondent's cargo carried on board the MV Dolphin Star; that there be stay of any proceedings in the superior court pending the appellant's protection of the appellant's contractual lien; that the superior court has no jurisdiction to handle the admiralty claim in view of the contract between the appellant and the 1st respondent; and make an order for costs in favour of the appellant in this court and in the High Court.
15. We heard this appeal on the court's virtual platform on July 31, 2023 during which learned counsel Mr Ousa Okello appeared for the appellant, Mr Kinyua Kamunde appeared for the 1st respondent while Mr Samir Inamdar appeared for the 2nd respondent. Learned counsel relied on their respective written submissions which they briefly highlighted.
16. On behalf of the appellant, an issue was taken with the 1st respondent's supplementary record of appeal and it was submitted that under rule 92(4) of the *Court of Appeal Rules*, the said supplementary record was not in compliance with rule 87 of the *Court of Appeal Rules* since the documents contained therein did not emanate from the superior court. It is submitted that the appellant will suffer prejudice if the said documents are retained since it will not be able to respond to the documents as no law allows the appellant to file an affidavit.
17. According to the appellant, had the superior court considered *CPR* 61.8 (7)(b) of England, it would have found that the appellant had interest over the cargo, which interest would be affected by the orders sought to sell the vessel; that the learned Judge ignored and misconstrued rule 61.7(b) of the *Civil Procedure Rules, England*; that despite citing the case of *Dr Donna Molavi v Guy Hibbert & another* and identifying the conditions necessary for an order for a joinder application to succeed, the learned Judge went ahead to find that the appellant had not satisfied condition 2; that the learned Judge failed to note that part 19.2.(2)(B) of the *Civil Procedure Rules* of United Kingdom specifically provided that "if there is an issue involving the new party and existing party" and not "if there is a claim.." hence the learned Judge's comparison of an *in rem* and an *in personam* claim was totally misconceived; that the 1st respondent's claim was for security for unpaid freight and the appellant's claim was for unpaid freight and unlawful arrest hence the issues between the appellant and 1st respondent were connected with the matters in dispute in the High Court.
18. The appellant asserted that it should be joined in the proceedings since the grant of the orders sought by the 1st respondent would deprive the appellant of its right to a lien right over the 1st respondent's cargo and its claim in the arbitral tribunal for unpaid freight would have been rendered nugatory. According to the appellant, the binding agreement provided for arbitration in London hence the dispute was supposed to be resolved by arbitration in London. The appellant urged the court to take judicial notice that there was nothing in the agreement that gave the 1st respondent any ground to institute *in rem* proceedings in Kenya.



19. According to the appellant a party cannot escape its contractual obligations, simply because it sued a person that was not a party to its agreement; that there was a jurisdictional ouster clause in the agreement hence the High Court was bereft of jurisdiction pursuant to section 21(4) as read with section 20(2) (h) of England [Senior Court Act 1981](#); that it served the 1st respondent with a notice of intention to exercise lien over the cargo pursuant to the contractual agreement hence it has an interest to protect its right; and that by virtue of the High Court impugned ruling, *ipso facto*, the appellant could not exercise its lien on the 1st respondent's cargo.
20. In opposition to the 1st respondent's further supplementary record of appeal dated July 25, 2023, the 2nd respondent filed a notice of preliminary objection dated July 27, 2023 wherein it stated that the court has no jurisdiction to entertain the pleading. The 2nd respondent asserted that the pleading never formed part of the superior court on March 18, 2022; no leave obtained to introduce grounds not specified in the memorandum of appeal contrary to rule 107 of the [Court of Appeal Rules, 2022](#); that it seeks to introduce additional evidence contrary to rule 31 of the [Rules](#); that the said document has no relevance to, or bearing upon the subject matter of this appeal; that notwithstanding the leave granted to the 1st respondent by the deputy registrar on July 24, 2023 to file the Record, jurisdiction to include it as part of this Appeal cannot be conferred on this court by the grant of such leave or by the acquiescence or acceptance of the parties; that the admission of the documents in the record of appeal would deprive the 2nd respondent of any opportunity to respond to the allegations and assertions made against it thereby contravening the basic principles of natural justice and the right to fair hearing. In this regard, reliance has been placed on the case of [Zachariah Okoth Obado v Edward Akong'o Oyugi & ors](#) [2014] eKLR, [Saltee International Ltd & anor v Industrial Development Bank Ltd & ors](#) [2001] eKLR and [AG & ors v Okiya Omutatab Okoiti & ors](#) [2020] eKLR.
21. On behalf of the 1st respondent it was submitted that this appeal has been overtaken by events in light of the ruling delivered by this Court on July 28, 2023 in Civil Application No E026 of 2022; that appeals arising from decisions of the High Court in Admiralty proceedings are not subject to the [Court of Appeal Rules](#) and since this appeal was not instituted in accordance with the English [Civil Procedure Rules](#); that the appellant by challenging the jurisdiction of the High Court to hear the claim has taken a step in the proceedings and cannot therefore seek to stay those proceedings pending arbitration; that since the appellant's freight has already been paid, the reason for joining the appellant to the proceedings no longer exist; that the 1st respondent's claim exceeding USD 2,600,000.00 cannot be stayed to await determination of the arbitral proceedings for USD 35,744.00'; that since the arrest of the vessel has not been ruled unlawful, the issue for damages for wrongful arrest does not arise; that since rights of lien are not granted or conferred by courts, the appellant did not need permission of the court to enforce any contractual right as it has access to justice under article 48 of the [Constitution](#); and that the orders of stay of proceedings sought by the appellant would contravene the right to fair trial guaranteed in article 25(c) of the [Constitution](#).

Analysis And Determination

22. It is important before dealing with the issues in this appeal to set out in brief, the background of the suit appealed from. The vessel the subject of these proceedings is registered by the Panama Maritime Authority and its owners are disclosed as Defang Shipping Company Limited. There is a time charter dated January 1, 2019 between the 2nd respondent as owners of the vessel and the appellant as charterers and it provides that the appellant has the liberty to sublet the vessel for all or any part of the time covered in the time charter, with the charterers remaining responsible for the fulfilment of the charterparty. We must however point out that the authenticity of that document is disputed by the 1st respondent. Subsequent to entering into the time charter, the appellant, on January 19, 2021, entered into a voyage



- charter with the 1st respondent and in the fixture note, the 1st respondent is described as the charterer while the appellant is described as the owner of the vessel. The fixture note provides that all disputes arising from the voyage charter are to be determined by an Arbitral Tribunal in London.
23. After the institution of these proceedings, the appellant instituted arbitral proceedings in London against the 1st respondent, as the respondent in which the appellant's claim is for unpaid freight, load port demurrage, breach of the arbitration agreement and a declaration that the 1st respondent is to indemnify the appellant in respect of any liabilities that the appellant may incur to the 2nd respondent in the time charter between the appellant and the 2nd respondent.
24. This is an appeal against an interlocutory decision made by the trial court arising from an application by the appellant to be joined as an interested party to the proceedings appealed from. There is a long list of decisions where this court has expressed undesirability of an appellate court dealing with an interlocutory appeal, expressing conclusive views on the issues touching on the merits of the suit and the application, as doing so is likely to infringe on the jurisdiction of the trial court, and may inhibit it in exercising its discretion in the matter pending before it. The practice is and has always been that at interlocutory stage the court may only express its views in the matters in controversy on a *prima facie* basis. Otherwise, a concluded view is likely to tie the hands of the judge who would eventually hear the case, and is likely to embarrass him or her. See *Mansur Said & others v Najma Surur Rizik Surur* Civil Appeal No 186 of 2005; *Agnes Nzali Muthoka v Insurance Company of East Africa* Civil Appeal No 234 of 2000 [2001] 1 EA 143; *Niazons (K) Limited v China Road & Bridge Corporation (Kenya)* Civil Appeal No 157 of 2000 [2001] KLR 12; [2001] 2 EA 502; *Noorlands Limited v Ravji Karsan Patel* Civil Appeal No 285 of 2000; *David Kamau Gakuru v National Industrial Credit Bank Limited* Civil Appeal No 84 of 2001.
25. It is in that light that we have considered the submissions made regarding the documents incorporated in the supplementary record of appeal lodged by the 1st respondent and formed the view that nothing turns on those submissions in so far as the determination of the present appeal is concerned. In other words, those documents are unnecessary for the purposes of determination of the present appeal and we wish to say no more on that issue.
26. There is no doubt that the decision whether or not to join a party is an exercise of discretion. In deciding the appeal, we are guided by the Supreme Court authority of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* (2019) eKLR in which it was held that:
- “We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of *Kacem v Bashir* (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:
- ‘In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are stricter: (1) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.’”
27. It was therefore held by this Court in *Price & another v Hilder* [1986] KLR 95 that it would be wrong for the court to interfere with the exercise of the trial court's discretion merely because the court's decision would have been different. The Supreme Court of Uganda, in *Kiriisa v Attorney-General and another* [1990-1994] EA 258 held that it is settled law that the discretion must be exercised judiciously



and an appellate Court would not normally interfere with the exercise of the discretion unless it has not been exercised judiciously. As to what the term “discretion” connote the Court stated that:

“Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances.”

28. A discretion necessarily involves a latitude of individual choice according to the particular circumstances and differs from a case where the decision follows *ex debito justitiae* once the facts are ascertained. In matters of discretion authorities are not of much value, unless they are cited with a view to showing that the discretion was not exercised judiciously. This is because no two cases are exactly alike and even if they were, the court cannot be bound by a previous decision to exercise its discretion in a particular way because that would be in effect putting an end to the discretion. See *Evans v Bartlam* [1937] AC 47 and *Jenking v Bushby* [1891] 1 Ch 484. Thus, in matters of discretion no one case can be an authority for another. See [*Nanyuki Equator Sacco Co-Operative Society Limited v Nyeri Sacco Society & another*](#) Civil Application No Nai 86 of 2005.
29. The issue before us in this appeal is whether in the circumstances of this case, the trial court was justified in declining to join the appellant to the proceedings before it.
30. Part 19.2(2) (a) and (b) of the [*Civil Procedure Rules*](#), England provides that:
 1. This rule applies where a party is to be added or substituted except where the case falls within rule 19.5 (special provisions about changing parties after the end of a relevant limitation period).
 2. The court may order a person to be added as a new party if –
 - a. it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings; or
 - b. there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue.
31. We therefore agree that there is no inherent or general discretion to add a new party to existing proceedings and that the two limbs are different and independent. Therefore, even if one or other (or both) are satisfied, the addition of a party does not follow automatically since the court must consider the overall discretion. It must also be remembered that the power to add a party to existing proceedings is essentially a case management decision and will only be made if it would further the overriding objective in the concrete circumstances of the case. See *Re Pablo Star* (2018) 1 WLR 738.
32. Without necessarily deciding, we harbour doubts as to whether a person who intends to make a claim against a claimant in a suit ought properly to be joined in the proceedings as an interested party in the proceedings.
33. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55, it was held that:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because



that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies, (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

34. In this it is clear that there is no claim by the 1st respondent against the appellant. Similarly, it was not alleged that there was a claim by the 2nd respondent against the appellant in the proceedings before the trial court. Accordingly, the appellant could only be joined to the proceedings if it could show that its presence in the suit was necessary for effectual and complete settlement of all questions in the suit between the 1st respondent and that 2nd respondent or that the orders, which the 1st respondent sought in the suit, would legally affect the interests of the appellant. Alternatively, the appellant had to show that it was desirable, for avoidance of multiplicity of suits, to have it joined so that it is bound by the decision of the Court in the suit between the 1st respondent and the 2nd respondent. To our mind, for the appellant to have succeeded, in its application, it ought to have proved that its interest in the case, at the time it made the application, had already accrued or matured.
35. The grounds for seeking joinder to the proceedings were that arising from the time charter party entered into between the appellant and the 1st respondent, the appellant has a claim against the 1st respondent for freight of USD 614,967.13, load demurrage of USD 35,744.40 and damages for detention of the vessel by reason of the arrest by the Court which claim is increasing on a daily basis; that as a result, the appellant has instituted arbitration proceedings against the 1st respondent in London; that the 1st respondent has no known security for the satisfaction of any award that may be made against it in the arbitration proceedings apart from the cargo carried under the terms of the voyage charter; and that the appellant is entitled to secure a contractual lien over the claimant's cargo for its claim in the said arbitral proceedings.
36. As for the limb of stay, the appellant's case was grounded on the fact that the issues between the appellant and the 1st respondent are being litigated in the said arbitration and that the court has no jurisdiction to substantially entertain the 1st respondent's claim against the 2nd respondent.
37. The appellant asserted that it should be joined in the proceedings since the grant of the orders sought by the 1st respondent would deprive the appellant of its right to a lien right over the 1st respondent's cargo and its claim in the arbitral tribunal for unpaid freight would have been rendered nugatory. Put simply, the appellant was seeking to be joined to the proceedings to enable it secure the stay of the same proceedings in which it was seeking to be joined with a view to proceeding with the arbitration proceedings in London
38. We must emphasise that the dispute which is the subject of these proceedings is not an ordinary civil suit. These are proceedings in rem against the ship. In our view, one cannot, under the guise of joinder to such proceedings, which are proceedings in rem, seek to obtain a relief that ought to be sought in other ordinary civil suits or in personam proceedings, which seems to be the nature of the appellant's claim against the 1st respondent. In this case, it is our view that by seeking to be joined to the in rem proceedings in order to secure a decree that it may obtain against the 1st respondent in the arbitration



proceedings, the appellant set out, through judicial craft, to achieve collateral purposes not connected with the proceedings which were before the court.

39. A party who seeks to be joined to the proceedings must satisfy the court that the conditions precedent in *Barclays Bank D C O v C B Patel and others* [1959] EA 214, exist. In that case, it was held that:

“For parties to be joined in an action there must be (1) a right to relief arising out of the same transaction or series of transactions and (2) a common question of law or fact. Both conditions must be satisfied and it is necessary to consider whether the right to relief arises out of a transaction or series of transactions or merely out of similar transactions.”

40. Joinder of parties to proceedings is not meant to assist parties who have claims in other cases to secure their interests in those other cases by stagnating proceedings in the cases in which they seek to join when they have no claim in those claims. What is recognised is for a party who has a decree in its favour to execute against a decree issued in favour of its judgement creditor in another suit. In this case, the appellant has no unsettled decree against the 1st respondent and likewise the 1st respondent is yet to get a decree against the 2nd respondent.

41. In addition, the learned trial Judge was duty bound to consider whether the joinder of the appellant to the proceedings would promote the overriding objective. In this case the effect of the joinder of the appellant and the main objective of the appellant in seeking to be joined to the proceedings would be the stultification of the proceedings since the appellant’s intention was to stay the proceedings rather than to assist in their speedy determination.

42. Before us it was argued that the learned Judge did not take into account the provisions of part 61.8(7) of the Civil Procedure Rules of England. That provisions states that:

(7) Any person –
interested in property under arrest or in the proceeds of sale of such property; or
whose interests are affected by any order sought or made, may be made a party to
any claim in rem against the property or proceeds of sale.

43. In our view, part 61.8(7) of the Civil Procedure Rules of England must be read together with Part 19.2(2) (a) and (b) of the same Rules since whereas the former provides for joinder, the latter is the one that gives guidance on what the court ought to consider in exercising its discretion under the former. We therefore find that nothing turns on the submissions that part 61.8(7) of the Civil Procedure Rules of England

44. We have considered the submissions made before us and there is no basis upon which we can fault the learned Judge in the exercise of its discretion. We are not satisfied that the learned Judge, in arriving at its decision committed an error of law or principle; or that she took account of irrelevant considerations or failed to take account of a relevant consideration; or that her decision was plainly wrong. Accordingly, we find no merit in this appeal, which we hereby dismiss. We award the costs of the appeal to the 1st respondent to be borne by the appellant.

45. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF NOVEMBER, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

