



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 309 OF 2015**

**PARVEEN ADAM AND SAFIA BUTT**

**SUING AS CHAIRPERSON AND SECRETARY OF EAST AFRICAN CENTRAL MUSLIM  
WOMEN'S ASSOCIATION..... PLAINTIFFS**

**VERSUS**

**AFRICAN BANKING CORPORATION LIMITED.....DEFENDANT**

**TASNEEM SHABIR.....FIRST PROPOSED INTERESTED PARTY**

**DEFENDANT/APPLICANT**

**NAHEED KHAN....SECOND PROPOSED INTERESTED PARTY**

**DEFENDANT/APPLICANT**

**RULING**

1. The two proposed Interested Parties herein, **Tasneem Ashraf Shabir** (1<sup>st</sup> Proposed Interested Party) and **Naheed Khan** (2<sup>nd</sup> Proposed Interested Party) have moved the Court vide their Notice of Motion dated **2<sup>nd</sup> July, 2015** for orders that:-
  1. **The application be certified urgent and that the same be heard *ex parte* in the first instance. (Spent)**
  2. **The Court be pleased to enjoin them as Defendants in the suit.**
  3. **Leave be granted for the Interested Parties to file their pleadings in this case as Defendants.**
  4. **The costs of the application be provided for.**

The application is expressed to have been brought under **Order 1 Rules 3, 8, and 10 of the Civil Procedure Rules** as well as **Section 3A of the Civil Procedure Act** and “**all enabling provisions of the law.**”

2. The background to the application is that the two Plaintiffs/Respondents filed a Plaint herein on 24<sup>th</sup> June 2015 in their capacities as Chairperson and Secretary, respectively, of the East African Central Muslim Women's Association seeking a mandatory injunction directing the Defendant, African Banking Corporation Ltd, to lift its decision, made on 17<sup>th</sup> November 2014 freezing the account of the Muslim Women's Association at its Westlands Branch. The Proposed Interested

- Parties/Applicants, who are also members and officials of the Muslim Women's Association, have come to court contending that the orders sought on behalf of the East African Central Muslim Women's Association, seeks orders affecting the Muslim Women's Association, which is a different entity altogether.
3. The Applicant's contend that as the Treasurer and Assistant Treasurer of the Muslim Women's Association they have a right to participate in these proceedings for the reasons that:
    - a. **The Muslim Women's Association and the East African Central Muslim Women's Association are two distinct legal entities with separate officials and Constitutions.**
    - b. **It is irregular, illegal and an abuse of the process of the Court for the Plaintiffs to purport to seek orders of the Court in the name of East African Central Muslim Women's Association, which would have the effect of allowing them to operate the bank account of the Muslim Women's Association when they have no mandate or legal authority to do so.**
    - c. **That the Plaintiffs have mischievously withheld vital information from the Court pertaining to the Constitution of the Muslim Women's Association which would be pertinent in resolving the dispute herein.**
  4. For the foregoing reasons, the Applicants argue that it is necessary for them to be enjoined as Defendants herein so as to safeguard the interests and assets of Muslim Women's Association and to uphold the Association's Constitution and Regulations.
  5. The application is grounded on the affidavit of **Tasnim Ashraf Shabir**, the 1<sup>st</sup> Proposed Interested Party/Applicant and the further affidavit of **Najeed Khan**, the 2<sup>nd</sup> Proposed Interested Party, sworn and filed on 17<sup>th</sup> July 2015, in which they deponed that as the Treasurer and Assistant Treasurer of the Muslim Women's Association, they became aware that the Association's account had been frozen by the Defendant, and that the Plaintiffs had moved to Court to seek the re-activation of the account, without any reference to them, yet the 1<sup>st</sup> Applicant is a co-signatory to the said bank account.
  6. They are further concerned that the suit has been filed in the name of the East African Central Muslim Women's Association which is a separate and distinct legal entity from the Muslim Women's Association. The 1<sup>st</sup> Applicant thus averred that the Plaintiffs are out to circumvent the Constitution of Women's Muslim Association, with the objective of acquiring control of the assets of the Muslim Women's Association for personal gain, hence the need for their joinder.
  7. It was thus the submission of the two Applicants that they have shown a legitimate and tangible interest in the subject matter of the suit to warrant their joinder. They relied on the case of **Brek Sulun Hemed Vs Constituency Development Fund Board & Another (2014) eKLR** in support of their case.
  8. A response to the application on behalf of the two Plaintiffs/Respondents is in the lengthy affidavit of **Parveen Adam** (1<sup>st</sup> Plaintiff) sworn on the 9<sup>th</sup> July, 2015 in which she deponed, inter alia, that the application is misconceived and is merely intended to paralyze the Plaintiff's activities and functions; and that whatever complaints the proposed Interested Party have could be addressed and resolved internally at the Association's regular meetings or Annual General Meeting. She further deponed that the 1<sup>st</sup> Interested Party is her younger sister with whom they have fallen out over personal issues and that out of animosity, the 1<sup>st</sup> Interested Party now seeks to vent her anger on her by publicly embarrassing her in her capacity as the Chairperson of the Association.
  9. The rest of the averments resonate more, in my considered view, with the substantive matters in controversy in the pleadings rather than the question as to whether the two Interested Parties should be enjoined in these proceedings.
  10. In their Written Submissions the Plaintiffs took issue with the propriety of the application contending that the grounds raised by the two Interested Parties as the basis for their application to be enjoined in these proceedings are issues which cannot be taken up in the Commercial & Admiralty Division as they relate to squabbles between sisters. They relied on **Malindi Criminal Appeal Nos. 44, 45 & 76 of 2014: Karisa Chengo and Others vs. Republic (UR)** to support their argument that division and jurisdiction of the courts is now specified and clearly defined, and therefore a court in the Commercial & Admiralty Division cannot entertain or hear a matter which within the jurisdiction of the Civil Division of the High Court.

11. It was further submitted that since the Muslim Women's Association was registered as a Non-Government Organization (NGO), its life came to an end in 1998 by virtue of the provisions of Section 13 of the Non-Governmental Organizations Coordination Act No. 19 of 1990. Hence the two Proposed Interested Parties have no *locus standi* to litigate on behalf of an entity that is non-existent. The Court was therefore urged by Counsel for the Plaintiffs/Respondents to dismiss the Notice of Motion dated 2<sup>nd</sup> July, 2015 with costs as it has no foundation in law.
12. The Court has carefully considered the arguments for and against the instant application in the light of the pleadings, affidavits and submissions filed herein. Although the parties delved into arguments for or against the closure of the subject bank account, the issue that falls for the Court's determination at this juncture is simple and straight forward, namely, whether or not the two proposed Interested Parties should be enjoined in these proceedings as Defendants as has been sought.
13. Order 1 Rule 3 of the Civil Procedure Rules which gives guidance as to who may be joined as Defendants provides that:

**“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”** (Underlining added)

14. This suit was filed by the Chairperson, and Secretary on behalf of the East African Central Muslim Women's Association against the African Banking Corporation Limited. The reliefs sought are as follows:
  - a. **An order of mandatory injunction directing the Defendant to lift its order made on 17<sup>th</sup> November, 2014 freezing the Association accounts at its Westlands Branch.**
  - b. **An order of injunction to restrain the Defendant's officers from restraining the Plaintiffs from operating the Association's accounts.**
  - c. **An order that the Defendant Bank do allow the Plaintiffs immediate access to the funds to enable the Plaintiffs to utilize its funds.**
  - d. **General, exemplary and aggravated damages for libel, breach of contract.**
  - e. **Costs**
15. Granted the foregoing it cannot, strictly speaking, be said that the relief sought against the Bank is such as is being sought herein the Plaintiffs against the two Applicants. Indeed there is no relief sought by the Plaintiffs against the Applicants as it is not the Plaintiffs who are seeking their joinder. To that extent therefore I find that the provision relied on is inapplicable.
16. I have further considered the provisions of Order 1 Rule 8, Civil Procedure Rules and note that whereas that provision would otherwise have been the most appropriate it presupposes that the parties have the same interest. Hence, whereas the two Applicants and the two Plaintiffs are members and officials of the Muslim Women's Association, the suit has been brought on behalf of a different entity, the East African Central Muslim Women's Association. More importantly, the two Applicants are not interested in the same outcome that the two Plaintiffs have set out to achieve against the Bank. To that extent therefore, the court finds Rule 8 to be similarly inapplicable.
17. The other enabling provision upon which the application is predicated is Rule 10(1) of Order 1 of the Civil Procedure Rules, which deals with substitution and addition of parties. That Rule provides thus:

**“ Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the Court thinks fit.”** (Emphasis supplied)

18. It is noteworthy that it must be demonstrated to the satisfaction of the Court that:

- a. the suit has been instituted in the name of the wrong persons as the Plaintiff, or that it is doubtful whether the suit has been instituted in the name of the right Plaintiff;
- b. the suit has been instituted in the names of the wrong persons due a bona fide mistake;
- c. it is necessary for the determination of the real matter in dispute for another person or other persons to be substituted or added as Plaintiff/Plaintiffs.

This is hardly the case herein as the Plaintiffs are in no doubt at all about their *locus standi* vis-a-vis the Defendant Bank.

19. Order 1 Rule 10(2) of the Civil Procedure Rules, on the other hand targets misjoinder. It 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 to effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”**  
(Emphasis added)

It is not the case of the proposed Interested Parties that the Plaintiffs or the Defendant be struck out, granted that the two Plaintiffs are also signatories to the subject account. It is further conceded that the bank account is maintained at the Defendant’s Westlands branch. Accordingly I find that these elements of Order 1 Rule 10(2) of the Civil Procedure Rules are similarly inapplicable to the facts presented in respect of the instant application.

20. I note that Sections 1A of Civil Procedure Act was also cited by the Applicants as one of the enabling provisions upon which the application is hinged. That section enjoins the Court to administer justice fairly, expeditiously and in a proportionate manner by focusing attention on substantive justice in resolving disputes. Thus, looking at the matter with this in view, can it be said that the two Applicants have made out a good case for their joinder for which, recourse being had to the provisions of Section 1A of the Civil Procedure Act, would afford them reprieve?

21. In the case of **Brek Sulum Hemed vs. Constituency Development Fund Board & Another [2014] eKLR** that was relied on by the Applicants, Muriithi J, while faced with a similar application by interested parties, observed thus:

**“To be sure there is no procedure under the Civil Procedure Act and Rules for the joinder of interested parties and the practice of application for [by] interested parties must have been developed by necessary implication...”**

22. The court proceeded to fall back on the provisions of Sections 1A and 1B of the Civil Procedure Act as read with Order 1 Rule 10(2) of the Civil Procedure Rules, in disposing of the matter. He ruled thus:

**“As interested parties, the applicants need only demonstrate interest in the subject of the suit or in other relevant matter affecting the suit. I do not think that the phrase ‘all questions involved in the suit’ in Order 1 Rule 10(2) is to be restrictively construed to mean only such questions as are raised by the present parties. I think an issue may properly be taken to be a ‘question involved in the suit’ if it is so related to the suit as to affect the question in the suit...I find therefore that the applicants are ‘necessary parties’ within the meaning of Order 1 rule 10 of the Civil Procedure Rules.”**

23. Similarly, in **Mombasa Civil Appeal No.15 of 2015 between JMK and MWM and Another [2015] eKLR**, the Court of Appeal had this to say:

**“Order 1 Rule 10(2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo motu*, to order the name of 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.”**

24. The Court of Appeal quoted with approval from **Sarkar’s Code of Civil Procedure (11<sup>th</sup> Ed. Reprint, 2011, Vol. 1 P. 887)** which states thus with regard to the equivalent provision of the Indian Code of Civil Procedure, 1908 (as amended):

**“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.”**

25. In the light of the foregoing I would proceed to consider the application on the basis of necessary implication flowing from the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules. First and foremost, there is no dispute herein that the two Applicants were officials of the Muslim Women’s Association as Treasurer and Assistant Treasurer. The 1<sup>st</sup> Applicant was, in addition, a co-signatory to the Association’s bank account that is the subject of this litigation and therefore has an interest in the objects for which the funds in the bank account were collected.

26. The parties’ point of departure, however, is the allegation by the two Applicants that the suit has been brought in the name of East African Central of Muslim Women’s Association and not the Muslim Women’s Association, in whose name the account was opened; and that the 2<sup>nd</sup> Plaintiffs are intent on misapplying the funds. It is noteworthy that this is the line of defence adopted by the Defendant as is evident in its Written Statement of Defence and the Defendant’s response to the Notice of Motion dated 22<sup>nd</sup> June 2015. Under these circumstances, it is plain that whereas the Applicants ought to have been enjoined as co-plaintiffs, they are not interested in the same outcome as the Plaintiffs.

27. It must be for the foregoing reason that the Plaintiffs contended that the Applicants’ relief lies elsewhere, either at the Association’s annual general meeting or in the Civil Division of the High Court. To this end, an argument was pitched by them, on the authority of **Malindi Criminal Appeal Nos. 44, 45 & 76 of 2014: Karisa Chengo and Others vs. Republic**, to the effect that a matter falling within the jurisdiction of the Civil Division of the High Court should not be entertained in the Commercial & Admiralty Division, and therefore the grievance of the two Applicants being a dispute between officials of the Association, is a matter falling within the jurisdiction of the Civil Division. I have perused the **Karisa Chengo case** aforementioned and to my mind the issue was not whether cases can be filed across divisions but whether a Judge of Environment & Land Case (ELC) could participate in hearing Criminal Appeals as a High Court Judge. This is evident from the finding of the Court of Appeal thus:

**“... It is apparent that the High Court is the only Court with jurisdiction to hear and determine Criminal Appeals. Indeed the provisions of Article 165 (3) (a) leave no doubt that the High Court has unlimited original jurisdiction in Criminal and Civil matters save those reserved for the two special Courts. Nowhere is it provided under the Industrial Court Act or the Environment and Land Court Act that these two Courts shall have jurisdiction to deal with criminal matters other than those matters reserved for the specialized Courts. If there had been such an intention, nothing would have been easier than specifically stating so. They too therefore do not have jurisdiction to deal with matters reserved specifically for the High Court ... We reject the argument that a Judge once appointed as either a High Court, ELRC or ELC Judge can hear and determine matters reserved for any of those Courts.”**

28. Accordingly, whereas I agree in principle with the proposition that a dispute falling within the jurisdiction, of say the Civil Division of the High Court, should not be filed in the Commercial & Admiralty Division, the authority relied on does not advance that argument. Besides, as a co-signatory of the bank account that is the subject of this suit, sufficient cause has been shown herein to warrant the joinder of the two Applicants in these proceedings with the object of an

efficacious resolution of the dispute between the parties. To direct that the applicants file a separate suit would work against the provisions of **Article 159(2) of the Constitution of Kenya** as well as the Overriding Objective of the Civil Procedure Act and the Rules thereunder as expressed in Section 1A thereof.

29. In the result, it is my finding that the Notice of Motion application dated 2<sup>nd</sup> July 2015 is meritorious. The same is hereby allowed and orders given as prayed in paragraphs 2 and 3 thereof. Costs of the application to be in the cause.

DATED, SIGNED and DELIVERED at **NAIRIOBI** this **21<sup>st</sup>** Day of **OCTOBER 2015**

**OLGA SEWE**

**JUDGE**