



REPUBLIC OF KENYA



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New Mega Africa Limited v Absa Bank Kenya PLC; Wekesa (Applicant) (Civil Case E068 of 2022) [2024] KEHC 1788 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1788 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E068 OF 2022
DKN MAGARE, J
FEBRUARY 26, 2024**

BETWEEN

NEW MEGA AFRICA LIMITED PLAINTIFF

AND

ABSA BANK KENYA PLC DEFENDANT

AND

EVANS MURUMBA WEKESA APPLICANT

RULING

1. This application dated 21/12/2023 is unique in its incompetence. This is the second time the Applicant wishes to join this case. The Applicant claims nothing from either party. What is being disputed herein is a contract between the parties for which h the Applicant is not privy to.
2. He does not have his horse in the race. It is however apparent that he is a hand for hire. He has already filed a suit against the defendant herein, Mombasa HCCC E039 OF 2023 [Evans Murumba Wekesa v Absa Bank Kenya Plc](#). IN that suit he can raise whatever he wishes to raise.
3. I dismissed the Application to be joined as a third party. I had indicated that this court is bound by the precedent of the Supreme Court in the case of [Methodist Church in Kenya v Mohamed Fugicha & 3 others](#) [2019] eKLR, where they stated as doth: -
 - (43) It thus emerges quite plainly that the High Court can join interested parties to proceedings, where necessary. That is why in [Meme v Republic](#) [2004] 1 EA 124; [2004] 1 KLR 637, the High Court observed that a party could be enjoined in a matter on the basis of certain considerations viz:
 - “(i) joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;



- (ii) joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) joinder to prevent a likely course of proliferated litigation.”

4. The Applicant did not meet any of the criterion for joinder. Upon dismissal of his application he then filed an application to be joined as a co-defendant. He insists on being a party herein. On 16/1/2024 I heard an application dated 21/12/2023. The same was meant to scuffle a hearing that was due then. I ordered that parties file submissions.
5. I vacated the hearing date in situ and ordered a security for costs of Kshs 30,000/= be deposited by 23/1/2024. I set the matter for mention on 12/2/24.
6. The matter was fixed for Ruling today. I have set out a brief history to show the genesis of the conflict It is a conflict without basis. It is conceded that none of the parties have a claim against the Applicant. Further, the application has no claim against the parties in the suit. What then is his business? He states that he has relevant information. Order 1 Rule 3 provides as doth: -

“ 3. Who may be joined as defendants [Order 1, rule 3.] All persons may be joined as defendants against 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 separate suits were brought against such persons any common question of law or fact would arise.”

7. The joinder itself is governed by order 1 rule 10. It provides as follows: -

“ 10. Substitution and addition of parties

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (2) 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.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.



- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

8. This was elucidated in the case of *BWK (of unsound mind suing through the next friend CMK) v Samuel Maina Kung'u & 4 others* [2021] eKLR, Justice Gacheru held as doth: -

This order [order 1 rule 10(2) requires the Court to evaluate the importance of such a party to the suit and their relevance to the just determination of the suit. The provisions were echoed by the Court of Appeal of Tanzania in *Tang Gas Distributors Ltd v Said & Others* [2014] EA 448 as quoted by the Court of Appeal in Mombasa CoA App No. 15 of 2015 *JMK v MWM & another* [2015] eKLR quoted:

“can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage”.

9. The test for joinder of parties was brought out nicely in the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Mainigi (Intended Plaintiff)* [2022] eKLR, where Justice G V Odunga as then was stated as follows: -Although the parties herein could not resist the

“temptation to wade into the merits of the main application, the mater before me is simply whether to allow the application for the joinder of the interested party to these proceedings and whether the consequential order of amendment of the pleadings ought to be granted. 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 vs. 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:

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

56. In *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [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.”

57. In *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.”

10. Conceptualizing, Problematizing, and contextualizing the question by the applicant requires the court to relook at the test by Justice Nambuye in the above case. It cannot be gainsaid that the Applicant has no interest in the claim. He is not a necessary party and is not a proper party. He is not a party to the contract being challenged further he is not a proper party, whose presence is crucial for the determination of the suit.
11. An example of a proper party is Kenya revenue authority in a commercial dispute. Though they have no claim on the subject matter, they determine customs and import duties payable.
12. Their presence will not aid ends of justice. The Applicant is a hatchet man hired to throw a spanner into works. I will not dismiss the application with more analysis than this. In the current matter, the applicant does not show that any relief sought flows from the defendant to the plaintiff.
13. Further whichever party wins the case, the Applicant has not been able to demonstrate that the ultimate order or decree cannot be enforced without his presence in the matter.
14. Finally, he has not shown that his presence is necessary to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit.



15. Whichever one looks at it, the Applicant is a busybody. Before I depart, I wish to point out that parties must help the court in the administration of justice. I will not be surprised that the Applicant will be seeking leave to Appeal after this and seeking to have the interested party as a witness for one of the parties. I will also not be surprised that the next course will be seeking stay pending Appeal. This means everything else other than proceeding. In the decision of *Nuru Ruga Ali & another v Commodity House Limited & 3 others* [2021] eKLR, the court stated as follows: -

“The actual notice and an opportunity to be heard was left to the whim and caprice of the parties to control the pace of litigation. This aspect of the appellants’ argument allegations that he was not heard fairly by virtue of the dismissal order is to me a breach of both procedural and substantive justice guaranteed by the basic instruments of governance in the administration of justice.

The instant claim had been pending before Court for some time and thus being a claim with high stakes between the claimant and defendant on award of damages in tort certainly, the adverse party will seize every opportunity to frustrate the trial. At this juncture, it is apt to reiterate the position taken in the persuasive jurisprudence in the matter of *Hailulu v Anti-Corruption Commission & Others* [2191] [2009] NAHC 187 The Namibian Court observed:

“The principles for the consideration of a postponement application are settled: an application for a postponement must be made timeously, as soon as the circumstances which might justify such an application become known to the applicant. An application for postponement must be bona fide and must not be used as a tactical manoeuvre. A court should be slow to refuse a postponement where the true reason for a party’s non-preparedness has been fully explained and is not due to delaying tactics. The overriding considerations in the courts exercise of the discretion whether or not to grant a postponement is the need to do ‘substantial justice’ between the parties. The court is principally concerned with one question: what is the prejudice to be suffered by the party adversely affected by the postponement and can it be cured by an appropriate order of costs? It must now be accepted as settled that it is unacceptable to assume that as long as the opponent’s prejudice is satisfactorily met with an appropriate costs order nothing else matters. In the litigation process, litigants and their legal practitioners have a duty not only towards each other but also towards the court and the interests of the administration of justice. A litigant’s duty is to avoid conduct that imposes a supererogatory cost burden on the opponent. The duty towards the court and the interests of the administration of justice has two aspects to it: the first is the convenience of the judge assigned to hear the case and the second is the proper functioning and control over the court roll. When an indulgence is sought from the court, the litigants’ duty towards the court and the interests of the administration of justice was stated as follows by this court:

“The grant of an indulgence for failure to comply with rules of court or directions is in the discretion of the court – to be exercised judicially. Lack of prejudice to the opposing party is an important consideration in assessing whether or not to grant condonation – but in this day and age it cannot be the sole criterion. In my view, the proper management of the roll of the court so as to afford as many litigants as possible the opportunity to have their matters heard by the court is an important consideration to be placed in the scale in the court’s exercise of the discretion whether or not to grant an indulgence....” It is a notorious fact that the roll of the High Court is overcrowded. Many matters deserving of placement on the roll do not receive court time because the roll is overcrowded. Litigants and their legal



advisors must therefore realize that it is important to take every measure reasonably possible and expedient to curtail the costs and length of litigation and to bring them to finality in a way that is least burdensome to the court.” (own emphasis added).

16. Consequently, the same is dismissed with costs of Kshs 30,000/=. The Applicant is a busy body with nothing to do other than vex the court and the parties.
17. In the circumstances I direct that the applicant shall not file any application or document in this matter. If the Applicant wishes to address any application related to stay or review they cannot do so without an application for leave filed by a party to the proceedings and supported by an affidavit of the plaintiff or defendant or its Senior Officers, with a copy served on the Attorney General and the director of public prosecution for purposes of invocation of the *Vexatious Proceedings Act*, cap 41 laws of Kenya.

Determination

- a. The application dated 21/12/2023 is unmerited and is consequently dismissed with costs of 30,000/= paid out of security for costs deposited, in default execution to issue.
- b. The Applicant not to file any document in this file except with leave applied for by a party supported by an affidavit of the party or its senior officers and a copy to the office of the director of public prosecution and the Attorney general for purposes of *vexatious proceedings Act*, cap 41 Laws of Kenya.
- c. Should need be to file an application the same should be made by a party to the proceedings supported by an affidavit of an officer of any of the two parties.
- d. This matter proceeds for hearing on 15/5/2024 without fail and must be concluded by 25/2/2025, failing which the suit shall stand dismissed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF FEBRUARY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kirui and Mr. Oloo for the Plaintiff

Mr. Abaja for the Intended 2nd Defendant

Miss Athman for the Defendant

Court Assistant - Brian

