



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 9 OF 2019

WINFRED GURNTHHER HERBERT OSSE.....PLAINTIFF

-VERSUS-

1. RONNY PATRIC HERBERT OSSER

2. JEANNE NOTALIE BOEHLIG

3. HANOS (K) LIMITED.....DEFENDANTS

R U L I N G

1. By a chamber summons dated 22/01/2020, FESTUS OCHOLA OGADA and HANS BRUNO HUSE seeks to be joined to this suit. The application is grounded on the allegations that the two applicants incorporated the company with the plaintiff and contributed to the purchase of the suit property and that he had never transferred his shares in the company and that the position taken by the 1st & 2nd defendant and regarding the shareholding of the 3rd defendants is fraudulent; accordingly the applicants confined that they need to be joined to the proceedings to shed light and also protect the property lights in the property under litigation.

2. In asserting their rights they have exhibited the memorandum and Articles of Association of the Company showing shareholding of the company at incorporation by which each of the three promotes was allotted asked as well as a power of attorney by which Mr. Hans has appointed Mr. Ogada to be his attorney to do all and everything in his name on behalf regarding the shares on the 3rd defendant and the property registered in the name of the Company including a representative in any suit arising out of the subject matter of the power of attorney.

3. In response the defendants filed a Replying Affidavit sworn by Mr. Ushwin Khanna, a prospective witness in the matter who has files a witness statement and became conversant with the facts of the case on account of having been in conduct of HCC No. 900 of 1991 and 567 of 1992 for which he learnt that Mr. Ogada had resigned as a shareholder of the company by transferring his single share to either Mr. Hans or Mr. Wilfred. He also asserted that Mr. Hans had died and that 75 shares were given to the plaintiff's wife also deceased. He then exhibited minutes of the 3rd defendants extra-ordinary general meeting held on the 8/8/1989 by which Mr. Ogada transferred his one share to Mr. Herbert mandatory while Han Huse did transfer his share to Shilla and Peter Janickee.

4. There was also a statement of grounds of opposition filed by the plaintiff in which it is averred that the application is unfounded and abusive of the process of the court as the applicants' remedies he's note in this suit but elsewhere and was that on merited and deserved dismissed with costs. The plaintiff in addition filed a Replying Affidavit whose gist was that the threshold for grant of the orders for founder had not been met in that the subject matter of the suit does not affect the applicants in any way when the prayers in the pliant are given due regard and the plaintiffs have no cause to pursue in the current suit. He then aligned himself with the position taken by Mr. USHWIN KHANNA in the affidavit filed in opposition to the application and concluded by asserting that if granted the founder will embarrass or delay the trial and the court.

5. Having read the papers filed and with the allegations that the share structure of the company had been altered without the plaintiffs participation, the court on the 9/12/2019 ordered that the Directorate of Criminal Investigations get the documents from the file and parties and establish whether or not MR. HANS BRUNO HUSE was indeed dead pursuant to that order a report was filed 17/06/2020 shown to have been compiled by on JOHN MUIINDE (SSP) and returning a verdict that the questioned signature were not by the same author of the specimen signatures.

6. Parties did file written submissions as directed by the court and I have enjoyed the benefit of reading those submissions. In their submissions, the applicants isolated the prime issue in the dispute for determination by the court to be how their shares were disposed of and contend that it would be prejudicial if the case was to proceed in their absence. They cited to court the decisions in *Nderitu Wachira vs Serasi Enterprises Ltd [2016] eKLR* for the proposition that an application for joinder or amendment can be made at any time provided it be

shown that the person ought to have been joined at the commencement or that the presence of the applicant is necessary to enable the effective and complete adjudication of the disputes involved.

7. For the plaintiff, submissions were offered to the effect that whereas a necessary party must be a party who has the ability to enable court effectively and completely adjudicated the issues in the suit, there was also a requirement that he convinces the court on what case he would advance as to be helpful to the court. He cited the court the decisions in *Attorney General vs Kenya Bureau of Standards [2018] eKLR* and *Macharia Kamochio vs Commissioner of Co-operatives [2016] eKLR*.

8. For the defendants, the same decision in *A.G. vs KBS [supra]* was cited for the proposition that before a court orders joinder, the plaintiff and the defense must raise doubt as to which of the parties is liable in the final outcome of a dispute; that it must be demonstrated that it is desirable to add a party to the suit so that his presence facilitates the just resolution of the dispute and that care is always taken so that joinder does not serve to vex parties or convolute the proceedings with new matter and grounds not contemplated by the parties or envisaged in the pleadings.

9. There was also an assertion that the applicants are guilty of indolence as to make their claim, if any, stale in that the structure of shareholding had changed severally without any protestation by the applicants. For that submission the decision *Peter Gachau vs Equity Bank Ltd [2017] eKLR* was cited for the proposition that courts of equity never lend their aid to stale demands where a party has slept on his rights and acquiesced for a great length of time.

10. On the date the matter came up for hearing parties left it to the court to consider the submissions filed and came up with a deformation.

Analysis

11. Applications for joinder ought not to present any difficult considerations to be determined. The perimeters set by Order 1 Rule 10(2) must be seen to seek to underscore the principle of law that a dispute need not be proliferated over several suits but as much as possible should be consolidated and confined into a single suit. That dictate is geared to achieve the efficient and proportionate application and employment of judicial resource in time.

12. Accordingly all a court faced with an application for joinder needs to establish is whether the applicant has a dispute that can be determined within the existing suit and if the applicant has material that would enable the court effectively and conclusively determine the existing dispute. That however is no license that every cause of action associated with an existing suit qualify for joinder even where such joinder would jeopardize the expeditious determination of the matter.

13. The words 'effectively and completely adjudicated upon and settled all questions involved in the suit' are to me a guide to court that every time it is brought to its attention that a party was necessary for joinder at commencement of the suit or is necessary to be present at the trial of the dispute needs to be joined and joined even *suo moto* without the court being moved.

14. In the current matter, I do not entertain any doubt that the applicants, do on *prima facie* basis, have a dispute that seeks to determine how they ceased being shareholders and alleges that loss of shares to have been a consequence of a fraud committed against them. It is matter that the court cannot pretend to be oblivious about. I therefore do find that the applicant indeed may have a dispute to be answered by both the plaintiffs and the defendants.

15. The question is however whether they were necessary party at the commencement of the suit to have been made parties at that stage. I doubt if their presence was necessary at the commencement of the suit if one looks at the cause pleaded and the remedies sought. I consider that if the applicants were to sue for fraud then they would have to pursue the same as against the current plaintiff as well as the 1st and second defendants. It then begs the next questions: - If the application is allowed and it becomes imperative that the plaintiff be amended, how would the current plaintiffs be treated in the amendment? Will he remain a plaintiff or a defendant? Whose duty will it be to amend the plaintiff, the applicants of the plaintiff?

16. Those questions present the kind of scenario I consider will not promote the just, expeditious and proportionate disposal of the matter but will instead convolute the pleadings. When such prospects become probable then even where the applicant cuts out the figure of a necessary party the joinder then become undesirable as being contra the dictate that legal disputes be resolved expeditious and proportionately.

17. I am guided by the observation by the Court of Appeal in *A.G. vs KEBBS [supra]* that the joinder of the applicants in this suit with introduce a new matters and maybe a new cause of action that could have accrued separately from the cause of action in the matter pending, a cause that was never contemplated at the commencement of the suit and as against not only the defendants but also the plaintiff a fact that will do nothing but convolute the pleadings and the process of dispute resolution. On that account I decline to join the applicant into this suit and I thus order that the application be dismissed.

18. This however, is not to say that the applicants shall forever not pursue their claim. They can in fact do so but separately without being imposed into the suit by the plaintiff in which the plaintiff is adamant that they will add no value if joined.

Dated, signed and delivered this 26th day of October 2020

P J O Otieno

Judge