



REPUBLIC OF KENYA



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**Bindo v Stephen Kipkenda & Dorothy Kiprono t/a Kipkenda & Co.
Advocates; Runo (Intended Interested Party) (Civil Suit E228 of 2021)
[2022] KEHC 15073 (KLR) (Civ) (10 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15073 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT E228 OF 2021

JN MULWA, J

NOVEMBER 10, 2022

IN THE MATTER OF: THE CIVIL PROCEDURE ACT (CAP 21 LAWS OF KENYA)

AND

IN THE MATTER OF THE ADVOCATES ACT (CAP 16 LAWS OF KENYA) AND

**IN THE MATTER OF: AN APPLICATION FOR
ENFORCEMENT OF A PROFESSIONAL UNDERTAKING**

BETWEEN

RAMA HAMISI BINDO PLAINTIFF

AND

**STEPHEN KIPKENDA & DOROTHY KIPRONO T/A KIPKENDA & CO.
ADVOCATES DEFENDANT**

AND

DAVID K. RUNO INTENDED INTERESTED PARTY

RULING

1. The Application dated 12/4/2022 was filed by the intended interested party one David K. Rutto though his Advocates D. K. Rutto & Co. Advocates. His prayer is for leave to be enjoined in the proceedings as an Interested party.
2. The main proceedings were commenced by way of an Originating Summon (OS) taken out by the Plaintiff, Rama Hamisi Bindo against P. Wachira T/A Kipkenda & Company Advocates as the



Defendant. The originating summons is dated 17/9/2021 and premised on provisions of order 37 rule 3, order 52 rule 7 of the *Civil Procedure Rules* (CPR).

3. The Plaintiff by the originating summons seeks:
 - a. That the Defendant P. Wachira T/A Kipkenda & Co. Advocates do fulfil his professional undertaking dated 16/9/2016 and pay to the Plaintiff Kshs. 40 million with interest thereon until payment in full.
 - b. That Judgment be entered against the Defendant in the sum of Kshs. 40 million upon its undertaking.
 - c. That the Defendant do bear the costs of the suit.
4. The grounds for the application are stated at the face thereof, and supported by an affidavit sworn on the 12/4/2022 by the Applicant David K. Runo. By an amended originating summons dated 15/12/2021, new parties were introduced as the Defendant, Stephen Kipkenda and Dorothy Kiprono t/a Kipkenda & Company Advocates, thus removing P. Wachira, by leave of court.
5. In opposing the application, the Respondent/Defendant filed a Replying Affidavit sworn by Stephen Kipkenda Advocate on the 22/3/2022. The Plaintiff in these proceedings is represented by M/s Sigaro & Omollo LLP Advocates; while the Defendant Advocates are represented by M/s T. K. Rutto and Company Advocates. Both Parties have filed written submissions.

The Applicants case and submissions.

6. The main prayer by the Applicant is for leave to be enjoined in the proceedings as an Interested party, having been adversely mentioned as a necessary party, to enable the court to effectually and completely adjudicate upon, and settle all questions involved in the dispute – as provided under order 1 rule 10(2) of the *Civil Procedure Rules*. The Applicant gives a very detailed chronology of events as to why he ought to be joined into the proceedings in his Supporting Affidavit; and his involvement in the sale, or variation of Deed where it is alleged he voluntarily entered into the Variation of the Deed, thus bringing him into the centre of the dispute; including the alleged sale of one of the eight properties through the advocates resulting to the professional undertaking.
7. By his advocates submissions dated 21/6/2022, citing provisions of Order 1 rules 1 & 2 of the *Civil Procedure Rules*, it is submitted that, the Applicant is a qualified party, and has met the threshold as an Interested Party, whose presence is necessary to assist the court. Reliance is placed in several cases; *Unesco Paper Products Ltd v Kenya Railways Corporation Ltd & 2 others* [2015] e KLR, *Zephil Holdings Ltd v Mimosa Plantations Ltd & others* [2014] e KLR, *Tang Gas Distributor Ltd v Said & others* [2014] EA 448, and *Gladys Nduku Nthuki v Letsbego Kenya Ltd & others* [2022] e KLR, among others; for the proposition across board that an interested party means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court, but is not a party, or may not be directly involved in the litigation. Added is the Supreme Court of Kenya - *Communications Commission of Kenya and 4 others v Royal Media Services Ltd & 7 others* Petition No. 15 [2014] e KLR.

The Respondent's Case and Submissions

8. The submissions are dated 21/6/2022. It is submitted that, the application by the intended interested party is fatally defective and lacks merit, and ought to be dismissed, and relies on the replying affidavit and the submissions. The main grounds for the above submission is what it terms as a legal difference between the words “join and enjoin”, citing the case *in Re Estate of Barasa Kamenje Manywa* (2020)



@ KLR (Musyoka J.) I will come to the Learned Judge’s holding in the case; as the Applicant by his application sought to be “enjoined” in the proceedings as an interested party.

9. The Plaintiff, who is the Respondent in this application does not wish to have the Applicant brought on board and relies heavily on what I would term as a definition or appreciation of the two words – “enjoin” and “join”, thus, putting forth the question whether the intended interested party’s prayer to be enjoined in the suit is fatally defective.

Joinder or enjoinder?

10. In the case *Re Estate of Barasa Kanenje Manya* (*Supra*), the court (Musyoka J.) gave the difference between the two words – join and enjoin – which the Learned Judge stated are interchangeably, but erroneously used. The court rendered itself upon taking guidance from several sources and stated:

“ ... to “join” a party to a suit means to add that person to the suit. To “enjoin” in law means to injunct or to bar a party from doing something. “Enjoinder” means a probation order by injunction. ... “joinder” as the uniting of parties or claims in a single law suit... enjoin which defines as legally prohibit or restrain by injunction...”

11. In the suit, the judge was dealing with, an application for the applicants to be “enjoined” to the cause as parties; literally meaning that they wanted to be joined as parties to the cause, but by using the word “enjoined”, meant that they be injuncted or barred or prohibited from the cause.

That is the same position the Applicant finds himself in, using legal terms that he may not have known their legal meaning and impact.

12. Justice Musyoka J. in the case under review noted that the Applicants were unrepresented by Advocate, and therefore lay people, who may not have been familiar with legal terms and meanings attached. The Judge did not dismiss the application for that reason, having clearly understood what the Applicants were seeking from the court, not injunctions, but to be joined to the proceedings.

13. The above is squarely the same mistake the Applicant fell into, erroneously as it is clear what his intentions were, to be joined or added as a party to the proceedings.

Granted, the application was drawn by his legal counsel. But then, advocates also make mistakes, and indeed many make mistakes in many ways! They are but human, prone to mistakes.

It is the Respondents submission that, the court should not presume the intention to apply for a joinder as opposed to enjoinder.

14. The application is made under provisions of Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*. The above provisions state the objective of the *Act*, to facilitate the fair, expeditious, proportionate and affordable resolution of the civil disputes governed by the *Act*.

At 1A (2), the *act* provides

“ The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective in subsection (1). The objective of the Act is captured at Section 1A (1) see above.”

15. Order 1 rule 10(1) of the *Civil Procedure Rules* provides for the addition and substitution of parties to a case – if the court is satisfied that the suit has been instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute.



Not to be seen as Supporting the Applicant’s mistake, I am persuaded by the cited decision by the Respondent *Re Estate of Barasa (Supra)*, and concur with the Learned Judge Musyoka J, that the impugned words “Join and enjoin” many a times are used interchangeably and erroneously; and now that the differences have been brought to light, let counsel and all litigants take note, for their future pleadings.

16. I am also minded that it is not always that an intentional mistake by advocate would be visited upon the client. Each mistake has to be considered against the peculiar circumstances of the case. However, while acknowledging that advocates’ mistakes ought not be visited upon a client, it should be remembered that an advocate’s duty is not limited to the client, but has a corresponding duty to the court in which he practices and to the other side – *Tana & Athi River Development Authority v Jeremiah Kimigho Mwakio & 3 others* [2015] e KLR and Court of Appeal case, *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] e KLR.
17. I am under an obligation, pursuant to section 1A (2) of the *Act* to exercise my discretion to give effect to the overriding objective in Sub-section (1). Further, Article 159(2)(d) of the *Constitution* mandates the court to dispense justice without undue regard to procedural technicalities. To that extent then, the Applicant’s application dated 12/4/2022 shall be sustained and shall be considered on the substantive issues as flagged by the parties.

Analysis and determination

18. My re-edition of issues for determine are; whether the Applicant meets the threshold for joinder as an Interested Party to those proceedings.

In an application like the one before the court, the Court of Appeal in *Joseph Njau Kingori v Robert Maina Chege & three others* [2002] e KLR (Nambuye J) rendered: -

“ ... it has to be shown that the intended party:

- a. Is a necessary party
- b. Is a proper party
- c. There is a relief flowing from him to the Plaintiff
- d. The ultimate order or decree cannot be enforced without his participation in these proceedings.

19. The threshold was further elaborated in the above case that:-

“ A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation will be recognizable in the Court of Law being an interest, which the court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party.”

20. The Supreme court of Kenya in the *Communications Commission of Kenya (Supra)* defined who an interested Party is, as follows:

“ an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when



it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”

The Supreme Court posed the two questions: -

- a. What is the intended party’s state and relevance in the proceedings, and
 - b. Will the Intended Interested Party suffer any prejudice if denied joinder
21. The above two questions could as well be the main questions and issues in the instant application, in addition to the issue I framed above at paragraph 18.

By the Supreme Court’s definition of an interested party –above, I flag four conditions that the Applicant has to meet so as to be joined in the proceedings being whether: -

1. He has a stake in the proceedings and outcome of the proceedings,
2. He will be affected by the decision the court may come up with,
3. His relevance in the proceedings,
4. None joinder would prejudice his interest in the proceedings.

The same conditions are flagged by the Court of Appeal in the case *Joseph Njau Kingori(Supra)* at paragraph 14 above.

22. I have carefully considered the very lengthy grounds upon which the application is premised and repeated in the Supporting Affidavit the Applicant alleges to have been signatory with the Plaintiff, of the Deed of Settlement and the Deed of Variation dated 16/9/2016 and 17/9/2019 respectfully. In particular, I have considered his deposition at par E-(vii), that if the agreement is honoured, the Defendant Advocates would be released and discharged from their professional undertaking.
23. It is thus clear to me that the Applicant would be a relevant party to the proceedings as he seems to have a lot of material information that would at the end assist the court to adjudicate the dispute effectively and to finality.

The Defendant by paragraph 8 of its Replying Affidavit avers that, following the execution of variation of Deed by the Plaintiff and the Applicant on the 17/9/2019, any dispute arising therefrom would be directed to the Applicant, and not to the Advocates. Clearly, the Applicant has an identifiable stake in the totality of the dispute before the court as the executed Deeds place upon him some obligation should the terms of the Deeds not be honoured.

24. It is therefore clear that he has an interest in the outcome of the dispute as the court may eventually decide, and as the Supreme Court in *Commissions Commission of Kenya (Supra)*, his joinder would provide protection for his rights having been mentioned adversely, and the effects in law:- *Zephir Holdings Ltd (Supra)*. Further, the involvement of the Applicant in all the steps leading to the dispute between the Plaintiff and the Defendant, and eventually filing of the case, in my mind speaks of a party who has an interest in the whole process before the court, needless to state, that any of the parties would find it fit to include him as a witness in view of his standing in the whole matrix – *Parmet Ole Kiseet v Sylvia Moi & 3 others* [2021] e KLR.
25. For the foregoing, I find and hold that the Applicant has demonstrated his interest and relevance in the suit by the Amended Originating Summons that has to be protected by his presence in the suit.



Consequently, the Application dated 12/4/2022 is allowed. The Applicant is thus granted leave to be joined in these proceedings. He shall, as an Interested Party take the necessary steps to bring himself on board, and in any event within 30 days of this ruling.

Each party shall bear own costs of the application.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10TH DAY OF NOVEMBER 2022

J. N. MULWA

JUDGE

