



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 159 OF 2015

DIG-TEC IMAGES LIMITED.....APPELLANT

VERSUS

KENYA RAILWAYS STAFF RETIREMENTS & BENEFITS SHCEME.....1ST RESPONDENT

MBUKINYA SUCCESS (K) LIMITED.....2ND RESPONDENT

AND

RODGERS WERE WASHIKA

FRED YESHO MUZUNGYO

ROBERT AZARIAH.....INTENDED INTERESTED PARTIES/APPLICANTS

RULING

1. The Applicants have filed a Notice of Motion dated 30th April, 2015 seeking to be enjoined in this appeal as Interested Parties. The application is premised on the grounds set out on the face of the motion and the depositions in the Supporting Affidavit of Rodgers Were Washika the 1st Applicant sworn on his own behalf and on behalf of the 2nd and 3rd intended interested parties in their capacity as members of the 1st Respondent. He stated that there is a dispute pending in court relating to the subject matter herein which forms part of the property of the scheme to be managed and invested by the 1st Respondent scheme in trust and for the benefit of the members including them. He contended that they are apprehensive that an adverse determination in this matter may jeopardise their welfare in terms of pension and stated that their participation in this matter shall help the court in the determination of the matter in dispute since they have crucial information relating to the subject matter which has been one of the contentious issues in the affairs of the scheme. He stated that their inclusion shall not in any way prejudice the interest of any party in this suit and that without their participation they remain greatly exposed as no other party represents their welfare in this matter.
2. The application was opposed. Mr. Nicholas Kikui swore a Replying Affidavit filed in court on 7th May, 2015. He contested that this appeal relates to a contractual dispute between the Appellant and the 1st Respondent which contract the Applicants are not privy to. That the suit property is wholly owned and managed by the 1st Respondent and the Applicants are not joint owners, partners or shareholders of the 1st Respondent and therefore have no interest in the running and

- management of the suit premises. He stated that the Applicants are not parties to the lower court proceedings and cannot therefore make entry at the appeal stage and further that they are not experts in anything which shall add value to this appeal. He contended that the Applicants' rights as pensioners will not be affected and that the Applicants have not demonstrated how their rights is at stake. That they are busy bodies as well as serial vexatious litigants. That they have filed numerous suits against the 1st Respondent amongst them Milimani High Court Constitutional Petition No. 156 of 2015 and Milimani High Court Constitutional Petition No. 159 of 2012 which were dismissed.
3. A further affidavit was filed by the 1st Applicant on 8th May, 2015. He contended that the deponent to the Replying Affidavit has no authority to speak on behalf of the 1st Respondent. That they as members of the 1st Respondent have an interest in ensuring the proper management of the scheme including how it invests and manages its property which it holds, manages and invests in trust for the members for their benefit. He contended that there is no absolute bar to the introduction of new facts at the appellate level and as such it would be upon the court to make such a determination; that the proper management of the funds and property of the scheme has an impact on the amounts payable to members as pension and the sustainability and consistency of such payments. That the existence of numerous suits against the 1st Respondent is an indication of mismanagement of the 1st Respondent and disgruntlement of members and should not be used to grant immunity to the 1st Respondent against public scrutiny. It was contended that the Petitions mentioned in the Replying Affidavit have no relation to the matter in dispute in this matter.
 4. Mr. Omollo learned counsel for the Applicants referred to Clause No. 4 and 5 of the Trust Deed and submitted that according to the Trust Deed and Rules of Kenya Railways Staff Retirement Benefit Scheme, the property of the scheme is to be managed in a way that is beneficial to the members who are beneficiaries of the scheme. He stated that the dispute relates to property L.R. No. 209/6502 Nairobi to which the 1st Respondent made a double allocation to both the Appellant and the 2nd Respondent. It was contended that the manner in which the 1st Respondent managed the property is not the manner authorised by the trust and that the management has jeopardised the interest of the Applicants. It was submitted that the 1st Respondent ought to have an Annual General Meeting and give a report and be accountable to the members.
 5. Learned counsel Mr. Walusale for the 1st Respondent essentially reiterated the averments in the replying affidavit and submitted that the issue of double allocation is being adjudicated on. That the only interest the Applicants have is for their pension benefits to be paid to them and that the same has been religiously paid which is an indication that the 1st Respondent has been carrying its mandate properly. He contended that the Applicants have not demonstrated that they have a strong interest warranting them to be enjoined. He stated that Mr. Nicholas Kikuvi is a senior official Benefits Officer of the 1st Respondent vast with issues affecting the 1st Respondent.
 6. In response thereto. Mr. Omollo submitted that there is no bar for a party to be enjoined at appellate stage. He stated that negative assertions had been made on the conduct of the 1st Respondent at paragraphs 7 & 10 of the Supporting Affidavit and that the Applicants limited their allegations to the present dispute at paragraph 5, 6 and 9 of the Supporting Affidavit.
 7. I have considered the depositions of the parties together with the submissions by learned Counsel. What falls for this court's determination is whether the Applicants have an interest in this appeal and the effect of enjoining them and whether or not Mr. Kikuvi is authorised to swear a replying affidavit on behalf of the 1st Respondent.
 8. The Applicants referred this court to Clause 4 and 5. Clause 5 provides that

"...for that purpose, the trustees shall hold the contributions paid to them by the sponsor and the Members and any other sums investments and income and all lump sums representing the same upon trust for the respective persons for whose benefit such sums and other benefits are expressed to be payable in accordance with the provisions of this Deed and the Rules."

9. Clause 21 on protection against financial loss is to the effect that the trustees shall protect the scheme and individual assets against any manner of financial loss. This is done in the interest of

the members. It is worth noting that while the 1st Respondent denies that the Applicants have no interest in the property which it double allocated, it has not shown that its members have no interest in the manner it handles the sources of their pension. Considering the provisions of Clauses 5 and 21 of the Trust Deed and Rules of Kenya Railways Staff Retirement Benefit Scheme, I find and hold that the Applicants have an interest in the manner in which the 1st Respondent handles where the pension of its members is derived from.

10. The purpose of enjoining a party to a proceeding is to have a necessary party for the purposes of determining the real matters in question. Order 1 Rule 10 (2) provides that:-

"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."

11. It follows therefore that, a party as long as his joinder shall assist in determination of the matters in question, can be enjoined at any stage of the proceeding. In this regard, I am satisfied that the Applicants have established an interest in the appeal and can properly be enjoined in this appeal. Further, to this, the 1st Respondent has not established that it stands to suffer prejudice in the event the Applicants are enjoined. In the end I find merit in the application and I hereby allow the same. Costs shall be in the appeal.

Dated and Signed at Nairobi this 18th day of June, 2015.

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A. MABEYA

JUDGE

Read, delivered and Signed at Nairobi this 19th day of June, 2015.

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D A ONYANCHA

JUDGE