



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL SUIT NO 6 OF 2016
NGUVU CONSTRUCTION AND MINING LIMITED.....PLAINTIFF
VERSUS
AARON KITUNGU MBUVI.....DEFENDANT

R U L I N G

INTRODUCTION

1. The Plaintiff filed this suit together with an application both dated 3rd March 2016 seeking, in terms of the Plaintiff, “a declaration that the Plaintiff is entitled to possession of all its equipment namely: IH bulldozer, Caterpillar dump truck, Volvo dump truck, Caterpillar truck shovel, KOBELCO excavator and a Crushing Plant currently in LR. 9775.” By the Notice of Motion of the same date, the Plaintiff in similar terms principal orders that –

a. **An interim preservation order do issue preventing the defendant its agents, employees from moving the construction machinery in site LR. 9775 namely IH Bulldozer, caterpillar dump truck, Volvo dump truck, Caterpillar truck shovel, KOBELCO excavator and a crushing plant pending hearing and determination of this application inter partes.**

b. **The applicant be granted access and police escort/security as he removes its machinery from LR No. 9775 at Lukenya to their yard herein in the same locality.**

2. The court considered the application at the *ex parte* urgent application stage on same date 3rd March 2016 and directed that the application be served upon the defendant for hearing *inter partes* on the 8th March 2016, and in the meantime directing an order in terms of prayer No. 2 of the Notice of Motion (set out in 1 (a) above) until hearing of the application *inter partes*.

3. The Plaintiff’s Process Server filed an affidavit of service upon the defendant, which is set out in full below:

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 6 OF 2016

NGUVU CONSTRUCTION AND MINING LIMITED.....APPLICANT

VERSUS

AARON KITUNG'U MBUVIRESPONDENT

AFFIDAVIT OF SERVICE

(UNDER ORDER 5 RULES 15 OF THE CIVIL PROCEDURE RULES)

I **ANDREW K. MWANZIA** of **P.O. Box 1926-90100 MACHAKOS** within the Republic of Kenya do hereby make oath and solemnly state as follows:-

1. **That** I am a licensed Court Process Server of the High Court of Kenya and all subordinate courts.

2. **That** on 4.3.2016 at 8.00am I received one copy of notice of motion dated 3rd March, 2016, a plaint with supporting document and a hearing notice and another full set of the said documents for service from **M/S Muema & Associates Advocates** with instructions to effect service upon the Respondent herein.

3. **That** on the same day accompanied by the applicants servant **one Kamau** we travelled to **Mlolongo Chiefs Office** whereby I found the sub-chief of the area I explained myself and that I wanted to effect service to the respondent through her office who telephoned the said **AARON KITUNGU MBUVI** whereby he told her that he is at the site in Lukenya and accompanied by the applicants servant who knows the site we went back to Lukenya where the site is and upon arrival we found the respondent whom I knew for I had served him earlier with court document I therefore greeted and informed him the purpose of my visit, and I personally served him with copies of the said documents who accepted my service by way of retaining his copies and refused to sign upon my principal copies which I hereby return to this honourable court duly served upon **AARON KITUNGU MBUVI** the respondent herein.

4. **That** again on the 7th day of March, 2016 I received a court order from the firm of **M/S Muema & Associates** for service upon the defendant.

5. **That** on the same day I proceeded to the Lukenya site at L.R 9775 upon getting information from **Kamau** the applicants servant that the defendant has been spotted there and I did find him there at around 2.30pm upon which being known to me from the previous services I did once again introduce myself and effected service upon him he recovered the court order but declined to sign on my principal copy which I herewith return this honourable court duly served upon the respondent.

6. **That** I do return the said documents to this honourable court duly served upon the respondent herein.

7. **That** all what is stated above is true to the best of my knowledge, information and belief.

SWORN at MACHAKOS

This 7th day of **March**, 2016

By the said

ANDREW K.MWANZIA

.....
Signed

DEPONENT

BEFORE ME

COMMISSIONER FOR OATHS

4. When the matter came up for hearing on the 8th March 2016, with the filing of affidavit of service sworn by one Andrew K. Mwanzia on the 7th March 2016, as shown above, the Court proceeded to hear the plaintiff's application for injunction dated 3rd March 2016 in the absence of the defendant. The court's proceedings for the day are set out verbatim as follows:

“Coram:

Before Hon. E. Muriithi, J

Court Assistant Doreen

Mr. Muema for Plaintiff/ Applicant

N/A for the Respondent

Mr. Muema

Respondent has been served. I seek prayer 3 of the Application. The Applicant was met with force when he sought to remove the equipment. I refer to the affidavit. **The dispute was about the lease agreement as to mining of the land. There is no dispute as to ownership of the equipment. I refer to paragraph 2 - the equipment is under Asset Financing with CFC Bank. See also Bills of lading. The applicant/deponent is the guarantor and stands to lose if the equipment is auctioned by the Bank.** We pray that the Court allows the applicant to mitigate its losses. We pray that the application be allowed.”

Court:

Upon hearing the Counsel for the applicant, consider that the applicant has a strong prima facie case for the grant of an order for mandatory injunction sought as the ownership of the property has been demonstrated and the payment of lease sum of 620,000/- . The applicant should be allowed to recover his equipment to avoid losses by way of sale by the Asset Financing bank if no repayments are made.

Accordingly, I grant the order prayed in terms of Prayer No. 3 of the Notice of Motion dated 3rd March 2016. Costs in the Cause.

THE APPLICATION

5. Upon execution of the Order for recovery of the motor vehicles and equipment, the Defendant, being aggrieved thereby, filed the present application by NOTICE OF MOTION dated 18th March, 2016, which was presented before the Court on 21st March 2016, seeks specific orders as follows:

“Orders

1. *This matter be certified urgent and heard ex-parte in the first instance due to reasons of urgency*

herein.

2. Pending inter-partes hearing and determination of this application, this Honourable court be pleased to issue an interim order of stay of execution of its orders issued herein on 8th March, 2016 in order to maintain the status quo and preserve the sub strum of the case.

3. This Honourable Court be pleased to discharge and/or set aside its orders issued herein on 8th March, 2016 granting the Plaintiff access and Police escort/security to remove the construction machinery on L.R. 9775 namely IH Bulldozer, Caterpillar dump truck, Volvo dump truck, caterpillar truck shovel, KOBELCO excavator and a crushing plant.

4. An order do issue that the Defendant/Applicant be served with the Plaint, Court summons as well as the Plaintiff's Notice of Motion dated 3rd March, 2016 with leave to defend.

5. Such further or other orders that this Honourable Court may deem fit and justice to grant in the circumstances.

6. Costs of the application be provided for."

6. The application was founded on grounds set out in the application as follows:

Grounds

1. The Defendant/Applicant has not been served with the suit papers herein (plaint, summons and injunction application) Hearing Notice and any of the orders issued herein as alleged or at all.

2. The Plaintiff/Respondent obtained the orders of 8th March, 2016 through deliberate concealment of material facts to the suit herein which if disclosed, the Court would have reached a different decision.

3. The Plaintiff/Respondent is in the premises guilty of deliberate non-disclosure of material facts and therefore disentitled to the orders issued herein.

4. The Plaintiff/Respondent has not come to court with clean hands and its Notice of Motion dated 3rd March, 2016 is premised on an affidavit full of falsehoods and hence committed perjury.

5. If the order is sustained and executed as granted, it will breach and trample on the Defendant's rights.

6. The Plaintiff's application lacks merit and otherwise have not been granted were it not for the Plaintiff's misrepresentation.

7. There is sufficient cause for the setting aside of this Honourable Court's ex-parte order of 8th March, 2016.

8. In light of the change of circumstances by virtue of the facts disclosed by the Defendant herein, the injunction order issued on 8th March, 2016 can no longer be sustained.

9. It is in the interest of justice that the orders prayed for herein be granted."

7. The Court considered the application of 18th March at the ex parte stage set the application for hearing *inter partes* on 22nd March 2016 and in the meantime directing the preservation of the status quo by stay of execution in terms of prayer 2 of the Notice of Motion set out above.

8. With leave of Court following oral application by the defendant's counsel complaining that the plaintiff had removed certain equipment despite the order of stay of execution, the defendant filed an Amended Notice of Motion dated 23rd March 2016 introducing as Prayer NO. 4 for –

“An order do issue that the Plaintiff forthwith return at its costs the machinery and equipments it moved from the Defendant's possession on L.R. 9775 pursuant to this Honourable Court's orders namely one complete unit of a primary crusher, KOBELCO excavator and one dump truck Caterpillar.”

9. The Defendant/applicant's case was based on facts set out in the supporting affidavit of 18th March in which he deponed that he had not been served with the summons, Plaint, application and order of court as alleged in the affidavit of service by one Andrew K. Maingi as he was not at Lukenya on the material dates as alleged; that there was no lease between him and the plaintiff contending that the lease relied on by the Plaintiff was a forgery which was the subject of criminal investigations; that the lease on his property was between him and Seike Industrial Limited signed by one Crispin Musembi Mulika on behalf of the Company in which Chistopher Wanyoike Ndungu, the director of the plaintiff who swore the affidavit in support of the Plaintiff's suit was a co-director; that the said Seike Industrials Limited had paid the Ksh.620,000/- by petty cash vouchers in its name and the company owed him Ksh.4,000,000/- in rent; and that he had given instructions to an auctioneer to levy distress for the rent arrears on the machines the subject of the suit which he said 'were brought to the ground by the said Crispin Musembi Mulika as owner and by the Company known as Seike Industrials Limited and not Nguvu Construction and Mining Ltd.' .

10. As regards service, the defendant supported his evidence by statements of bank accounts and Safaricom money transfer printout to showing transactions that he had made at Loitoktok and Nairobi on the material dates of alleged service, the 4th and 7th March 2016, indicating that he was away from the site where the service was allegedly effected upon him, and called for the cross-examination of the Process server and the Assistant Chief Mlolongo who had according to the Process server called the defendant ahead of the service on 4th March 2016.

RESPONSE BY THE DEFENDANT

11. The Plaintiff filed a replying Affidavit sworn by Christopher Wanyoike Ndungu on 24th March 2016, contending principally dismissing the defendant's allegation of non service as red herring 'to avoid facing the real issues in controversy in this matter as he has nothing to lose while the equipment is confiscated'. On the merits of the application, the deponent set out the plaintiff's case in paragraphs 7 -12 and 17 – 22 as follows:

“Replying Affidavit dated 24th March, 2016

Paragraph No. 7-12 and 17-22

7. That one of the grounds relied in this application is that the applicant has confiscated the respondent machinery as a lien for rent arrears incurred amounting to Kshs. 4,000,000/= by another party other than the plaintiff herein and it suffices to say that is an admission that he has unlawfully confiscated the machinery.

8. That the machines herewith are the properties of Nguvu Construction Company limited the respondent herein and the ownership of machine has no nexus to any other party to warrant confiscating the same. Attached hereto are copies of import documents marked “NCML1”.

9. That the assertion that I forged a lease agreement between the respondent and the applicant is not true as the respondent/applicant has been receiving money directly from me through Mpesa and even in cash all totaling to Kshs. 620,000 as earlier deponed in our application granting the orders on the strength of the lease agreement. Attached hereto is the payment voucher, marked

annexture “NCML2”.

10. That the lease exhibited herein is as “CW2” is a forgery as there has never been a lease between Seike Industrials Limited and a person called Haron Kitung’u Mbuvi and it is notable that it is not executed by myself or the applicant herein and neither is it attested.

11. That the lease dated 10.12.2015 said to be subject of criminal investigations is the only valid document between the defendant and the plaintiff herein and it is when we went to start the work the applicant stopped us and the applicant gave police false information which has remained unactionable when we explained the issue to police to date with the view to create a non-existent dispute.

12. That the respondent cannot be allowed to blow hot and cold at the same time if he has any rent arrears which is denied with Seike industrials limited he cannot therefore confiscate equipment belonging to the plaintiff it is totally unjustifiable and he ought to pay for the illegal confiscation.

17. That the machinery and equipment namely IH bulldozer, caterpillar dump truck, Volvo dump truck, caterpillar truck shovel, KOBELCO excavator and a crushing plant is property of Nguvu Construction Limited and registered as such.

18. That the equipments have been acquired under an asset financing facility from CFC Stanbic bank by the respondent company herein and the guarantors are the two directors of Nguvu Construction Company Limited who are shareholders and even paid to the supplying company in Sweden down payment as required under the asset financing facilities. Attached hereto is term loan letter and acknowledgment of undertaking by directors marked NCML3.

19. That the plaintiff/respondent company herein has never issued shares to any other person apart from its two directors Christopher Wanyoike Ndungu and Regina Kendi. Attached hereto are the companies’ annual returns for the year ending 2015. Marked as NCML4.

20. That Seike Industrials Limited did not mine or excavate as per the alleged disputed leased but did purchase from stone cut machine cut stones waste which we used to sell to East Africa Portland Cement factory as Pozzollana from the neighbouring parcels of land.

21. That we were to start mining in January, 2016 at the applicant’s parcel of land hence the need to execute an agreement which the respondent/applicant did execute on 10.12.2015 and there has never been any other agreement with Seike Industrials Limited as asserted.

22. That in the interest of justice we pray that this Honourable court appreciating the facts of ownership of the machinery do vacate the stay orders and allow the machinery be under custody of Nguvu Construction Company Limited.”

12. The Plaintiff’s deponent filed a further replying affidavit attaching the registration certificates on the equipment in the name of the Plaintiff, explaining his relationship turned sour with the said Crispin Musembi Mulika as an employee and subsequently director of the Plaintiff without shares, conceding that he was a director of Seike Industrials Ltd but denying that the company ever entered a lease with the defendant, and denying that any rent of Ksh.4,000,000/- was owed to the defendant.

13. The defendant filed a further affidavit of 8th April 2016 in response to the plaintiff’s further replying affidavit detailing the dealings of the defendant with the said Crispin Musembi Mulika and Seike Industrials Ltd who brought the machines on his property in February 2016; explaining the basis of his rental demand and attaching a statement by the advocate who prepared the lease between the Defendant and the Seike Industrial Limited disowning the lease allegedly entered with the Plaintiff and an affidavit by the said Crispin Musembi Mulika claiming a beneficial interest in the equipment for Seike Industrials Limited explaining at Paragraph 13 (3) of the Affidavit sworn on 8th April 2016 that-

“That at the time of procuring these machines, Seike Industrial Limited had no financial base to procure a loan facility and therefore I agreed with my business partner Mr. Ndung’u that we use Nguvu Construction and Mining Limited to procure a loan to pay part of the purchase price as we service the loan and pay the balance of the purchase price. It is on that strength that the log books were processed in the name of Nguvu Construction and Mining Limited, but thereafter have the same transferred to Seike Industrials Limited where we are equal partners.”

The Hearing

14. The application was then set for hearing commencing the 30th March 2016 after directions were taken for the filing of various affidavits by the parties. The hearing proceeded on the basis of affidavits and oral submissions by counsel – Mrs Yano for the Plaintiff and Mr. Nyandieka for the Defendant - with the cross-examination of the Process Server and the Assistant Chief Mlolongongo on the question of service of the defendant with the Summons, Plaint and application in the suit as alleged in the Affidavit of Andrew K. Mwanzia sworn on 7th March 2016. The application was heard on 30th March 2016, 6th April 2016, 12th April 2016, 15th April 2016 and 25th April 2016, and ruling was reserved for the 12th May 2016 at 2.30pm. As the court did not sit on the afternoon session of the 12th May 2015 date, ruling was deferred.

ISSUE FOR DETERMINATION

15. As presented by the Plaintiff in the application of 3rd March 2016, there was no dispute as to ownership of the motor vehicles and equipment the subject of the suit. However, the application of 18th March 2016 by the defendant reveals that the ownership (at least beneficial ownership) of the equipment and motor vehicles is disputed. The Court cannot determine at the interlocutory stage in this application whether the equipment and motor vehicles the subject of the suit belong to the plaintiff or to another party. I venture to suggest that such a determination can only be made upon full hearing of such a suit complete with cross-examination of the parties and their witnesses.

16. There is obvious contestation as to the ownership of the vehicles and equipment the subject of the suit. The defendant’s claim for rent and, therefore, the right to levy distress must be determined at the full hearing of the suit along with the issue of which of the two Leases between the Plaintiff or Seike Industrials Limited is valid must also be determined.

17. When the court granted the interlocutory mandatory injunction it was on the well known principles that the court may grant an interlocutory mandatory injunction in clear and exceptional cases where the plaintiff/applicant demonstrates his right to the relief sought. See ***Kamau Mucuha v. The Ripples Limited***, Court of Appeal Civil Application No. NAI. 186 of 1992 (NAI.77/92 UR).

18. That was on the basis of the evidence then before the court and the sworn testimony in the affidavit of service that the defendant had been served with the plaint, summons and application in the suit. The application now before the court dated 18th March 2016 is also not an occasion for the determination of the plaintiff’s application for injunction herein dated 3rd March 2016 which was already considered on the 8th March 2016 in the absence of the defendant who was shown to have been duly served with the suit papers and a hearing notice for that date.

19. The issue before the Court is whether the court order of 8th March 2016 upon hearing in the absence of the defendant ought to be set aside on the grounds of misrepresentation that the defendant had been duly served with the suit documents and notified of the hearing date and non-disclosure of material facts relevant to the ownership of the suit property and its presence on the defendant’s parcel of land LR No. 9775, as urged by the defendant.

DETERMINATION

The law

20. The question before the Court is whether the order of 8th March 2016 should be set aside *ex debito justitiae* for want of hearing of fair hearing of the defendant. As held by Lord Diplock in *Isaacs v. Robertson*, [1984] 3 All E.R. 140 at 143 there is a category of orders liable to be set aside *ex debito justitiae* even without need to apply for its setting aside in accordance with the Rules of court:

"[T]here is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice." [Underlining mine]

21. In the context of service of process, Ringera, J. as he then was in ***Gandhi Brothers v. H.K. Njagi t/a H.K. Enterprises*** Nairobi HCCC No. 1330 of 2001 referred to his earlier ruling in *Remco Ltd v. Mistry Jadva Parbat & Co & 2 Ors.* HCCC NO. 171 of 2001 where the judge said:

"[If] there is no proper service of summons to enter appearance to the suit, the resulting default judgment is an irregular one which the court must set aside ex debito justitiae (as a matter of right) on application by the defendant. Such a judgment is not set aside in exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process itself."

22. In *THE KING v. THE GENERAL COMMISSIONERS FOR THE PURPOSES OF THE INCOME TAX ACTS FOR THE DISTRICT OF KENSINGTON. Ex parte PRINCESS EDMOND DE POLIGNAC.* (1917) 1KB 486 it was *Held*:

"If on the argument showing cause against a rule nisi the Court comes to the conclusion that the rule was granted upon an affidavit which was not candid and did not fairly state the facts, but stated them in such a way as to mislead and deceive the Court, there is power inherent in the Court, in order to protect itself and prevent an abuse of its process, to discharge the rule nisi and refuse to proceed further with the examination of the merits."

On the facts of the case

Service of process

23. Upon hearing the testimony of the Process Server Andrew K. Maingi (PW1) and of the Assistant Chief Florence Kii (PW2), it is clear that the fact of service of the plaint, summons and court order herein as deponed to by the Process Server was not proved. The Process server deponed in his affidavit that the Area Assistant chief had called the defendant on his number (which number the Process Server testified in court he did not know) and was informed by the defendant that he was at his site in Lukenya. On the other hand, the Assistant Chief testified that she did not know the defendant and had only attempted to call him on a number provided by the Process Server which did not go through. The evidence of the Assistant Chief only confirmed that the process Server had sought the assistance of her office to trace the defendant on the 4th March 2016 not that he had served the defendant. On a balance of probabilities having considered the evidence of the defendant as to his whereabouts on the two days of alleged service, I find that the service on the defendant was not proved. In proceeding with the hearing of the application on the 8th March 2016 on the basis of the affidavit of service of Andrew K. Maingi of 7th March 2016, the Court was misled, and its proceedings of the day must be taken to be irregular on account of misrepresentation by the Process Server. The proceedings of 8th March 2016 must, therefore, be set aside *ex debito justitiae*.

24. In swearing his Affidavit of Service of 7th March, 2016, the said Process Server may have committed

an Offence under the Oaths and Statutory Act, and the matter shall be reported to the Director of Public Prosecution (DPP) with a copy of this ruling for investigation and further action as necessary.

Disputed ownership of equipment and accrual of rent under Lease

25. From the pleadings and affidavits in this suit, the assertion that there was no dispute as to the ownership of the equipment and motor vehicles and that there was only a rent dispute against which the plaintiff had paid the sum of Ksh.620,000/- which as shown in the ruling was the basis for the grant of the interlocutory order of 8th March 2016 was not candid nor fairly stating the facts of the case. The deponent of the affidavit for the Plaintiff did not disclose in the supporting affidavit to the application for mandatory injunction dated 3rd March 2016, which he concedes in the further replying affidavit herein at paragraphs 32 -33 that there was a dispute with the defendant as to rent beginning December 2015

“Paragraphs No. 32 and 33

32. That it was in December, 2015, that the parties entered into the written agreement wherein the plaintiff was to pay the defendant Kshs. 250,000/= per month for the 1st four (4) months and thereafter Kshs. 300,000/= per month.

33. That it was on this premises that the mining process had to begin on 25th January, 2016. This did not happen, as immediately the machines were switched on, the defendant stopped the operation, I reported the frustrations to the police vide OB NO. 54/25/1/2016, and further OB 54/26/1/2016.”

26. The deponent did not also disclose the ownership dispute with one Chrispin Musembi who claimed a beneficial interest through Seike Industrials Limited, to which the said deponent in his further replying affidavit conceded to be a co-director. Had the Court been made aware of the dispute as to the ownership of the equipment and motor vehicles and the dispute as to the rent on the defendant’s parcel of land, the Court would have ordered full hearing of the dispute rather than interlocutory mandatory injunction in favour of the plaintiff.

27. Moreover, the facts relied on by the respective parties are so divergent in their effect that it is not possible for the court to hold that the Plaintiff’s case for the recovery of the equipment and motor vehicles by reason of failure of the lease between the parties was clear and exceptional as to justify the grant of interlocutory mandatory injunction in accordance with the principles for the grant of interlocutory mandatory injunction.

Joinder of necessary Parties

28. Order 10 rule (2) of the Civil Procedure Rules on joinder of parties to a suit is in the following terms:

“10. (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.”

29. In ***Civicon Limited v. Kivuwatt Limited and 2 Ors.***, Civil Appeal No. 45 of 2014, the Court of Appeal at Mombasa (Makhandia, Ouko & M’Inoti, JJA.) considered the provisions for the joinder of parties in Order 1 rule 10 of the Civil Procedure Rules, and held that-

“[I]t may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order 1 rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party

in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit and the interest need not be the kind that must succeed at the end of the trial.”

30. In this suit, the said Musembi Mulika has in his affidavit attached in the Defendant’s further affidavit of 8th April 2016 urged the Court to join him as a defendant in the suit as well as the company which he alleged to be co-directors with one of the shareholders/directors of the Plaintiff. Although there is no formal application for joinder, the court, being aware of the request for such joinder by the affidavit, may on its own motion pursuant to Order 10 rule 2 of the Civil Procedure Rules order joinder of such party for the effective resolution of the dispute, if it considers that such a party is a necessary party.

31. The court considers that the said Chrispin Musembi Mulika and Seike Industrials Ltd are parties necessary in the suit ‘*in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit*’ including the issues of validity of lease and accrual of rent against the Plaintiff or the said Seike Industrials Limited and the ownership, legal and beneficial, of the suit property.

ORDERS

32. For the reasons set out above, the court grants the Defendant’s Amended Notice of Motion of 23rd March 2016, with costs to the Defendant.

33. The Court further orders that one Chrispin Musembi Mulika and M/S Seike Industrials Limited be joined as defendants in this suit.

34. On the basis of urgency in view of the accrual of asset financing debt, the matter shall be mentioned on a date to be fixed in consultation with the parties for directions as to hearing of the Plaintiff’s application dated 3rd March 2016.

DATED AND DELIVERED THIS 18TH DAY OF MAY 2016.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Nyakeriga for Mrs. Yano for the Plaintiff

Mr. Nyandieka for the Defendant

Mr. Nicholas- Court Assistant.