



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 528 OF 2015

PINNACLE (K) TRAVEL AND SAFARIS LIMITED.....PLAINTIFF

VERSUS

OMAR FARUK OSMAN.....1ST DEFENDANT

MOHAMMED TATAWI

ALEXAANDEDRE NIYUNGEKO

ANTENEH ARAHAM

MAUREEN MUDE

JANE UWIMANA

(ALL SUED AS THE OFFICIALS OF EASTERN AFRICA JOURNALISTS

ASSOCIATION (EAJA)2ND DEFENDANT

RULING

[1] This Ruling is in respect of the Notice of Motion dated **20 March 2017**. That application was filed herein by the 1st Defendant, **Omar Faruk Osman**, on the **21 March 2017**, pursuant to **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya, Order 1 Rule 10(2)** of the **Civil Procedure Rule 2010** and all other enabling provisions of the law, for the following orders:

[a] Spent

[b] That the Court be pleased to strike out the 1st Defendant, **Omar Faruk Osman** as a party to this suit.

[c] That the costs of the application be provided for.

[2] The application is premised on the grounds that, after this suit was instituted on **28 October 2015**, the 1st Defendant filed a Statement of Defence on **20 May 2016** clarifying that he negotiated for the credit facilities that are the subject of this suit in his official capacity as the Secretary General to the 2nd

Defendant, and not in his personal capacity. He further averred that he has no personal liability or obligation to pay or satisfy corporate debt owed by the 2nd Defendant; and that in any case, on **22 December 2016**, the 2nd Defendant paid the principal amount. It was thus the prayer of the 1st Defendant that he be struck out of the suit as he has no role to play herein as a party; and that he is ready and willing to come to court as a witness for the 2nd Defendant if required. These grounds were deposed to by the 1st Defendant in his Supporting Affidavit annexed to the application.

[3] The Plaintiff opposed the application and a Replying Affidavit to that effect was filed herein, sworn on **15 May 2017**, by one of its directors, **Elizabeth Mbugua**, in which it was asserted that the 1st Defendant is a proper party to these proceedings, having personally negotiated for the services that gave rise to this suit. The Plaintiff exhibited, as annexures to the Replying Affidavit, documentation to show that the 1st Defendant on various occasions, admitted the debt on behalf of the 2nd Defendant and made promises to pay, but which turned out to be false promises; and that although the principal sum has since been paid, the issue of interest and costs remain outstanding. The Plaintiff thus urged for the dismissal of the instant application with costs.

[4] The application was argued by **Mr. Wekesa** for the 1st Defendant, while **Mr. Oonge** made submissions on behalf of the Plaintiff. Learned Counsel basically reiterated the respective standpoints taken by their clients as evinced by their affidavits. **Mr. Wekesa** stressed the point that the 2nd Defendant, who is the debtor in respect of the subject services, was always willing to pay, and has since paid the debt, which payment has been acknowledged by the Plaintiff; and therefore that there would be no reason for the continued participation of the 1st Defendant in these proceedings. On the other hand, it was the submission of **Mr. Oonge** that the claim was made against the Defendants jointly and severally; and that it would therefore be premature to release the 1st Defendant before a final determination or settlement is reached in respect of interest and costs. Counsel drew the Court's attention to the documentation attached to the Replying Affidavit, including emails in which the 1st Defendant acknowledged the debt and promised to pay the same. His contention was that should the matter proceed to hearing on the question of interest and costs, the 1st Defendant would be a necessary party, having authored the documents that the Plaintiff intends to rely on in proving the contested aspects of the case. He also pointed out that the 1st Defendant filed a Counterclaim, which he had not explicitly adverted to in his application; and which, for all intents and purposes, is still pending.

[5] I have given careful consideration to the application, the averments in the two affidavits filed herein in connection with the application as well as the submissions by Learned Counsel. The procedural provision relied on by the 1st Defendant is **Order 1 Rule 10(2) of the Civil Procedure Rules**. It 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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

[6] The above provision was given consideration in the case of **Daphne vs. Murray Alexander Carson [1962] EA 515**, in which it was held that:

"There are a number of reasons why the relief sought under Order 1 r. 10(2) cannot be granted ... In the first place, I could not at this stage order that the defendant be dismissed from the suit without holding that the plaint discloses no cause of action against him, or that on the face of the pleadings as a whole the plaintiff has no chance of success. But to so hold would be to prejudge the pending case itself ... Secondly, an application of this nature under Order 1 r. 10(2) is misconceived. Rule 10(2) empowers the court to "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 to be added." The rule is thus concerned with parties who have been wrongly joined or who ought to be joined or added."

[7] It is instructive therefore that **Rule 10(2) of Order 1, Civil Procedure Rules** employs the conjunctive "**and**" between striking out a party and joinder of another party. Indeed, the marginal note reads "**substitution and addition of parties.**" In the instant situation, there appears to be no such prayer for replacement of the Defendant, though it is manifest that the 1st Defendant is in effect shifting the burden of the litigation on the 2nd Defendant, which is already a party to the suit. It is noteworthy however that the suit was brought against the two Defendants jointly and severally; and that the 1st Defendant was sued alongside five other officials of the 2nd Defendant, not in their personal capacity, but as officials of the 2nd Defendant. Indeed, in **John Ottenyo Amwayi & 2 Others vs. Rev. George Abura and 2 Others Nairobi HCCC No. 6339 of 1990, Bosire, J** (as he then was) expressed the view that:

"The Societies Act does not contain provisions with regard to the presentation and prosecution of suits by or against unincorporated societies. It would appear to me that the Legislature did not intend that suits be brought by or against those societies in their own names."

Accordingly, I take the view that all the six officials of the 2nd Defendant, are proper parties herein.

[8] More importantly, the Plaintiff has demonstrated that it was the Plaintiff and not any of the other officials sued herein, who handled this particular transaction. Copies of the emails annexed to the Replying Affidavit are a manifestation of the leading role the 1st Defendant played in managing the relationship between the Plaintiff and the 2nd Defendant after the debt became overdue.

[9] Thus, there can be no doubt, from the foregoing analysis, that the presence of the 1st Defendant herein is necessary to enable the Court effectually and completely adjudicate upon and settle all the residual issues in the suit, and I so find. In the premises, I would dismiss the Defendant's Notice of Motion dated **20 March 2017** with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2017

OLGA SEWE

JUDGE