



**Opondo & 2 others v Amboka; Morongo t/a Kraido & Co
Advocates & another (Intended Interested Party) (Civil Appeal
37 of 2019) [2025] KEHC 1307 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1307 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE
CIVIL APPEAL 37 OF 2019
AC MRIMA, J
FEBRUARY 28, 2025**

BETWEEN

**CHARLES OPONDO 1ST APPLICANT
MARGARET SUWAI 2ND APPLICANT
BOARD OF MANAGEMENT, AIC KAPSITWET SECONDARY
SCHOOL 3RD APPLICANT**

AND

JESCAR GATAKAA AMBOKA RESPONDENT

AND

**KRAIDO MAJUNE MORONGO T/A KRAIDO & CO
ADVOCATES INTENDED INTERESTED PARTY
ABSA BANK KENYA PLC INTENDED INTERESTED PARTY**

RULING

Background:

1. This is a ruling in respect of an application by way of a Notice of Motion dated 1st February 2024. The application was lodged by Charles Opondo, the 1st Applicant herein, and is supported his Affidavit deposed to on a similar date.
2. The application is a post-judgment one and seeks the following orders: -
 1. Spent



2. That pending hearing and determination of this Application, Kraido Majune Morongo T/A Kraido & Co. Advocates be joined to this Application as the 1st Interested Party.
3. That pending hearing and determination of this Application, ABSA Bank Kenya PLC be joined to this Application as 2nd Interested Party so as to give details as to the particulars of ownership for account No. 203XXXXXXXXX197 held at ABSA Bank Kenya PLC.
4. That upon hearing and determination of this Application, the 1st Interested Party be and hereby ordered to unconditionally release the sum of Kenya Shillings Five Hundred and Fifteen Thousand (800,500/-) only within 14 days after delivery of this Ruling.
5. That costs of this Application be paid by the 1st Interested Party.

The Applicant's case:

4. In the grounds and affidavit in support of the application, the Applicant stated that there was need to join the intended 1st Interested Party to shed light as to why he has declined to release the sum of Kshs. 800,500/- being part of decretal sum he received in Kitale Chief Magistrates Court Civil Case No. 6 of 2017, pending hearing and determination of the instant appeal.
5. The Applicant stated that despite the appeal having been dismissed and the Respondent being ordered to release the monies, the intended 1st Interested party, who acted for the Respondent and received the decretal sum had declined to release the monies despite multiple reminders. It, therefore, was his case that there was urgent need to compel the 1st Interested Parties to unconditionally release the sum of Kshs. 800,500/-.
6. The Applicant further deposed that despite visiting the Respondent's Counsel Chambers and getting the promise that Counsel would refund the money, the Interested Party had failed to keep his word hence the instant application.
7. In support of the application, the Applicant filed written submissions dated 19th July 2024. He argued that a Plaintiff is entitled, under Order 1 Rule 15 of the Civil Procedure Rules (CPC) to join as parties to the same suit all or any of the persons severally or jointly liable. It submitted that so is the case for the Defendant under Order 1 Rule 15(1)(c) of the CPC. Regarding the instant dispute, the 1st Applicant submitted that he had proved relation to the interested parties and the issues raised in the application were merited to have them joined in the case. The Applicant further submitted that the 2nd Interested Party refusal to respond to the application is in fact an admission of facts since it was served with the application and the Orders of this Court.
8. On the prayer that the intended 1st Interested Party should be ordered to unconditionally to release Kshs. 800,500/-, the Applicant submitted that it had proved that it paid a specific amount in part payment of the decretal sum in Kitale CMCC No. 6 of 2017 in accordance with section 107(1) of the *Evidence Act*.
9. In conclusion, the Applicant stated that he had proved a case and that the intended 2nd Interested Parties' failure to respond to the application should be a reason to make a finding of costs against it.

The 1st Intended Interested Party's case:

10. Majune Kraido, Learned Counsel opposed the application through his Replying Affidavit deposed to on 17th July 2024. It was his case that he received a letter of demand from the Applicant's Advocates requiring him to refund the monies. He deposed that the Applicant's act of demanding the monies



directly from him while knowing that he was not a party to the suit in the subordinate Court was frivolous, mischievous and vexatious attitude towards him. He further claimed that this Court has no jurisdiction to entertain the application since the money demanded by the Applicant was paid to his Firm for onward transmission to his client pursuant to execution decree which was levied by Igare Auctioneers.

11. Counsel deposed further that the Applicant made payments in instalments in an attempt to liquidate the decretal sum after notice of proclamation was served upon him. He asserted that the Applicant did not make any payments as a result of any order by this Court pending appeal. It was his case that the Applicant abandoned the appeal and opted to settle the decretal sum by instalment. He further claimed that the orders to refund any money paid, if at all any, should have been sought and obtained from the trial Court and that nothing had arisen in the trial Court that confers jurisdiction on this Court. The intended 1st Interested Party stated that the Applicant ought to have made the instant application before the trial Court and only upon refusal is when this Court's jurisdiction could be invoked.
12. In the premises, it urged this Court to find that the application is premature and without merit, hence, be dismissed with costs.

The 2nd Intended Interested Party's case:

13. The 2nd Intended Interested Party did not participate in the hearing of the application.

Analysis:

14. Flowing from the application and the submissions, the issues that arise for determination are as follows:
 - i. Whether this Court has jurisdiction over the application.
 - ii. If the answer in (i) above is in the affirmative, whether the application is merited.
15. The above issues will now be dealt with in seriatim.

i. Whether this Court has jurisdiction:

16. The contest on jurisdiction is one that must be addressed from the very outset. It is so central in judicial proceedings that a Court acting without jurisdiction is acting in vain. It engages in is nullity. In *Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited* [1989] KLR 1Nyarangi, JA, expressed himself as follows on the issue of jurisdiction: -

.... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings...

17. Whereas this Court appreciates the significance of jurisdiction, it is apparent that the 1st Intended Interested Party opposes this Court's jurisdiction in response to an application seeking his joinder. This Court does not find the jurisdictional contention as a serious one. That is because a Court has jurisdiction to add or substitute any party in proceedings in a matter where it is properly so moved. As such, this Court has jurisdiction over the joinder application.
18. The first issue is, hence, answered in the affirmative thereby paving way to the second issue.



ii. Whether the application is merited:

19. Briefly, the dispute before this Court first arose at the subordinate Court. Jescah Gatakaa Amboka, the Respondent herein, sued the Applicants herein for defamation. The trial Court awarded her Kshs. 3,000,000/- as general damages and Kshs. 1,000,000/- for aggravated damages. On appeal, this Court was of the finding that there was insufficient evidence to prove that the impugned defamatory statements were published by the Applicants. As a result, this Court made orders, among them the following;
 - b. The Judgment and decree in Kitale Chief Magistrates Court Civil Case No. 6 of 2017 are hereby set-aside and substituted with a finding that the said case be and is hereby dismissed for want of proof.
 - c.
 - d. Any sums of money deposited in any Bank account(s) or in Court pursuant to any earlier orders of this Court shall be released to the Depositors.
20. It is on the foregoing basis that the 1st Applicant sought to recover the decretal sum paid to the Respondent through his Advocate, the 1st Intended Interested Party herein. The payments were allegedly made in cash and into Counsel's Bank account held in Absa Bank Kenya PLC, the 2nd Intended Interested Party herein, hence, the instant application.
21. The most paramount issue, therefore, which this Court ought to address relates to the circumstances under which the alleged payments were made to the Respondent's Counsel, who is the intended 1st interested party herein. From the record, when judgment was entered by the trial Court, the Respondent initiated execution proceedings. The Applicants then approached this Court for a stay order which was granted on condition that the sum of Kshs. 1,000,000/= be deposited in a joint-interest-earning account of both Advocates. There being no compliance, the Respondent took out warrants of attachment where the 1st Applicant's household items were eventually attached. In a bid to save the situation, the 1st Applicant directly approached the Respondent's Counsel and an arrangement on instalment payment was reached. It is alleged that based on the agreement the 1st Applicant subsequently made payments of over Kshs. 800,000/= to the Respondent's Counsel.
22. From the above, what comes out is that neither the lower Court nor this Court were involved in the payment arrangement between the Applicants and any of the intended interested parties. In other words, the alleged payments to the Respondent's Counsel were not in consonance with the order which had been issued by the Court. Whereas the Court had ordered that the security be deposited into a joint bank account, the parties instead opted for direct settlement amongst themselves. Had the parties complied with the Court order or had they deposited the sums in Court or alternatively had they executed and filed a consent varying the Court order, the Applicant would not be in the situation he is now in.
23. The prevailing situation is not as simple and clear as the Applicants may wish to portray. It raises so many questions that call for answers. For instance, it has to be ascertained whether any sums were really paid out and, if so, how much and the reason thereto. The Court would further have to determine whether the sums are due to the Applicants given the circumstances the payments were made into and the position taken by the Counsel. Such requirements are substantive and cannot be made in a matter where the party alleged to have received the sums of money has raised a red flag. As the alleged payments were not made on the basis of a Court order and the arrangement was not brought into this Court's purview, then there is need to interrogate the matter further. That cannot be made in an instance where



the party is sought to be enjoined as an interested party. These are matters which ought to be dealt with in a substantive suit between the appropriate parties and not vide a joinder application where the subject appeal was long disposed of. Bringing the intended interested parties on board at this point in time will not assist the Applicants in any way since the substantive issues must be first settled and that cannot effectively be undertaken in this matter.

24. In this case, had the payments been made on the express orders of the Court, then the position would have been different as this Court would just proceed to enforce its orders made in the appeal and ensure the deposits are restored to the depositors. However, the position is different and that calls for a different approach altogether.
25. The upshot is that the joinder application is not merited and suffers a false start.
26. As I come to the end of this ruling, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and later elected to the Judicial Service Commission thereby mostly being away from the station. Apologies galore.
27. Consequently, the Notice of Motion dated 1st February 2024 is hereby dismissed with costs.
28. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Ruling virtually delivered in the presence of:

Mr. Were for Mr. Musungu, Learned Counsel for the Applicant.

No appearance for Mr. Kraido, Learned Counsel for the 1st Intended Interested Party/Respondent.

Duke – Court Assistant.

