



**Sheikh & another v Diamond Trust Bank & another; Dedhia & another (Intended Interested Party) (Civil Suit E447 of 2022)
[2025] KEHC 7369 (KLR) (Commercial and Tax) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7369 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E447 OF 2022
FG MUGAMBI, J
MAY 30, 2025**

BETWEEN

HAFSA KASSIM SHEIKH PLAINTIFF

AND

A.O. BASID LIMITED INTENDED PLAINTIFF

AND

DIAMOND TRUST BANK 1ST RESPONDENT

DALALI TRADERS 2ND RESPONDENT

AND

AVANI ANILKUMAR DEDHIA INTENDED INTERESTED PARTY

KUNSO GENERAL TRADERS LTD INTENDED INTERESTED PARTY

RULING

1. The plaintiff has moved this Court by a Notice of Motion dated 5th October 2023 brought under Order 1 Rule 1, Order 45 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules*. The application seeks the following multiple reliefs:
 - i. Leave for joinder of the intended 2nd plaintiff and the intended interested parties as the 2nd plaintiff and interested parties to the suit herein.
 - ii. Leave to the plaintiffs to amend their Plaint in terms of the attached draft amended plaint and the same be construed as properly on record upon payment of requisite fees



- iii. Review and setting aside of the ruling dated 22nd September 2023.
2. The application, which is supported by the affidavit of Abdi Basid Omar sworn on even date, comes in the wake of a ruling delivered by this Court on 22nd September 2023 (hereinafter the ruling). In that ruling, the Court dismissed the plaintiff's application for an injunction to restrain the sale of LR No 3734/135 Lavington Nairobi (hereinafter the suit property) by the 1st respondent (hereinafter the Bank). The plaintiff now contends that together with the intended 2nd plaintiff (hereinafter the Company), they fully repaid the amounts borrowed from the Bank, together with interest amounting to Kshs 375,552,250/=.
 3. The plaintiff asserts that the initial loan amounts were secured by the suit property, which belongs to her, and that the Bank accordingly discharged the charge over the said property through a discharge of charge dated 9th September 2019. She further confirms that although the Company subsequently obtained an additional facility of Kshs. 44,000,200/=, it was secured by L.R. No. 7240/540, Thika Road. An additional sum of Kshs. 138,890,892/= was separately secured by L.R. No. 209/4546, Industrial Area.
 4. According to the plaintiff, the suit property was, as a result, unencumbered and the plaintiff proceeded to develop it by constructing six townhouses. With the title being free of any encumbrances, the plaintiff avers that portions of the suit property were subsequently sold to the intended interested parties, whose respective interests have since been duly registered. She further states that this information was not placed before the Honourable Court at the time of the ruling of 22nd September 2023. The plaintiff now contends that the respondents are estopped from advertising for sale or otherwise attempting to dispose of the suit property, and from interfering with the third-party rights that have since been created and registered under the head title.
 5. The application is opposed by Bank through a replying affidavit sworn on 24th November 2023, by Faith Ndonga, a Legal Officer in the Bank's Debt Recovery Unit.
 6. The Bank opposes the application for joinder of the parties on the grounds that such joinder would unnecessarily complicate an otherwise straightforward matter. The Bank asserts that there is another pending suit, being HCCC No. E328 of 2024 in which the plaintiff in that matter is the spouse to the plaintiff herein. The said suit relates to another secured property which he seeks to restrain the Bank from selling. The Bank asserts that while the two plaintiffs are spouses, each separately obtained credit facilities from the Bank, which were secured by distinct properties. Consequently, the realization processes in the event of default, as well as the resulting causes of action, were different and should be treated independently.
 7. With respect to the alleged discharge of charge, the Bank contends that the Company applied for and was granted various loan facilities from as early as 2009. These facilities were secured through a series of charges over the suit property, specifically: a first legal charge dated 16th February 2009; a further charge dated 14th December 2012; a second further charge dated 2nd June 2015 and a third further charge dated 3rd December 2015.
 8. The Bank maintains that the Company defaulted in repayment, thereby prompting the Bank to commence the process of realization. It denies having issued a full discharge of charge over the suit property, and clarifies that the partial discharge referred to by the plaintiff was issued solely to facilitate the surrender of the existing title to the government for purposes of obtaining a new title. Accordingly, the Bank asserts that the plaintiff's claim that the suit property is free from encumbrances is factually incorrect.



9. It accuses the plaintiff of failing to disclose the fact that the Bank agreed at the instance of the plaintiff and the Company, to amalgamate their securities sometime in November 2019. According to the Bank, the amalgamation was done with the knowledge that two of the town houses on the property had been transferred. That as late as September 2020 the plaintiff and the Company requested further facilities and were cognizant of the fact that the suit property remained charged.
10. In opposing the application for review, the Bank contends that the plaintiff has not satisfied the legal threshold for review. It argues that the new evidence that the plaintiff seeks to introduce was well within the plaintiff's knowledge at the time of the earlier proceedings, and that the matters now raised are res judicata, having already been determined in the ruling of this Court of 22nd September 2023.

Analysis and Determination

11. Having examined the application, responses, and submissions, three issues arise for determination; whether the Court should allow the joinder of the Company and the intended interested parties to the suit; whether the Court should grant leave for the amendment of the plaint and finally, whether the application for review of this Court's ruling should be allowed. I shall however first dispense with a preliminary point that has been raised by the Bank regarding the application.
12. The Bank contends that the application before this Court is fatally defective on the ground that the supporting affidavit sworn on 5th October 2023 by Abdi Basid Omar, a director of the intended 2nd plaintiff Company, has been deposed by a person who is not a party to the suit. Consequently, the Bank seeks to have the application struck out.
13. The Bank relies on the decision of the Court of Appeal in *Moiyo Matanya ole Keiwua V Chief Justice of Kenya & 6 Others*, [2008] eKLR, wherein it was held that affidavits sworn by persons who are not parties to the proceedings are incompetent and must be expunged from the record. The Learned Judges stated:

“ [These] affidavits were sworn by two people who were not parties to the proceedings in the superior court. Moreover, the two did not seek leave of the Court to be joined as parties and they purported to swear affidavits. ... In our view the Ntutu brothers would qualify as busy bodies who had no business in swearing and filing these affidavits. ... For those reasons we would order that the affidavits of the two Ntutu brothers be and are hereby expunged from the record.”

14. Similarly, the High Court in *Kenya Power & Lighting Company Limited V Julius Wambale & Another*, [2019] eKLR applied the principles in *Moiyo Matanya* and struck out an affidavit sworn by a person who was not a party to the proceedings, finding it to be fatally defective. It referred to the Court of Appeal's finding stating that:

“ ... affidavits which are sworn by persons who are not parties to the proceedings before the court are incompetent and ought to be expunged from the court record. In the premises, I find that the affidavit sworn by Erastus Mbaka on 19th February 2019 is incurably defective and cannot be sustained. It is consequently struck out. Having struck out the only affidavit which was sworn in support of the motion, the application has been left bear with no legs to stand on. It amounts to an empty shell. Since the motion cannot stand on its own unsupported by an affidavit, I find that the same is incompetent and is a candidate for striking out. The Notice of Motion dated 19th February 2019 is accordingly struck out with costs to the respondents.”



15. In the present matter, the supporting affidavit to the application is sworn by a director of the intended 2nd plaintiff, who is not a party to the suit. While the applicant has included a prayer seeking the joinder of the intended 2nd plaintiff, that prayer remains undetermined, and the intended 2nd plaintiff has not been formally enjoined in these proceedings. Until such joinder is granted, the intended 2nd plaintiff remains a stranger to the suit, and by extension, any director purporting to act on its behalf similarly lacks the requisite legal standing to swear an affidavit in support of the application.
16. Thus, in line with the binding authority in *Moiyo Matanya* and in agreement with Kenya Power & Lighting Company Limited, the affidavit sworn by Abdi Basid Omar is a nullity and must be struck out as it has been sworn by a person who is a stranger to these proceedings.
17. The effect of striking out the affidavit is that the application is left unsupported by any affidavit evidence. Consequently, the application dated 5th October 2023 is rendered incompetent, as there is no evidentiary basis upon which it can stand. It must therefore be struck out in its entirety.
18. In arriving at this determination, I am mindful of the overarching objectives of justice as espoused under Sections 1A and 1B of the *Civil Procedure Act* and Article 159(2)(d) of *the Constitution*, which mandate that courts should administer justice without undue regard to procedural technicalities. However, it is well settled that these provisions are not a panacea for fundamental defects that go to the core of the competence of the proceedings. They are not a blanket license to disregard fundamental procedural requirements that strike at the very root of the competence of the proceedings.
19. In my view, the principle that substantive justice should prevail over technicalities cannot be invoked to cure a fatal defect where a person who is not a party to the suit purports to swear an affidavit in support of an application without due authority or standing, such as the present scenario.

Disposition

20. Accordingly, the application dated 5th October 2023 is struck out with costs to the 1st respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF MAY 2025.

F. MUGAMBI

JUDGE

