



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 83 OF 2014**

**LIVINGSTONE KAMANDE GITAU.....1<sup>ST</sup> PLAINTIFF**

**DEVELOPMENT SURVEY SERVICES COMPANY LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME.....DEFENDANT**

**RULING**

On 23<sup>rd</sup> July 2015, the parties to this suit complied with pre-trial requirements and were directed to take hearing dates at the registry. A hearing date was set for 14<sup>th</sup> December 2016. However on 25<sup>th</sup> February 2016, the Defendant filed an application to strike out the 1<sup>st</sup> Plaintiff's suit on the grounds that the 1<sup>st</sup> Plaintiff as an individual has no *locus standi* to bring a claim against the Defendant; that there has never been any agreement or contract pitting the Defendant and the 1<sup>st</sup> Plaintiff; the subject transaction is between the Defendant and the 2<sup>nd</sup> Plaintiff which is an artificial person capable of suing and being sued in its own name; the 1<sup>st</sup> Plaintiff is a stranger to the Defendant in Law and cannot therefore maintain a suit against it; that it is in the interests of justice that the prayers sought are granted in order to facilitate the resolution of the dispute; that no prejudice shall be visited upon the 1<sup>st</sup> Plaintiff if the application is granted.

It is brought under Section 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rules 10(1),(2) of the Civil Procedure Rules. There is a supporting affidavit sworn by Simon Nyakundi the Chief Executive officer of the Defendant. It buttresses the grounds in the application. Annexed to it is the letter which forms the base of the contract between the parties dated 29<sup>th</sup> March 2010.

The 1<sup>st</sup> Plaintiff filed Grounds of Objection on 16<sup>th</sup> March 2016. He maintained that the Application was incompetent and misconceived, frivolous and vexatious and an abuse of the process of this Court as the same was never pleaded in the defence or raised at the pre-trial conference. He also maintained that the 2<sup>nd</sup> Defendant being a corporate personality can only operate through its agents. The 1<sup>st</sup> Plaintiff further maintained that the Defendant is bound by its pleadings and cannot at this late stage introduce such an issue bearing in mind the suit has already been fixed for hearing; that the application is in conflict with the overriding objective and Article 159(2)(d) of the Constitution. No Replying Affidavit has been filed to verify the Grounds of Objection. Parties argued the application by way of written submissions which the court has duly considered.

The underlying facts are brief. The 1<sup>st</sup> Plaintiff is the proprietor and Director of the 2<sup>nd</sup> Plaintiff. The 2<sup>nd</sup> Plaintiff was awarded a contract by the Defendant to subdivide L.R. No. 209/6502 Muthurwa Estate owned by the Defendant and afterward deliver land titles in the Defendant's name.

There is no doubt that under Order 1 Rule 10(2) of the Civil Procedure Rules, the Court may at any stage of the proceedings order the name of any party joined either as Plaintiff or Defendant to be struck out. The question in this case is whether the 1<sup>st</sup> Plaintiff was or is improperly joined to these proceedings. An application can be brought by either party or the court may act on its own, to either strike out or add the

name of a party as plaintiff or as defendant for the purpose of enabling it to effectually and completely adjudicate upon and settle all questions involved in the suit.

The 1<sup>st</sup> Plaintiff herein argued that the Defendant's application should not be allowed because it is coming too late in the day. I agree that it has been brought somewhat late in the day but considering the provisions of the law and the purpose therefore, nothing would defeat the purpose intended by the legislature which is that, the striking out or addition of a party will be done in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

Here the main question involved is whether or not the Defendant owes the Plaintiffs Kshs. 108,180,673/20. It would in my view not only be proper but necessary that the 1<sup>st</sup> Plaintiff remains in the suit to shed more light on the above. The Defendant has not demonstrated what prejudice it is likely to suffer if the 1<sup>st</sup> Plaintiff continues as a party.

So while such an amendment may be allowed at any stage of the proceedings as provided under Order 1, Rule 10 (2) subject only to the law of limitation, the court's discretion in my view is very wide. In this case the 1<sup>st</sup> Plaintiff is actually the person who carried out the survey work being the agent of the 2<sup>nd</sup> Plaintiff. I believe he was always in control of the circumstances which led to the claim herein. It would not be proper to remove him from these proceedings.

My view is that if the provisions of Order 1 Rule 10(2) are rationally applied there is need for the continued joinder of the 1<sup>st</sup> Plaintiff to these proceedings not only as a necessary party, but also as a proper party to the proceedings for a complete and final decision of the issues involved. The continued joinder of the 1<sup>st</sup> Plaintiff will not jeopardize the trial but will instead assist the court and the trial process.

For the foregoing reasons, without deciding the merits of the suit against the Defendant, I do not find that the 1<sup>st</sup> Plaintiff is improperly joined in this suit. I consequently dismiss the application dated 23<sup>rd</sup> February, 2016. Costs shall be in the cause.

Orders accordingly.

***Dated, signed and delivered at Nairobi this 26<sup>th</sup> day of September 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**