



REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL SUIT NO. 28 OF 2015

BETWEEN

ACTIONRICH INVESTMENT COMPANY LIMITED PLAINTIFF

AND

JOSEPH OTIENO ONYANGO 1ST DEFENDANT

EVANS ODERO NYAKIGO 2ND DEFENDANT

THE LAND REGISTRAR, KISUMU LAND REGISTRY 3RD DEFENDANT

AND

KENPIPE CO-OPERATIVE SACCO SOCIETY LIMITED GARNISHEE

AND KENPIPE HOUSING COOPERATIVE SOCIETY LIMITED OBJECTOR

RULING NO. 4

1. By a Notice of Motion dated 10th October 2016, the plaintiff **Actionrich Investment Company Limited** asked this court to correct the name of the Garnishee in the proceedings by substituting the name **KENPIPE CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED (“Kenpipe Sacco”)** with **KENPIPE HOUSING CO-OPERATIVE SOCIETY LIMITED (Kenpipe Housing)**.

2. The application is grounded on the fact that the plaintiff brought a garnishee application against **Kenpipe Sacco** in which it sought to recover Kshs. 18,087,000/- owed to it by the 1st and 2nd defendants. The application was allowed on 18th May 2016 but upon execution it turned out that the plaintiff had erroneously referred to the Garnishee as **Kenpipe Sacco** instead of **Kenpipe Housing**. The plaintiff contends that **Kenpipe Housing** had indeed entered appearance and referred to itself by the right name. The plaintiff is apprehensive that if the Garnishee’s name is not corrected to reflect the proper name, it may not be able to recover the debt.

3. The Garnishee opposed the application on the basis that the plaintiff purports to rely on “*without prejudice*” communication which cannot found a cause of action. It avers that the application is incompetent and cannot lie under the law.

4. **Section 100** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* empowers the court to order amendments at any time, and on such terms, as to costs or otherwise as it may think fit amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of

determining the real question or issue raised by or depending on the proceeding.

5. The plaintiff seeks an amendment which would have the effect of correcting and or substituting named parties to the proceedings. The provisions of **Order 1(2) Rule 10** of the **Civil Procedure Rules**, which are apposite, provide;

(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 in the suit, be added.

6. What is before the court is a case of a misnomer which must be corrected to avoid causing an injustice to the parties. According to the record of proceedings, the Garnishee introduced itself correctly and admitted that it was willing and able to abide by the courts garnishee orders issued on 18th May 2016. This demonstrates that no prejudice will be occasioned to the Garnishee and the objector if the names are corrected.

7. The issue raised by the garnishee about reliance on “*without prejudice*” communication is a non-issue because it had previously already admitted on record its willingness to comply with the garnishee orders. In **Ruling No. 3**, I set out the arguments by **Kenpipe Housing** as follows;

*[7]In the second application, **Kenpipe Housing**, referred to itself as the garnishee. Its Chairman, Richard Aketch, deponed that **Kenpipe Housing** entered into an agreement to purchase **LR No. EAST KISUMU/DAGO/449** from the 2nd defendant and that in accordance with the agreement, the release of the balance of the purchase price to the 2nd defendant was subject to completion of the sale process and granting of vacant possession. It contended that it **Kenpipe Housing** was obliged to pay the settle the sum of Kshs. 18,087,000/- due to **Actionrich** before settling the Kshs. 10,000,000/- which was in any event subject to the agreement and that the 2nd defendant had no expectation of immediate payment of Kshs. 10,000,000/-. It also informed the court that in April 2016, the Land Registrar registered the transfer and issued **Kenpipe Housing** with a title and that it was in the process of securing a loan by charging the property in order to pay the balance of the purchase price upon securing vacant possession.*

8. It is also plain that **Kenpipe Housing** is the registered owner of the land sold to it by the 2nd defendant and thus it has fully benefitted from the sale yet no payments have been made to the plaintiff.

9. In addition, I am alive to the court’s overriding responsibility to do substantive justice. Accordingly, all proceedings advanced for and orders made against **KENPIPE COOPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED** will be deemed to be proceedings advanced for and orders made against **KENPIPE HOUSING CO-OPERATIVE SOCIETY** and the plaintiff shall be at liberty to amend and correct all orders and proceedings accordingly.

DATED and DELIVERED at KISUMU this 28th day of November 2016.

D.S. MAJANJA

JUDGE

Mr Lore instructed by Millimo, Muthomi & Company Advocates for the Garnishee.

Mr Nyamweya instructed by N.E. Mogusu & Company Advocates for the 2nd defendant.

Mr Oruenjo instructed by Oruenjo Kibet and Khalid Advocates for the plaintiff/applicant.