Blue Valley Enterprises Limited v National Government Constituencies Development Fund (Civil Suit E013 of 2024) [2025] KEHC 4254 (KLR) (26 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4254 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT E013 OF 2024

DKN MAGARE, J

MARCH 26, 2025

BETWEEN

BLUE VALLEY ENTERPRISES LIMITED ..... PLAINTIFF

AND

NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT FUND ..... DEFENDANT

RULING

1. The Defendant herein filed an Application dated 13.11.2024 seeking the relief that the name of the Defendant be struck out from the proceedings. The matter was filed relating to a contract between the plaintiff and Mûkûrwe'inî National Government Constituency Development Fund Committee.

2. The Application is premised on the grounds that the Defendant was wrongly joined to the pleadings. The defendants state that the contract was with a third party.

3. The Plaintiff filed a replying affidavit dated 28.11.2024 by which it was disposed of that under Section 14 of the *National Government Constituency Development Fund Act*, Cap 414A, Defendant was the proper party to sue.

4. The parties also filed submissions. The Defendant's submissions dated 6.12.2024 submitted that the Defendant was wrongly joined and was a stranger to the aversions in the Plaint, which, for this reason, did not raise a reasonable cause of action. Reliance was placed on Section 16 of the *National Government Constituency Development Fund Act*.

5. It was also submitted by the Defendant that his court lacked jurisdiction, and there was a provision of internal depute resolution through Section 56 of the Act. Reliance was placed *inter alia* on *Geoffrey Muthinja & Another v Samuel Muguna Henry & Others* (2015) eKLR.

6. The plaintiff filed the submissions dated 25.1.2025. They argued that the law allowed amendments and joinder of parties before and at the hearing of the matter. The plaintiff also argued that the Board had the requisite capacity to be sued. The matter had been initially referred to the Board, and the issue of exhaustion of remedies was unfounded.

Analysis

7. Order 1 Rule 9 of the *Civil Procedure Rules* states that no suit shall be defeated for misjoinder or non-joinder of parties and requires that the court deals with the matter in controversy, so far as regards the rights and interests of the parties actually before it. The said provision is as follows:

> No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

8. In *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 others* [2016] eKLR the Court of Appeal held that:

> " Most critically Order 1 Rule 9 of the Civil Procedure Rules [2010] makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit."

9. The court is alive to Order 1 Rule 10 (2) of the *Civil Procedure Rules* which provides that:

> " The court may at any stage of the proceedings, either upon or without the application of either part, 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 defendants, 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."

10. From the above provision, it is clear that the court may, on its own motion or on the application of any party to the proceedings, order the striking out of a party who the court finds was improperly joined. In the exercise of that discretion, the court must as a matter of cause, act according to reason and fairness and not according to its whims and caprice. The words of Madan. J.A in the case of *DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina& Another* (1982) KLR 1 bear testimony that-;

> " The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case."

11. The question before this court is not whether an amendment can be made to join other parties. The question is whether the defendant is the right party to be sued. This is in terms of the privity of contract or estate. The matter proceeds in the premise that events occurred before the declaration of invalidity of the act forming the defendant. In the case of the *Institute for Social Accountability & another v National Assembly & 3 others & 5 others* (Petition 1 of 2018) [2022] KESC 39 (KLR) (8 August 2022) (Judgment), the supreme court declared as follows:

> In conclusion, we agree with the reasoning adopted by the High Court to the effect that the CDF Act 2013 violates the principle of separation of powers and that the CDF Act 2013

is unconstitutional. We also agree with reasoning of the Court of Appeal, but only to the extent that it upholds the position of the High Court. In doing so, as we have faulted and reversed the Court of Appeal's restrictive approach in interpreting the law in relation to powers and functions of the county governments; its finding that the CDF did not violate the division of powers between the two levels of government; and its interpretation that the CDF amounted to an inter-governmental transfer of functions. We have also reversed the Court of Appeal on its findings on the issue of CDF and division of revenue, and have restored the finding of the High Court, that the CDF Act 2013 violates the constitutional principle on the division of revenue.

A declaration is hereby made that the Constituency Development Fund Act, 2013 is unconstitutional.

12. Section 16 of the provides for the Functions of the Board as follows:

    a. ensure timely and efficient disbursement of funds to every constituency;

    b. ensure efficient management of the Fund;

    c. consider project proposals submitted from various constituencies in accordance with the Act, approve for funding those projects proposals that are consistent with this Act and send funds to the respective constituency fund account of the approved projects;

    d. co-ordinate the implementation of projects at the inter-constituency level; (e) receive and address complaints that may arise from the implementation of the Act;

    e. encourage best practices in the implementation of projects;

    f. administer the funds and assets of the Board in such manner and for such purpose as shall promote the best interest of the Board in accordance with the Act to ensure efficient management of the Fund; and

    g. perform such other duties as the Board may deem necessary from time to time for the proper management of the Fund.

13. In his case, we are not concerned with the powers of the Applicant. We are concerned with the question of whether there was a privity of contract with the respondent. This is crucial in respect of the enforceability of contra t with nonparties. This question was addressed in the court in the case *City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & another* [2016] eKLR on privity of contract as follows:

> " The doctrine of privity of contract is that, as a general rule, at Common Law, a contract cannot confer rights or impose obligations on strangers to it that is persons who are not parties to it. The parties to a contract are those persons who reach an agreement and, whilst it may be clear in a simple case who these parties are, it may not be so obvious where there are several contracts, or several parties or both. For example in the case of multilateral contracts; collateral contracts, irrevocable credits, contracts made on the basis of memorandum & articles of a Company; collective agreements, contracts with unincorporated association and mortgages, surveys and valuations.....

14. The court of Appeal, [Musinga, Gatembu & M'inoti JJ.A], addressed the issue of privity of contract in the case of *Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another* [2015] eKLR, as follows:

> Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in *Shanklin Pier V Detel Products Ltd* [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.
>
> While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the been subject of much criticism. In *Darlington Bourough Council V Witshire Northern Ltd* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:
>
> > "The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract."

15. What then is the role of the Applicant herein? Is there a cause of action capable f being enforced by the parties in the suit? This will always turn on the facts of the case and a reading of the actual contract between the parties. The advertisement was not made by the National Government Constituencies Development Fund board. The advertisement was made by the National Government Constituencies Development Fund Mûkûrwe'inî constituency.

16. The funding unit was a constituency. This is the reason the Supreme Court declared the act constituting the NG-CDF unconstitutional. It thus does not matter, that the National Government Constituencies Development Fund board, has an interest in the success of the contract. They were simply not a party to the agreed. A third party cannot bind another party without its signature.

17. If the matter does go to hearing, there is no competent officer at the National Government Constituencies Development Fund board. Who will competently deal with the matter? The party joined to the suit is not privy to the contract. In addressing this issue of privity of contract, the court in the case of *Werrot & Company Ltd & Others v Andrew Douglas Gregory & Others*, [1998] eKLR stated that:

> " For determining the question of who is a necessary party there are two tests;

(i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and

(ii) it should not be possible to pass an effective decree in the absence of such a party."

18. It is not possible to pass an effective decree in the absence of the contracting party. The Defendant is not a necessary party to the suit and has no useful purpose in the suit. While addressing the issue of who a necessary party is, the court, Devlin, J, in the case of A*mon v Raphael Tuck & Sons Ltd*, (1956) 1 All ER 273, cited in *Pizza Harvest Limited V Felix Midigo*, [2013] eKLR stated as such at p. 286-287:

> "What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party."

19. The suit is against one Respondent. It will serve no purpose to strike out a defendant and leave a suit without a defendant. Taking a look at the plaint this court does not find a suit against it has been made. The suit must be saved from its own ignominy by being struck out.

20. The second question is the question of exhaustion. The doctrine has its own exception for which a party must place themselves in before being allowed to proceed with their cases. The Court appreciates that whereas it is true that where dispute resolution mechanism exists outside Courts, the same should be exhausted before the jurisdiction of the Courts is invoked. This requirement is also to promote the application of Article 159 of the *constitution*, the said doctrine is not absolute. This is *Geoffrey Muthiga Kabiru & 2 others v Samuel Munga Henry & 1756 others* [2015] eKLR, where the Court of Appeal stated that:

> It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. The ex parte Applicants argue that this accords with Article 159 of the *constitution* which commands Courts to encourage alternative means of dispute resolution.

21. There exist exceptions to the doctrine of exhaustion. In *R vs Independent Electoral and Boundaries Commission (I E B C) & Others ex parte The National Super Alliance Kenya (NASA)* (*supra*), after

exhaustively reviewing Kenya's decisional law on the exhaustion doctrine, the High Court described the first exception thus:

> What emerges from our jurisprudence in these cases are at least two principles: while exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case (supra), the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the *constitution* or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake. See also *Moffat Kamau and 9 Others v Aelous (K) Ltd and 9 Others*.)

22. Therefore, this court will, in exceptional circumstances, consider and determine whether the exhaustion requirement would not serve the values enshrined in the *constitution* or law and allow the suit to proceed. This places the burden upon parties to present material to the court to consider the suitability of the Appellate mechanism. It must also consider available mechanism in each case and determine whether it is suitable to determine the issues raised.

23. The Plaintiff indicated that they appealed to the defendant who did not act on the complaint made pursuant to section of the *NG-CDF Act*. Section 56 of the *NG-CDF Act* provides as follows:

    (1) All complaints and disputes by persons arising due to the administration of this Act shall be forwarded to the Board in the first instance.

    (2) Complaints of a criminal nature shall be forwarded by the Board to the relevant government agencies with prosecutorial powers.

    (3) Disputes of a civil nature shall be referred to the Board in the first instance and where necessary an arbitration panel whose costs shall be borne by the parties to the dispute, shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to court.

    (4) Notwithstanding subsection (3), parties shall be at liberty to jointly appoint an arbitrator of their choice in the event of a dispute but where parties fail to jointly agree on an arbitrator, any of the parties may apply to the Cabinet Secretary direct the Board in collaboration with the Office of the Attorney General to commence arbitration.

24. The said postulation is moot and cannot apply to a case where the board is a party. The disputes contemplated relate to the contracts with constituency ng cdf. The doctrine of nemo judex in causa sua- no one should be a judge in his own case, militates against the defendant being the person to hear the complaint. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] eKLR, the Court of Appeal [Waki, Nambuye & Kiage, JJ.A stated as follows regarding the doctrine of exhaustion:

> It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that

there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the *constitution* which commands Courts to encourage alternative means of dispute resolution.

25. However, in this case, the doctrine was not available for the two reasons aforesaid.

26. The issue of costs is governed by Section 27 of the *Civil Procedure Act*, which provides as follows:

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

27. The Court of Appeal in the case of *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) had this to say:

> " It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

28. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

29. The circumstances of this matter require that each party bears the costs of the suit.

Determination

30. The upshot of the foregoing is that I make the following Orders:

    a. The Application dated 13.11.2024 is allowed.

    b. The suit against the defendant is struck out.

    c. Consequently, the suit herein is struck out in limine.

    d. Each party to bear their own costs.

    e. The file is closed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI ON THIS 26TH DAY OF MARCH 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Me. Nderi for plaintiff/Respondent

R. Chege for Defendant/Applicant

Court Assistant Michael