



REPUBLIC OF KENYA



Maarifa Developers Limited & another v Middle East Bank Limited & 4 others; Mereka (Intended Interested Party) (Civil Suit 40 of 2006) [2024] KEELC 6429 (KLR) (18 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6429 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 40 OF 2006
LL NAIKUNI, J
SEPTEMBER 18, 2024**

BETWEEN

MAARIFA DEVELOPERS LIMITED 1ST PLAINTIFF

AUSTIN SALMON KITOLOLO 2ND PLAINTIFF

AND

MIDDLE EAST BANK LIMITED 1ST DEFENDANT

**ROSEMARY NJERI WAWERU T/A THAARA AUCTIONEERS 2ND
DEFENDANT**

SULEIMAN MASUD 3RD DEFENDANT

SHAHCO INVESTMENTS LTD 4TH DEFENDANT

THALIA KATIA MARIA CASTANHA 5TH DEFENDANT

AND

DAVID M. MEREKA INTENDED INTERESTED PARTY

RULING

I. Introduction

1. This Honourable Court was tasked with the hearing and determination of two (2) Notice of Motion applications by Middle East Bank Kenya Limited, the 1st Defendant/Applicant herein dated 9th May, 2024 brought under a Certificate of urgency on the one hand. On the other hand, the other application was instituted by David M. Mereka, the 1st Intended Interested Party/Applicant herein dated 20th May, 2024 brought under a certificate of urgency.



2. Upon service of the Notice of Motion application dated 9th May, 2024, the 1st Plaintiff filed a grounds of opposition dated 17th May, 2024. It appears the one dated 20th May, 2024 never elicited any opposition. Pursuant to that, the Honourable Court will deal with these issues simultaneously for ease of reference hereof.

II. The Notice of Motion application dated 9th May, 2024

3. The 1st Defendant/Applicant brought this application under the provision of Section 13 of The *Insolvency Act* Cap. 53 Laws of Kenya, Sections 1A and 1B of The *Civil Procedure Act* Cap. 21, Order 24 Rule 6 and Order 51 Rule 1 of The *Civil Procedure Rules 2010*.
4. The 1st Defendant/Applicant sought for the following orders:-
 - a. Spent.
 - b. That the Plaintiff's suit be dismissed on the grounds that the 2nd Plaintiff who is also a Director of the 1st Plaintiff has been adjudged Bankrupt.
 - c. That this Honourable Court be pleased to make any other or such further orders as it may deem fit and just to grant.
 - d. That costs of this application be provided for.
5. The application by the 1st Defendant/Applicant is premised on the grounds, testimonial facts on the face of the application and averments made out under the 7 Paragraphed supporting affidavit of Kennedy Ogero Mokaya an Advocate of the High Court of Kenya and in conduct of the defence herein. The Deponent averred that:-
 - a. On 29th September, 2023 Austin Salmon Kitotolo the 2nd Plaintiff herein and who is also a Director of the 1st Plaintiff was adjudged and declared Bankrupt in the civil case "Nairobi Milimani Insolvency Petition No. E023 OF 2022-Mereka and Company Advocates v Engineer Austin Salmon Kitololo T/A Kitololo Consultants. Annexed in the affidavit was a copy of the Judgment marked as "KM -".
 - b. On 8th March, 2024 the Official Receiver appointed, One Owen Koimburi of P.O. Box No. 61120 - 00200 Nairobi as the Bankruptcy Trustee of the Estate of Engineer Austin Salmon Kitololo as per the provisions of the Insolvency Act as per the annexed advertisement Notice of Appointment marked as "KM - 2".
 - c. In the circumstances and pursuant to the Provisions of the *Insolvency Act* Chapter 53 Laws of Kenya and Order 24 of The *Civil Procedure Rules 2010* the proceedings herein should be stayed and/or the suit herein against the Defendant be dismissed all together.
 - d. The 2nd Plaintiff in his own capacity and as a Director of the 1st Plaintiff has no capacity to sustain, continue and prosecute the suit herein as against the Defendant.
 - e. In the circumstances and in the interests of justice the prayers prayed for herein should be granted.

III. The responses by the 1st Plaintiff

6. Maarifa Developers Limited, the 1st Plaintiff herein opposed the application dated 9th May, 2024 through filing a 5 Paragraphed grounds of opposition dated 17th May, 2024 as follows:-



- a. The said Application was unmerited to the extent that it sought to have not only the 2nd Plaintiff but also the 1st Plaintiff's suit dismissed.
- b. Despite the alleged bankruptcy status of the 2nd Plaintiff, the 1st Plaintiff, being a limited company is a separate legal entity with perpetual succession.
- c. In the case of "*Surjit Singh Hunjan & another v The Deposit Protection Fund Board (sued as the liquidator of the Prudential Building Society* [2012] eKLR", Justice Mabeya found that the *Insolvency Act* (repealed the Bankruptcy Act) provides that creditors (and not debtors) are precluded from instituting or continuing suits for recovery of debt. The Judge was referring to the provisions of Section 9 (1) of the *Bankruptcy Act* (repealed) as replaced by Section 48 (1) of the *Insolvency Act*, thus:

“My reading of that section is quite clear. The person barred from commencing or continuing with any proceeding after a receiving order has been made is a creditor and not a debtor. In the case before me, the person who commenced the proceedings was a debtor. Obviously, she had locus standi to bring this suit. She was never barred by any provision of law.

Even if the debtor was barred by that section, which is not the case, the suit by the 2nd Plaintiff cannot be defeated for the reason that his Co - Plaintiff lacked locus standi to sue. A proper order would have been to strike out the suit of the 1st Plaintiff and leave that of the 2nd Plaintiff surviving. This is not necessary for the reasons I have already set out above

- d. Nothing prevented the 2nd Plaintiff from continuing and prosecuting the suit both on his behalf and in his capacity as a director of the 1st Plaintiff until the appointment of someone in law (Bankruptcy Trustee), who would take up/maintain the suit for the benefit of his creditors, if he deems it fit.
- e. The Application dated 9th May 2024 to the extent that it sought to have the suit dismissed was premature and ought to be dismissed with costs.

IV. The Notice of Motion application dated 20th May, 2024

7. The 1st Intended Interested Party brought the application under the provision of Order 1 Rule 10 (2), Order 9 and Order 51 (2) of *Civil Procedure Rules, 2010*.
8. The 1st Intended Interested Party sought for the following orders:-
 - a. Spent.
 - b. That this Honourable Court be pleased to enjoin David M. Mereka as the 1st Interested Party in these proceedings.
 - c. That this Honourable Court be pleased to grant leave to M/s. Mereka & Company Advocates to formally come on record for the 1st Interested Party.
 - d. That the costs of this application be in this cause.
9. The application by the Applicant is premised on the grounds, facts and testimony on the face of the application and further supported by the 11 paragraphed annexed affidavit of David Mukii Mereka , the 1st Intended Interested Party herein. The Deponent averred that:



- i. His Law firm formally acted for the Plaintiff in this suit and subsequently filed an Advocate/ Client Bill of Costs in MSA No 329 of 2011 and which was taxed at a sum of Kenya Shillings Nine Million One Hundred and Ninety Thousand Eight Sixty Hundred (Kshs. 9,199,868/-) on 7th October 2011 as per attached order of the court marked as “DMM - 1”.
- ii. Upon various failed attempts to execute against the Plaintiff his Law firm filed bankruptcy proceedings at the High Court commercial and Tax, Insolvency cause No E023 of 2023 subsequently the court issued a bankruptcy order on 10th November 2023 attach in the affidavit and marked as “DMM - 2” and the Plaintiff herein was Adjudged Bankrupt and hence had no capacity to prosecute this suit.
- iii. As per attached letter from the Official Receiver dated 19th February 2024, attached in the affidavit and marked as “DMM - 3”, he made payment of a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) as per attached Certificate of Compliance dated 23rd February 2024 and marked as “DMM - 4” and thereafter the Official Receiver as per B attached letter dated 8th March 2024 and marked as “DMM - 4” appointed Mr. Owen Koimburi Njenga as the Bankruptcy Trustee.
- iv. He wrote to the Bankruptcy Trustee on 26th March 2024 as per attached letter marked as “DMM - 5” advising him that the outstanding was sum of Kenya Shillings Fourty Two Million Five Hundred and Fourty Three Thousand Five Ninety Five Hundred (Kshs. 42,543,595/-).
- v. The Bankruptcy Trustee proceeded to make the relevant advertisement in the local newspaper on 18th April 2024 as per attached advert and marked as “DMM - 6” annexed thereto.
- vi. By an email dated 9th May 2024, attached herewith and marked as “DMM - 7”, he wrote to the Advocates on record for the Plaintiffs in this matter requesting them to advise on the way forward but there was no response.
- vii. As per attached screen shots and marked as “DMM - 8”, he engaged Mr. A. S Kitololo in order to chat the way forward but were unable to agree.
- viii. The hearing of this suit came up on 13th May 2024 but he could not be heard hence this Application.
- ix. It was in the interest of justice that he be enjoined as an Interested Party in these proceedings in order to file documents relating to the Bankruptcy Order aforementioned to enable the Court give directions on the way forward.

V. Submissions

10. On 13th May, 2024 and 24th June, 2024 while all the parties were present in Court, they were directed to have the Notices of Motion applications dated 9th May, 2024 and 20th May, 2024 be disposed of by way of written submissions. Pursuant to that on 4th June, 2024 a ruling date was reserved on 23rd July, 2024 by Court accordingly.

VI. Analysis and Determination

11. I have carefully read and considered the pleadings herein and the relevant provisions made by the Learned Counsel. In order to arrive at an informed decision, the Honorable Court has three (3) framed the following issues for determination. These are:-



- a. Whether the Notice of motion application dated 9th May, 2024 on the capacity of the 2nd Plaintiff to sue having been adjudged a is merited.
- b. Whether the Application for joinder of interested party is merited.
- c. Who will bear the Costs of Notices of Motion applications dated 9th May, 2024 and 20th May, 2024.

ISSUE No. a). Whether the Notice of motion application dated 9th May, 2024 on the capacity of the 2nd Plaintiff to sue having been adjudged a is merited

12. Under this sub -title, the Honourable Court are meant to examine whether the 2nd Plaintiff having been adjudged bankrupt has the legal capacity to sue or be sued. The *Insolvency Act*, 2015 provides the legal frame for managing the affairs of bankrupt individuals, including their capacity to sue and be sued. However, any legal action involving the bankrupt’s estate must be handled by the bankruptcy trustee or the Official Receiver. The case of “*Re: Estate of John Githinji (Deceased)* [2018] eKLR”, highlighted that a bankrupt individual could independently initiate legal proceedings without the involvement of the bankruptcy trustee. It is not in dispute that the 2nd Plaintiff while filing the suit had not as yet been adjudged bankrupt. The bankruptcy order was issued in a judgment on 29th September, 2023 which is 17 years after the case was filed.
13. What the Honourable Court is determine is whether the suit property is part of the 2nd Plaintiff’s estate or an asset belonging to the 1st Plaintiff? According to the 1st Plaintiff in its grounds of opposition, despite the alleged bankruptcy status of the 2nd Plaintiff, the 1st Plaintiff, being a limited company is a separate legal entity with perpetual succession. The 1st Plaintiff relied on the case of “*Surjit Singh Hunjan & another v The Deposit Protection Fund Board (sued as the liquidator of the Prudential Building Society (supra)*”, where my brother Justice Mabeya found that the *Insolvency Act* (repealed the *Bankruptcy Act*) provides that creditors (and not debtors) are precluded from instituting or continuing suits for recovery of debt. The Judge was referring to the provision of Section 9 (1) of the *Bankruptcy Act* (repealed) as replaced by Section 48 (1) of the *Insolvency Act*, thus:

“My reading of that Section is quite clear. The person barred from commencing or continuing with any proceeding after a receiving order has been made is a creditor and not a debtor. In the case before me, the person who commenced the proceedings was a debtor. Obviously, she had locus standi to bring this suit. She was never barred by any provision of law.

Even if the debtor was barred by that section, which is not the case, the suit by the 2nd Plaintiff cannot be defeated for the reason that his co-Plaintiff lacked locus standi to sue. A proper order would have been to strike out the suit of the 1st Plaintiff and leave that of the 2nd Plaintiff surviving. This is not necessary for the reasons I have already set out above.”
14. I do agree with the 1st Plaintiff nothing prevented the 2nd Plaintiff from continuing and prosecuting the suit both on his behalf and in his capacity as a director of the 1st Plaintiff until the appointment of someone in law (Bankruptcy Trustee), who would take up/maintain the suit for the benefit of his creditors, if he deems it fit.
15. For this reason, therefore, I find that the Notice of Motion application dated 9th May, 2024 is unmerited and hence hereby stands dismissed.



ISSUE No. b). Whether the Application for joinder of interested party is merited.

16. Under this sub – title, the Honourable Court shall examine whether the Applicant should be joined as a party in the suit. It is instructive to note that before a party is enjoined in a matter, the court ought to satisfy itself that the proceedings are alive. That means that the suit must still be pending before the Court. Therefore, the applicant must move the Court during the pendency of the proceedings in that matter. Again, besides the proceedings being pending there should be not bar to them going on, so much so that if there are orders staying the proceedings then the party cannot move the Court since the proceedings are ‘frozen’ until the orders are lifted, vacated or set aside.
17. For the proposition that the proceedings must be pending, this Court relies on the cases of “[Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure, John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others \(applicants/intended interested parties\)](#) [2021] eKLR” and “[Elizabeth Nabangala Wekesa v Erick Omwamba & 3 Others; Esther Momanyi Omwamba \(applicant\)](#) [2021] eKLR”. In the first case, this Court held that in case a party wishes to be enjoined in a matter, the case must be either be at “the nascent or other stages but must be alive.” In the second case, it was held that in case a party moves the Court to be joined as a party, “there is no doubt anymore that if a party wishes to be joined in a matter he or she must move the Court during the pendency of the proceedings in that matter... the main point is that it (suit) is still alive.”
18. Similarly, in the case of:- “[Leonard Kimeu Mwanthi v Rukaria M’twerandu M’iringu; Nathaniel Kitbinji Ikiugu & 4 others \(Intended Interested Parties\)](#) [2021] eKLR”, Lady Justice Mbugua J stated, “A party claiming to be enjoined in proceedings must have an interest in the pending litigation...” From the facts of the instant case, this suit has neither been heard nor finalized. If anything, it is proceeding with applications at the interlocutory stage. Therefore, this stage is appropriate for the application of this nature.
19. It is worth noting that an application for joinder of an interested party may be made even at the appellate stage of the proceedings. The only condition to be met first is that the proceedings are still alive. The second point that the Court should take care of is that the proposed interested party should not use the procedure to institute a fresh suit, particularly if his application is made at the appellate stage.
20. On these two points I am guided by the holdings of the Court of Appeal and Supreme Court of Kenya respectively the following cases. The applicant in “[David Kiptugen v Commissioner of Lands, Nairobi & 4 others](#) [2016] eKLR” filed an application before the Court of Appeal to be joined as an interested party to the appeal and for remission of the matter back to the trial court for hearing de novo. The court allowed that application and held;

“We agree with Ms. Kirui that whatever the outcome of the appeal, if the applicant is not joined in this appeal, he will be deprived of an opportunity to be heard on his claim to the ownership of the suit land. That will of course be unconstitutional and against the rules of natural justice.”
21. Second, in the case of “[Communications Commission of Kenya & 4 Others v Royal Media Services Limited](#)”, the Supreme Court in declining a similar application for joinder of an interested party held:-

“The applicant now seeks to be enjoined in this matter, even though it was neither a party at the High Court nor at the Court of Appeal. The applicant has not demonstrated how the ends of justice would better be served by enjoining it in the appeal...”



We cannot exercise our discretion to enjoin a party that disguises itself as an Interested Party, while in actual fact merely seeking to institute fresh cause.”

22. The provision of Order 1 Rule 1 of the [Civil Procedure Rules, 2010](#) under which the application is brought provides as hereunder:

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

23. Further, the provision of Order 1 Rule 10 (2) of the said [Rules](#) provides that:-

“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.”

24. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of “[Kingori v Chege & 3 Others](#) [2002] 2 KLR 243” where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

25. In the case of: “[Departed Asians Property Custodian Board v Jaffer Brothers Limited](#) [1999] 1 EA 55” it was held as follows:-

“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.”



26. In the case of:- “*Civicon Limited v Kivuwatt Limited and 2 Others* [2015] eKLR” the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a Defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

27. In this case, the intended interested party was seeking leave to be joined to be able to participate in the proceedings being that he formally acted for the Plaintiff in this suit and subsequently filed an Advocate/Client Bill of Costs in MSA No 329 of 2011 and which was taxed at a sum of Kenya Shillings Nine Million One Ninety Nine Thousand Eight Sixty Eight Hundred (Kshs. 9,199,868/-) on 7th October 2011 as per attached order of the court marked as “DMM - 1” annexed herein. Upon various failed attempts to execute against the Plaintiff his firm filed bankruptcy proceedings at the High Court commercial and Tax, Insolvency cause No. E023 of 2023 subsequently the court issued a bankruptcy order on 10th November 2023 attach in the affidavit and marked as “DMM - 2” and the Plaintiff herein was Adjudged Bankrupt and hence has no capacity to prosecute this suit.
28. This Court relies on the case of “*Martin Kirima Baithambu v Jeremiah Miriti* [2017] eKLR”, where the court pronounced itself as hereunder:

“The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invoke the procedure provided under Order 1 Rule 15 of the *Civil Procedure Rules*. I say these things for the sake of jurisprudence.”

29. Accordingly, based on the foregoing reasoning, I strongly find great merit in the application for joinder. Thus, it must be allowed.

ISSUE No. c). Who will bear the Costs of Notices of motion application dated 9th May, 2024 and 20th May, 2024

30. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the *Civil Procedure Rules* Cap. 21 Laws of Kenya holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “*Harun Mutwiri v Nairobi City County Government* [2018] eKLR and “*Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another* [2015] eKLR, the court reaffirmed that the successful party



is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “*Hussein Mubumed Sirat v Attorney General & Another* [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

31. In the present case, upon various consideration, the Honourable Court elects not to award any costs.

VII. Conclusion & Disposition

32. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to Preponderance of Probabilities and balance of convenience. Having said that much, in a nutshell, I proceed to order the following:-

- a. That the Notice of Motion application dated 9th May, 2024 by the 1st Defendant be and is hereby found to lack merit and hence dismissed with no orders as to costs
- b. That the Notice of Motion application dated 20th May, 2024 by the Interested party is found to have merit and is hereby allowed with no orders as to costs.
- c. That an order be and hereby issued joining David M. Mereka as the 1st Interested Party in these proceedings and is granted leave to file defence and a counterclaim if any.
- d. That an order do and hereby issued for leave to M/s Mereka & Company Advocates to formally come on record for the 1st Interested Party.
- e. That for expediency sake this matter to be fixed for hearing on 3rd, 16th and 17th October, 2024 respectively.
- f. That there shall be no orders as to cost.

It Is so ordered Accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF SEPTEMBER 2024.

.....

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Mutugi and Mr. Ougo Okello Advocates holding brief for Mr. Kihiko Advocate for the Plaintiffs/ Respondents.
- c. Mr. Mokaya & Mr. Onyango Advocates for the Defendants.
- d. Mr. Njoroge Advocate holding brief for Mr. Mereka Advocate for the Intended Interested Party/Applicant.

