



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL SUIT NUMBER 315 OF 2015

MARTIN SIKUKU MMALANDI.....PLAINTIFF

VERSUS

CREATIVE INNOVATIONS LIMITED.....1ST DEFENDANT

PAVITER AMAR SOKHI

T/A AMAR CONSTRUCTION CO. LTD.....2ND DEFENDANT

R U L I N G

1. The applicant/1st Defendant took out a Notice of Motion dated 12th November, 2015 where it sought the following orders: -

- a. That the 1st Defendant **CREATIVE INNOVATIONS LTD** be struck out from this suit.
- b. That further to and/or in the alternative to prayer 1 above, **JASWINDER SINGH KALSI** and **HARBINDER SINGH KALSI** be enjoined as Defendants herein.
- c. That the costs of this Application and the suit be provided for.
- d. That this Honourable court be pleased to make such further or other orders as it may deem fit.

2. The application is premised on the grounds that the Plaintiff initially falsely claimed to be employed by Creative Innovations Ltd, the 1st Defendant. That the plaintiff has since filed an amended plaint confirming that he was not employed by the 1st Defendant and enjoining his employer Paviter Amar Sokhi as a Defendant. That the 1st Defendant was only a tenant at the premises at which the Plaintiff was allegedly injured and the landlords of the premises were Jaswinder Singh Kalsi and Harbinder Singh Kalsi who under the lease were responsible for maintenance of the building and all repairs and they had hired the 2nd Defendant who in turn employed the Plaintiff.

3. In response, the Plaintiff/Respondent deponed a replying affidavit dated 17th December, 2015 wherein he swore that he has no contention with Prayer 2 of the application. He stated that he had no knowledge that the 1st Defendant is a tenant in the said premises since he knows them as the owners of the premises. He further swore that the 1st Defendant was in actual occupation of the premises and it was their responsibility to point out any defects and issue warnings as to the dangers in the premises. He averred

that the 1st Defendant rushed him to hospital and issued him with an acknowledgment note that he was his employee. He asserted that he was under the direct care of the 1st Defendant.

4. The 2nd Defendant in response to the subject application and the Plaintiff's replying affidavit deponed an affidavit to the effect that it was contracted by the 1st Defendant to carry out repairs in their godowns. It claimed that it subcontracted Julius Munyoki to complete the works who also employed other people to assist him. He denied knowledge of the Plaintiff and averred that Julius Munyoki's averment that it had employed the Plaintiff is a figment of his imagination.

5. The parties proposed to be joined Harbinder Singh Kabi also deponed a response to the application. He stated that he owns the premises LR. 209/10617 rented by creative Innovators Ltd together with his brother Jaswinder Singh Kabi. He stated that according to the lease between them and the 1st Defendant, the tenant 1st Defendant is required to be responsible for maintenance of the premises. He denied claims that ordered, requested, contracted agents or representative to carry out repairs of the premises and averred that they are not aware of any repairs being carried out in the premises.

6. The Applicant/1st Defendant put in a further affidavit where he deponed that the replying affidavit of the proposed parties

7. Harbinder Singh should be expunged from the record as he is not party to this suit hence he has no right of audience. It argued that the lease agreement between the 1st Defendant and Harbinder Singh Kabi clearly states that the landlord is responsible for the repairs to the premises. He averred that the Plaintiff and Julius Munyoki have confirmed that they were employed by the 2nd Defendant and the 2nd Defendant has also confirmed at paragraph 6 and 7 of his replying affidavit that Julius Munyoki and the Plaintiff were indeed his employees. It further swore that it did not engage the services of the 2nd Defendants and accused it of colluding with Harbinder Singh Kabi to defeat the ends of justice.

8. When the application came up for inter partes hearing on 26th July, 2016. Mr. Nyakundi, counsel representing the 2nd Defendant raised an objection on the supporting affidavit sworn by Sebastine Musau. According to him, the affidavit was sworn long before the application was filed. The court directed that the objection be heard together with the application. On the same day, the parties through their counsels made oral submissions. The 1st Defendant sought to be struck off from the suit since the Plaintiff filed an amended plaint where he claimed he was employed by the 2nd Defendant and that there is no nexus between the 1st Defendant and the 2nd Defendant. It argued that since this is a personal injury suffered by the Plaintiff, which injury occurred in a building owned by the landlord, Harbinder Singh, then as a tenant it should not be enjoined in the suit. It argued that according to the lease agreement, it was the duty of the landlord to keep the premises in a good and tenable repair. It trivialized the note stating that the plaintiff was its employee since the 2nd Defendant allegedly conceded that the Plaintiff was his employee. On the objection raised by the 2nd Defendant of the dates in the supporting affidavit, it invoked Article 159 (2) (d) of the Constitution of Kenya where Justice is to be administered without undue regard to procedural technicalities.

9. The Plaintiff on his part submitted that he supports prayer 2 but opposes the other prayers. He argued that the 1st Defendant was in occupation of the premises and as such had a duty to issue out warnings and put up notices as to any dangers likely to be present in the premises. He averred that he was under the direct care of the 1st Defendant who rushed him to hospital and he wrote a note acknowledging him as the employee hence recommending treatment. On the objection raised by the 2nd Defendant, he argued that the supporting affidavit is defective in that it was deponed to on 12th November, 2013 yet the application before the court is dated 12th November, 2015. He prayed that it be struck out. He referred the court to the case of **Crescent Distribution Services Limited Vs Egnite Technologies Limited & Another**, Nairobi, HCCC No. 555 of 2011 wherein it was noted that the test of determining whether or not to join a party to proceedings are whether his presence is necessary to enable the court to effectively and completely settle

all the questions involved in the case. He averred that the 1st Defendant is a very necessary party to the suit.

10. On its part the 2nd Defendant concurred that the 1st Defendant is a necessary party in the matter because it is the occupier of the premises in question. It argued that according to the tenancy agreement, it was upon the 1st Defendant to carry out repairs at its own costs. It submitted that it was upon the 1st Defendant to ensure that all the visitors are safe in the premises and to point out the dangers that they may meet. It urged the court to dismiss the application and uphold the objection.

11. Having considered the arguments by the parties, the issue of determination is whether the 1st Defendant should be struck out from the suit and whether Jaswinder Singh Kalsi and Harbinder Singh Kalsi should be enjoined as parties to the suit. According to the Plaintiff, he claimed that he was employed by the 1st Defendant. He produced a note written and executed 1st Defendant addressed to Likoni Road clinic which stated that he is their employee and requesting the clinic to offer treatment to the Plaintiff. He later amended the plaint and averred that he was employed by 2nd Defendant but was working in the 1st Defendants premises. He stated in his plaint that he holds both the Defendants liable for breaching the statutory duty of care. He cast blame on the two Defendants for failing to provide him with safe working equipment and for failing to ensure his safety and well being by informing him of the loose iron sheets respectively.

12. From the foregoing, it is apparent that the Plaintiff is blaming both the 1st and 2nd Defendants whom he holds liable. While the 1st Defendant absolves himself from blame and shifts blame to the 2nd Defendant and the landlords, being Jaswinder Singh Kalsi and Harbinder Singh Kalsi, the 2nd Defendant argues that it is merely a tenant of the subject premises and that any repairs that were being undertaken were within the preserve of Jaswinder and Harbinder Singh who were the landlords in accordance with the lease agreement. It has attached the lease agreement to shed more light on its claim. Indeed, clause 4 of the lease agreement sets out the obligations of the landlord in which it is required to keep in good and tenable repairs the roof foundations, outside walls and main structure of the building provided always that such repairs have to be necessitated due to damages caused by the negligence on the part of the tenants.

13. While the reading of the above clause illustrates that the landlord is the one who is required to carry out repairs, clause 2 (g) lays the burden of repair of the premises on the tenant, the 1st Defendant herein. It is therefore, possible that the repairs that were being undertaken could have been sanctioned by either the 1st Defendant or the landlords, Jaswinder and Harbinder Singh. It is also apparent that the repairs were being undertaken by the 2nd Defendant who had been contracted and who subcontracted someone else, who might or might not have employed the Plaintiff herein.

14. The court of Appeal in the case of **JMK Vs MWK and Another (2015) eKLR** while referring to order 1 Rule (10) (2) of the Civil Procedure Rules held that: -

“... a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit to be added as a party. Commenting on this provision, the learned authors of Sarkar’s Code of Civil Procedure (11th Ed. Reprint, 2011 Vol. 1 P. 887), state that: -

‘The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.’

15. The court proceeded to adopt the above approach and further referred to the case of **Central Kenya Ltd Vs Trust Bank & 4 others, CA No. 222 of 1998**, when it affirmed the guiding principle in amendment of pleadings and joinder of parties that: -

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

16. Looking at the arguments advanced by the parties in this case. Parties are pointing fingers at each other. Striking out the 1st Defendant from the suit will be detrimental to the suit since it is apparent that it is a necessary party to this suit. The landlords of the premises Jaswinder and Harbinder Singh for reasons adduced above are also necessary parties to this suit who should be enjoined as Defendants for purposes of complete adjudication of this suit. I am not convinced that the proposed Defendants and 1st Defendant will be prejudiced if added and maintained as Defendants. Any injustice visited on them by this enjoiner can be compensated for with costs.

17. Regarding the issues raised on the supporting affidavit to the effect that it was deponed too long before the application was filed, this court finds that there is no prejudice that the Applicant has alleged will suffer if the same is admitted. In any event, Article 159(2) (d) of the Constitution emphasis on substantive rather than procedural technicalities. This court in exercise of its discretion, rejects that objection.

18. In the upshot, the court makes the following orders: -

a. Prayer 1 of the application is disallowed while prayer 2 of the same is allowed.

b. Costs in the cause.

Dated, signed and delivered at Nairobi this 13th day of October, 2016.

.....

L NJUGUNA

JUDGE