



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

MISC CASE NO. 15 OF 2013

BROLLO KENYA LTD APPLICANT

VERSUS

DAVID OYATTA RESPONDENT

RULING

1. The **Chamber Summons** Application before the court is an ex-parte application filed herein by the Respondent/Applicant on 4th September 2015. The application seeks to secure the following orders;
 1. *The court be pleased to order the addition of KETAN DOSHI, as a third Party and/or Interested Party to these proceedings.*
 2. *Leave do issue to the Respondent to serve upon the Third Party/Interested Party as appropriate notice attached to the affidavit of the Respondent in support of the application.*
 3. *The Supporting Affidavit attached hereto be deemed as pleading not only setting out the Counter claim against the Applicant but also the relief as against the Third Party/Interested Party.*
 4. *Costs of this application be in the cause.*
2. The application is premised on the grounds stated therein and is supported by the affidavit of DAVID OYATTA sworn on 31st August 2015 and a Supplementary Affidavit sworn on 18th March 2016.
3. The Brief history of the application is as follows; On 12th May, 2015, this Court ordered that the Applicant's Originating Summons filed herein does continue as if the cause had been commenced by Plaintiff and that the affidavits filed by the parties and the statement of accounts filed do form part of the pleadings. The Court further gave the parties liberty to file further or supplementary affidavits and as any other documents as may be necessary.
4. The contention of the Applicant in these pleadings is that it is not liable to pay fee due and/or certified as due and payable to the Applicant's firm in respect of civil cases HCCC No. 802, 803 and 804 all of 2002. The Applicant's case is that he is entitled to Kshs.10,151,871.43/= as fee from the suits including from the matter of HCCC No. 1232 of 2001 the subject of the proceedings. The Applicant states that as can be seen by the statement filed on 12th February, 2015, he has appropriated Kshs.5,920,772/= received as decretal in HCCC No. 1232 OF 2001 towards payment of his fee. He subsequently received Kshs.782,989.40/= during the pendency of this case reducing the Applicant's liability to Kshs.3,198,110.03 which the Applicant counter-claims. The Applicant's position is that instruction to him in all these suits were issued by Ketan Doshi and because the Applicant/Respondent is denying liability, it is important that the said

- Ketan Doshi be made party to these proceedings because the Applicant believes that he is equally liable, jointly and/or severally with the Applicant/Respondent to settle the said fees.
5. Although the Application before the court is filed ex-parte under the rules, the proposed Third Party has filed a Replying Affidavit in opposition to the application. The Replying Affidavit is sworn on 2nd March 2016.
 6. I have considered the Replying Affidavit, and contents thereof. Firstly, the application before the court is brought under Order 1 rules 15 of the Civil Procedure Rule. The relevant portion of that section states that;

“... and such leave shall be applied for by summons in chambers ex parte supported by affidavit”.

Therefore, the application before the court is an ex-parte application and the Replying Affidavit by the proposed Third Party is misplaced. That position notwithstanding, I have considered the said Replying Affidavit and my view is that the issues raised therein may be part of the Defence of the proposed Third Party once he is joined herein.

7. Now back to the ex parte application. The law states that, that kind of application is to be filed 14 days after close of pleadings. By an order of this court dated 12th May 2015, this court directed that the Originating Summons herein dated 21st January 2013 and the affidavit filed herein be deemed as pleadings for the purpose of this suit which was allowed to proceed as though filed by plaintiff. The parties were given the liberty to file further or supplementary affidavits and to take any necessary steps to continue with the suit in the normal way. So in my view, although the application to join the third party should be filed as soon as pleading close, this scenario is peculiar, and this court will excuse an apparent delay in filing this application.
8. It is also clear that the question in contention in this suit, which will have to be decided by the court, is who between the Plaintiff and the proposed Third Party is to pay the Respondent's legal fees. This in my view, means that the proposed Third Party is a proper party to be joined in these proceedings, as he could possibly have an answer to the said issue.
9. In the upshot, the Respondent's/Applicant's Chamber Summons dated 31st August 2015 and filed here on 4th September 2015 is allowed as prayed.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 15th DAY OF APRIL, 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

Mr. Nyamare for the Applicant

Mr. Osioma for the Third Party

No appearance of the Respondent

Teresia – Court Clerk