



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL DIVISION

AT MOMBASA

CIVIL CASE NO. 94 OF 2016

JAMIL TRADING LTD.....PLAINTIFF

VERSUS

KENYA REVENUE AUTHORITY.....RESPONDENT

R U L I N G

1. For determination by the court is the Notice of Motion dated 13/9/2016 seeking an order that the applicant, **Ethics and Anti-corruption Commission** be joined to the proceedings as an interested party. The application is grounded on the facts that the said applicant has received credible information that the plaintiff and or officers of the Defendant could have engaged in suspect activities which could have resulted in loss of public revenue and compromised National Security and that it has therefore commenced investigations in that regard. For that reason, as the entity entrusted under Article 379 and 252 to ensure compliance with Chapter 6 of constitution and for that matter empower to carry out investigations, it contends that if the matter proceeds without its participation, if mandate will be compromised.

2. The application was supported by the affidavit of the one JARSO ROBA DIDA whose gist is that there is an established an ignoble happening at the part by which traders use falsified documents with the collusion or connivance of officers of the Defendant to release goods from the port. In addition the deponent says that the persons concerned make false and or incorrect entries including under invoicing, false declaration of quantity and product description and have in effect diverted transit – cargo, and enabled entry of prohibited goods with one consequence that public revenue has been lost and public security compromised. For its mandate, the ongoing investigations and public good it seeks to participate in these proceedings so that it has an input and no drastic orders are made to the detriment of its work.

3. To the application the plaintiff filed grounds of opposition which by and large fault the application for joinder to lack factual and legal foundation; that it is merely speculative and that the applicants powers under section 13 of the Ethics and anti-corruption commission Act are quite broad and incapable of frustration by mere fact of failure to join the applicant to the proceedings.

4. When the parties addressed the court on the application, Mr. Bii for the applicant largely reiterated the averments in the application and affidavit in support and underscored the need to have the applicant be joined to the proceedings while stressing the position held by the applicant that there could have been collusion between the plaintiff and officers of the Defendant which may be furthered if the matter proceeds in the applicants absence.

5. On his part Mr. Wamego opposed the application took the position that the investigations so far touch on containers while his client cargo are loose not in containers and further that even the charges preferred so far do not touch on his clients and their employees. He therefore stressed the fact that so far there is no wrong doing established against his client to justify the detention of the goods and therefore no need to allow participation by the applicant.

Analysis and determination

6. To this court whether or not to allow a party to be joined to any ongoing proceedings is in the discretion of the court in terms of Order 1 Rule 10 Civil Procedure Act. That provisions expressed in the following wordings:-

“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”.

7. Being a discretionally power it must be exercised on set principles being applied to the fact so that it qualifies to be judicious and not capricious. It is the court to find for an applicant, or on its own motion, that a party's presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit!

8. Whether or not one is a necessary party to an action is a matter of law as applied to the facts revealed in each matter. In this matter the applicant has made the allegations disclosed above among them that it is investigating an information that the plaintiff and agents of the defendant could have colluded to have cargo leave the port without payment of due taxes with the result that not only have revenue been lost but the security of the state and the Nation may be compromised or threatened with compromise. Those facts when juxtaposed against statutory and constitutional obligations and mandate of the applicant persuade this court that the applicant is a necessary party.

In AMON vs RAPHAEL TRUCK SONS LTD [1956] 1 ALL E.R 273 the court in defining who is a necessary party said.

“The person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally. That is by curtailing his legal rights. That will not be the case unless an order may be made in the action in which he is legally interested”.

9. Put I the contexts of this matter, I hesitate not in saying that the applicant being the body Kenyans have entrusted with the duty to fight corruption cannot be said to lack interest in light of the fruits brought to the attention by the applicant and alleging evasion of tax and comprise of National Security.

10. Being so necessary party, it is ordered that it shall participate at the trial as such interested party and for that reason it has the liberty to file any papers and pleadings as it shall deem fit to protect its legal mandate and interests.

11. I order that the costs of this application be costs in the cause.

Dated, signed and delivered at Mombasa this 21st day of September 2016.

P.J.O. OTIENO

JUDGE