



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL SUIT NO.E002 OF 2020

CHEFWEST HOTEL LIMITED1ST PLAINTIFF

CHRISPINUS MUTSAMI MUTESHI.....2ND PLAINTIFF/APPLICANT

VERSUS

LYNN MILDRED BETT.....DEFENANT/RESPONDENT

KENYA COMMERCIAL BANK1ST INTERESTED PARTY

EQUITY BANK2ND INTERESTED PARTY

RULING

[1] The second plaintiff, **Chrispinus Mutsami Muteshi**, together with the first plaintiff, **Chefwest Hotel Ltd**, filed this suit against the defendant, **Lynn Mildred Bett**, praying for a permanent injunction restraining the defendant either by herself, her agents and/or servants from managing and/or interfering with the management of the first plaintiff company whose directors and shareholders are both the second plaintiff and the defendant. The claim arises from alleged mismanagement of the first plaintiff company and fraudulent diversion of its funds by the defendant from the month of December 2019.

Immediately after the institution of the suit, the second plaintiff vide a notice of motion dated 10th December 2020, filed an application for a temporary injunction to issue against the defendant restraining her from interfering with the management and affairs of the first plaintiff company. This was followed by an application dated 16th December 2020, made by way of a chamber summons for transfer of this suit from this court to the high court at Kisumu for hearing and disposal.

These two applications were followed by yet another application vide the notice of motion dated 25th March 2021, seeking orders to enjoin **Kenya Commercial Bank Ltd and Equity Bank Ltd** as interested parties to this suit and for them to release to the second plaintiff bank statements relating to A/C No. xxxxxxxx KCB Busia (K) branch and A/C No. xxxxxxxx relating to Equity Bank Busia (K) branch.

[2] It is this latest application which is the subject of this ruling and which is based on the grounds, set out in the appropriate notice of motion and supported by the second plaintiff's affidavit dated 25th March 2021. The defendant opposes the application on the basis of the grounds and averments contained in her replying affidavit undated but filed herein on 15th June 2021.

The proposed second interested party, Equity Bank Ltd, filed a replying affidavit dated 27th September 2021 deponed by its operations Manager, Busia (K) branch, **Hillary Koech**, in which it opposes the application for it to be enjoined as the second interested party in the suit. All these was however done pre-maturely as the bank had not yet been "roped" into the suit as an interested party. It even went ahead to furnish the necessary bank statements without being ordered to do so by the court. Suffice to say that they did so, only after being served with the present application by the second plaintiff, in which together with Kenya Commercial Bank Ltd, they were described as first and second interested parties respectively instead of proposed first and second interested parties respectively.

[3] Be that as it may, the application was canvassed by way of written submissions. Both the second plaintiff and the defendant filed their submissions through **Ochieng Opiyo & Co. Advocates** and **Otieno Wanjiru & Co. Advocates**, respectively.

This court after having given due consideration to the application in the light of the rival submissions and noting that it is essentially brought **under the provisions of Order 1 Rule 10 of the Civil Procedure Rules** and s.22 and 24 of the **Civil Procedure Act**, is of the opinion that the application is two pronged such that the two main prayers relating to joinder of parties and production of documents compliment each other in the sense that production of documents cannot be ordered against persons not party to the suit unless they are formally joined or added to the suit as interested parties. The big question is whether the second plaintiff has provided satisfactory and sufficient grounds for exercise of this court's discretion in his favour and grant the orders sought by himself.

It is instructive to note that the first plaintiff company did not respond to the present application in any manner and being a separate legal entity from its directors, the second plaintiff through his advocates on record purported to act for it.

[4] This application is apparently a dispute between the two directors of the first plaintiff contrary who are estranged husband and wife and have clearly allowed their divorce to be loud, ugly and messy much to the chagrin of their beloved company which they should formally dissolve if they cannot properly run and manage it together as a team or better still, dispose of it and its assets and share the “spoils”.

The foregoing notwithstanding, **Rule 10 of Order 1** of the CPR provides for substitution and addition of parties and in particular **Rule 10 (2)** provides that:-

“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 effectively and completely to adjudicate upon and settle all questions in the suit, be added”.

[5] This provision provides for joinder of parties and not enjoinder of parties as made in prayer (4) of the application. In English language and indeed, in law the words “joinder” and “enjoinder” are two separate and distinct words with different meanings as was indicated in the case of **In the Estate of Barasa Karenje Many (Deceased) (2020)** eKLR.

It would therefore follow that prayer (4) of the application is irrelevant for the purposes of an application to add or join a party in a suit if not, an outright misconception.

However, semantics aside, based on the pleadings in the suit and indeed this application, the second plaintiff/applicant has failed to provide satisfactory and sufficient cause or reason to have the two banks joined or added in this suit as interested parties. It was not established that the two banks presence in this suit is necessary in order to enable the court effectively and completely adjudicated upon and settle all questions involved in this suit against the defendant for a permanent injunction restraining her from running and managing the first plaintiff company which is seemingly a joint venture between her and the second plaintiff.

[6] As the two banks are not directors or shareholders of the first plaintiff and their relationship with the first plaintiff and by extension the second plaintiff and defendant is simply a bank/client business relationship their presence in this suit would be embarrassing to themselves and their client and may put them in an awkward position if they were to appear as parties in a dispute involving the management of their client. At most, they can only be called as witnesses by the disputants or either of them. In any event, a bank client does not need a court order to obtain bank statements from his/her bank unless it is shown that the withholding of such statement, is intentional, malicious and without any legal basis.

Viewed against this background it would not be far fetched for this court to opine that this application was made by the second plaintiff with the intention of “fishing” for evidence with which the defendant would be “fixed” or “nailed” as a punishment for mismanagement of the first plaintiff and “theft” of its financial resources.

It is worth noting that the element of fraud has been introduced into the dispute by both the second plaintiff and the defendant yet the correct forum should be a police station and a criminal court.

[7] With regard to s.22 of the **Civil Procedure Act**, it basically provides for the power to order discovery of documents as follows:-

“subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own notion or on the application of any party:-

(a) Make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogations, the admissions of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence.

(b) Issue summons to persons whose disobedience is required either to give evidence or to produce documents or such other objects as aforesaid.

(c) Order any fact to be proved by affidavit”

Subsection (a) was the most relevant in this application and from the pleadings in the plaint or statement of claim, the bank statements referred herein may not be relevant to the claim and prayer for a permanent injunction in a suit not based on company Law or grounded on fraudulent criminal transactions involving directors of a company. In the circumstances, the statements do not in the opinion of this court qualify as discoverable documents in this case. Besides, discovery typically occurs after closure of pleadings and this creates an opportunity for parties to exchange information regarding the witnesses and evidence presented before the court during trial. It is basically a pre-trial procedural aspect in which each party gets an opportunity to obtain evidence from the opposite party for clarity on the claim and issues raised in the pleadings.

[8] Even though discovery allows parties to obtain full knowledge of the issues and facts of a case before going to trial thereby facilitating the constitutional imperative of fair trial, it may not issue or be directed to matters not relevant to the subject matter. Also, this court may not deem it proper to order production of documents which reveal the evidence of the parties. Further, the documents sought herein are not in possession and power of the defendant but the proposed interested parties who are actually not parties to this case and as such cannot be

ordered to produce them by way of discovery.

[9] For all the foregoing reasons, it is the finding of this court that the second plaintiff has failed to establish and/or show satisfactory grounds for exercise of discretion in his favour. Consequently, the present application is dismissed with costs to the respondent/defendant. It is accordingly ordered.

This court acknowledges that it had on a previous occasion adjudicated on a matrimonial dispute involving the second plaintiff and the defendant touching on the distribution and ownership of the first plaintiff and its assets, it would therefore be in the interest of justice and to avoid unnecessary claims of bias from either party for this matter to be transferred to the High court at Siaya for necessary hearing and final disposal. It is further accordingly ordered.

J.R. KARANJAH

J U D G E

[DATED & DELIVERED THIS 27TH DAY OF OCTOBER 2021]