



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E 137 OF 2020

APOLLO MBOYA.....APPLICANT/PLAINTIFF

VERSUS

THE STANDARD GROUP LIMITED.....1ST DEFENDANT

JEROTICH SEIL.....2ND DEFENDANT

RULING

There is before the court an application by way of Chamber Summons dated 16th October, 2020 by the Intended interested party to be allowed to join these proceedings. The application is based on articles 47, 50 and 159 (2) (e) of the Constitution Order 1 (10) (2) and 22 of the civil Procedure Rules and Section 3a of the Civil Procedure Act. The applicants have set out the grounds on the face of the application alongside supporting affidavit sworn on 16th October, 2020 and a supplementary affidavit sworn on 20th November, 2020.

The 1st and 2nd defendants have indicated they do not oppose the application for joinder. The plaintiff however, opposes the application and there are grounds of opposition dated 17th November, and a replying affidavit sworn on 17th November, 2020. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows,

“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.”

Order 1 Rule 22. On the other hand states as follows,

“If a third party enters an appearance pursuant to the third-party notice, the defendant giving the notice may apply to the court by summons in chambers for directions, and the court upon the hearing of such application may, if satisfied that there is a proper question to be tried as to the liability of the third party, order the question of such liability as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the court may direct; and, if not so satisfied, may order such judgment as the nature of the case may require to be entered in favour of the defendant giving the notice against the third party.”

I have related the above provisions to the pleadings and the contents of the affidavits sworn by the plaintiff on one hand and the intended interest party on the other. I have also related the plea of the intended interest party to the cited provisions of the Constitution. It is clear that the order sought is discretionary. Any party knocking at the door of justice need only show a *prima facie* interest to be heard. I say so because, most of the averments in the affidavits of the plaintiff and the intended interested party have gone into detail on matters that belong to the province of a main trial. There is a real risk at an interlocutory stage to justify the legal position on the facts disclosed before evidence is adduced. The plaintiff has cited **Judicial Service Commission vs. Speaker of National Assembly and 8 others (2014) e KLR and Francis Karoki Muruatetu & Another vs. Republic & 5 Others (2010) e KLR** In which in the latter case the Supreme Court stated as follows,

“From the foregoing legal provisions, and from the case law the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party. (emphasis mine)

The elements were listed as follows:

- i) Since enjoined is not a right, a party has to lay before the court sufficient grounds by way of a formal application.
- ii) The party must demonstrate the personal interest/stake in the matter in the application.
- iii) The interest must “be clearly identifiable and must be proximate enough” so as not to appear peripheral.
- iv) The intended interested party must demonstrate the prejudice to be suffered in the event of non-joinder to the satisfaction of the court. This prejudice must be “clearly outlined and not something remote”.
- v) The party must “set out the case and/ submissions it intends to make before the court and demonstrate the relevance of those submissions.”

The same guidelines or principals were repeated by the Supreme Court in the case of Odinga & Another vs. Independent Electoral & Boundaries Commission & 2 others (2017) KLR – SCK.

I have considered the averment by the plaintiff that “the prospective interest party have been mentioned in the suit papers in a peripheral sense.” However, looking at the annexures to the plaint and the affidavits on record, the mention of the intended interested party and his company cannot be termed peripheral.

Going by the authorities which I find persuasive, it is clear in my mind that the intended interested party should be given an opportunity to present his position to the court, bearing in mind the pleadings set out by the plaintiff.

Applying the principles and or conditions set out in the Civil Procedure Rules and the decisions of the Supreme Court there is every reason to allow the application.

Accordingly, the application dated 16th October, 2020 is allowed as drawn. The plaintiff shall serve the interested party with all the pleadings upon which the interested party shall file a rejoinder within 30 days from the date of such service. The costs shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2021.

A. MBOGHOLI MSAGHA

JUDGE