



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HCC NO. 1655 OF 1986**

**HALAL MEAT PRODUCTS LIMITED.....PLAINTIFF**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....DEFENDANT**

**AND**

**ENG. JOHN M. LITONDO.....1<sup>ST</sup> INTENDED INTERESTED PARTY/APPLICANT**

**Estate of the Late ROBERTSON DUNN.....2<sup>ND</sup> INTENDED INTERESTED PARTY/APPLICANT**

**RULING**

By an application dated 4th August and filed on 5<sup>th</sup> August, 2020 the intended interested parties herein sought orders that they be enjoined in this matter as interested parties and that the defendant be restrained from making any payments to the plaintiff. As set out in the decree confirmed by the Court of Appeal.

There are many other orders sought which may not be relevant at this stage. The application is supported by grounds set out on the face thereof in addition to the supporting affidavit sworn by engineer John M. Litondo. That application triggered another application, this time by the plaintiff by way of Notice of Motion dated 21<sup>st</sup> August, 2020 for orders that the *ex parte* orders made on 11<sup>th</sup> August 2020 be set aside and the hearing of the application by the intended interested parties dated 4<sup>th</sup> August, 2020 be stayed or struck out with costs. There is a further prayer that the firm of Okatch and partners be restrained from acting for the intended interested party.

There is yet another application dated 24<sup>th</sup> September, 2020 by the intended interested parties for orders that the court disqualifies Ahmednasir Abdullahi (SC) Ms. Zamzam Habib and Mr. Edward Wangila and their respective law firms cited therein from acting in this matter. The application is supported by grounds set out therein and an affidavit sworn by Engineer John M. Litondo.

Parties have filed submissions related to the applications on record. The advocates sought to be disqualified in further participating in these proceedings have filed respective affidavits all sworn on 6th October, 2020. They have all denied the allegations raised by the advocate for the intended interested parties. It is instructive that the three affidavits have not been controverted in any material particulars by the intended interested parties. Most importantly however, the firm of Habib & Associates came onto record by way of an order of the court dated 21<sup>st</sup> February, 2018. That order has not been challenged to date, and it is that firm of advocates which has appointed Ahmednassir Abdulahi (SC) as lead counsel in this matter assisted by Mr. Edward Wangila Advocate.

After going through the record, I am satisfied that there is no merit whatsoever in the application to disqualify counsel now appearing for the plaintiff and that application is therefore dismissed. Returning to the Notice of Motion dated 4<sup>th</sup> August, 2020 by the intended interested parties, I note that this matter was concluded by the Court of Appeal on 29<sup>th</sup> July, 2016 when the defendants' appeal was dismissed.

From the disclosed material, up to that particular point the intended interested parties were not involved in that litigation and as at the time of filing their application, a decree had been extracted and in fact the plaintiff had already moved by way of Judicial review to execute that decree. Order 1 rule 10 of the Civil Procedure Rules provides as follows,

**“[Order 1, rule 10.] Substitution and addition of parties. 10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such**

terms as the court thinks fit.

(2) 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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

These are the provisions relied upon by the intended interested parties. The question is whether there are any proceedings upon which the intended interested parties may be allowed to participate in.

The Black's Law Dictionary 10th Edition defines at page 1398 proceedings to mean,

**“The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment.”**

If that be the case, then it is late in the day for the applicants herein to join in these proceedings. It is also to be noted that enjoinder of a party in any proceedings is not a right but is at the discretion of the court. – **See Odinga & another vs. Independent Boundaries Commission & 2 Others Election Petition N. 1 of 2017.**

If I were to allow this application then issues for determination would have to be drawn and heard by the court and a decision made thereon. It is not hard to observe that in such a situation, the current status of this matter is likely to be reversed to the detriment of the decree holder, in this case the plaintiff. Prejudice will therefore be visited upon a party who has a decree in possession and where execution is in fact in progress. I am not persuaded that this is the right step to take at this stage of this case which has been pending in our records from 1986.

The foregoing notwithstanding, the decree drawn from both the High Court and Court of Appeal decisions was emphatic in relation to the professional fees rendered by the surveyors, engineers and contractors. The two courts gave an award of seven and half percent to the professionals to be accounted for in the judgment rendered against the government. In fact, the certificate of the order against the government under Order 29 Rule 3 of the Civil Procedure Rules signed by the Deputy Registrar on 22<sup>nd</sup> January, 2018 was specific at item No. 5 thereof

**“THAT professional fees for the plaintiff, surveyors, engineers and contractors are hereby granted at 7 1/2 % of the above award.”**

It is easy to understand the anxiety of the applicants in this matter. That anxiety should be settled by the courts assurance to the effect that the said costs having been secured in the body of the judgment, and to avoid any prejudice, the accounting officer of the defendant shall ensure that the said sum shall be paid directly to the said professionals so that no other litigation shall prove necessary.

In endorsing that arrangement, the court is merely re-emphasising the decree which has not been appealed or disputed by any parties and also to ensure that the ends of justice are met.

The application is therefore dismissed with attendant consequences that any interim orders in place are all set aside in their entirety. Each party shall bear their own costs of both applications.

**Signed at Nairobi this 8th day of December, 2020.**

**A.MBOGHOLI MSAGHA**

**JUDGE**

**Dated, signed and delivered online via Microsoft Teams at Nairobi this 16<sup>th</sup> day of December, 2020**

**J.K. SERGON**

**JUDGE**