



**Peter Njenga Kamau t/a Penar Interconsumer Products v Ecolab INC & another (Civil Suit E462 of 2020) [2023] KEHC 18858 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18858 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E462 OF 2020  
FG MUGAMBI, J  
JUNE 16, 2023**

**BETWEEN**

**PETER NJENGA KAMAU T/A PENAR INTERCONSUMER PRODUCTS ..... PLAINTIFF**

**AND**

**ECOLAB INC ..... 1<sup>ST</sup> DEFENDANT**

**ECOLAB EAST AFRICA (KENYA) LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**Brief**

1. Before the court is the 2<sup>nd</sup> defendant's application dated 8<sup>th</sup> June 2022 brought under section 1A, 1B and 3A of the [Civil Procedure Act](#) cap 21, order 1 rule 10(2), order 51 rule 1 of the [Civil Procedure Rules](#) and all enabling provisions of the law.
2. It seeks the following orders;
  - a. Spent
  - b. That this Honourable court be pleased to strike out the 1<sup>st</sup> defendant as a party in this suit for misjoinder.
  - c. That the costs of this application be provided for.
3. The application is supported by an affidavit sworn by Wilfridah Bolo. It is grounded on the fact that the 1<sup>st</sup> defendant was wrongly joined in the suit which arises from an alleged breach of a distributorship



- agreement. The applicant avers that it entered into the agreement with the respondent and the 1<sup>st</sup> defendant was not a party to the same.
4. The application is opposed through a replying affidavit sworn by Peter Njenga Kamau on December 23, 2022. Other than dismissing the application as a waste of the court's time, the respondent avers that the participation of the 1<sup>st</sup> defendant in the suit would aid in determining the issues of principal-agency relationship raised in the suit. According to the respondent, striking out the 1<sup>st</sup> defendant at this stage would require going into the merits of the suit and finally that should the respondent succeed in the suit, the decree would not be enforced without the presence of the 1<sup>st</sup> defendant.
  5. Parties canvassed the application by way of written submissions dated February 14, 2023 and March 6, 2023, filed by the applicant and the respondent, respectively. I have considered the pleadings and these rival submissions.

### Analysis

6. The main issue for determination is whether there is a misjoinder of the 1<sup>st</sup> defendant as a party in this suit and whether it should therefore be struck out of the suit. The applicant invoked 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.”
7. In exercising the discretion granted under this provision, this court must be cognizant of what constitutes a necessary party in a suit. It is well settled that a necessary party is one against whom there is a direct and real right or interest in the reliefs sought or one whose presence is necessary for purposes of passing an effective decree. The party must be present for the court to effectually and completely adjudicate upon and settle all the questions involved in the suit.
8. The court is generally guided by the principle that all parties necessary for the effectual determination of a dispute should be joined to the proceedings (See for instance; [Kizito M. Lubano v KEMRI Board of Management & 8 Others](#) [2015] eKLR, [Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others](#) [1998] eKLR).
9. A necessary party is not to be confused with a necessary witness in a trial. In other words, a necessary party does not refer to a party who has relevant evidence to give on some of the questions involved because that would only make him a necessary witness and he may be called before court to testify. This was held in [Amon v Raphael Tuck & Sons Ltd](#) (1956) 1 All ER 273, cited with approval in [Pizza Harvest Limited v Felix Midigo](#) [2013] eKLR.
10. The respondent relies on a letter dated May 2004, written by the applicant seemingly to its customers and addressed to ‘whom it may concern’. By the letter the applicant confirms that the respondent had been appointed as an agent of the applicant. In the same communication the applicant assures the respondent of continued technical support from the 1<sup>st</sup> defendant, as its ‘international principal’. This, it would seem, is what precipitated the joinder of the 1<sup>st</sup> defendant to the suit.
11. Beyond this letter, no other evidence has been supplied to the court to support the existence of a principal/agency relationship between the 1<sup>st</sup> defendant and the applicant, as alleged by the respondent



in the plaint dated October 27, 2020. The Distribution Agreement dated 17<sup>th</sup> April 2004 clearly indicates that it is entered into between the applicant and the respondent. The 1<sup>st</sup> defendant is not a party to the same.

12. No evidence has been placed before the court to prove the existence of any obligations attaching from the 1<sup>st</sup> defendant to either the applicant or the respondent. There is also no communication between either party with the 1<sup>st</sup> defendant during the pendency of the agreement. The evidence before the court indicates that the transactions were between the applicant and the respondent. The breach of the agreement that is in issue can only be determined as between the applicant and the respondent, as there is clearly no privity of contract as far as the 1<sup>st</sup> defendant is concerned.
13. Finally, the principle of corporate personality established so long ago in *Salomon v Salomon* [1897] AC 22 is well recognized in this jurisdiction. The applicant has presented before the court a Certificate of Registration as well as Articles and Memorandum of Association which indicate that it is a body corporate registered in Kenya and that the 1<sup>st</sup> defendant has no control or direction over it.

#### **Determination and orders**

14. Without dwelling on the issue any further, I am therefore not convinced that the 1<sup>st</sup> defendant is a necessary party in this suit at all. The Notice of Motion dated June 8, 2022 is allowed and the 1<sup>st</sup> defendant is hereby struck out from the suit. The applicant shall have the costs of the application.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 16<sup>th</sup> DAY OF JUNE 2023.**

**F. MUGAMBI**

**JUDGE**

Court Assistant: Ms. Lucy Wandiri.

