



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 172 OF 2012

DUBAI BANK LIMITED ::: PLAINTIFF

- VERSUS -

UKAMBA AGRICULTURAL INSTITUTE ::: DEFENDANT

R U L I N G

1. The application before the court is a Chamber Summons dated **5th December 2012**. It is filed under Order 1 Rule 10 (2) of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act.
2. The application seeks the following orders:-
 1. *That leave be granted for South Eastern University College to be enjoined as an Interested Party/Defendant in the above suit.*
 2. *That upon the leave being granted the Plaintiff and Defendant be ordered to serve South Eastern University College with all the pleadings filed in the above matter.*
 3. *That the cost of this application be provided for.*
3. The application is supported by affidavit of **PROFESSOR GEOFFREY M. MULUVI** dated **5th December 2012** and is premised on the grounds set out therein.
4. The application is opposed by the Respondent who has filed a **Notice of Preliminary Objection** dated **5th December 2013** and filed in court on 12th December 2013. The Respondent also filed **grounds of opposition** dated **5th December 2013** and filed in court in 11th December 2013.
5. The brief history of the application is that by Gazette Notice dated 15th July 2008 issued by His Excellency the President Honourabel Mwai Kibaki, south Eastern University Order was issued under Section 5 of the University of Nairobi Act. In the said Gazette Notice, the South Eastern University College was formed and was to the successor of Ukamba Agricultural Institute under Clause 3 (3). Under Clause 3 (4) of the said Order, ***“all rights, liabilities and assets held by or anybody on behalf of Ukamba Agricultural Institute existing at the commencement of this Order, shall be automatically and fully transferred to the University College.”***
6. The Applicant alleges that they are holding the original title for LR. No. 209/10350, the subject matter in this suit. It is alleged that the Defendant herein has filed several suits challenging the said Gazette Notice No 102 of 2008, none of which have been determined conclusively. The above suits are as follows: -

- a. ***HCCC No. 136 of 2009 between Ukamba Agricultural Institute Limited and South Eastern University College and the city Council of Nairobi.***
- b. ***Petition number 11 of 2010 between Ukamba Agricultural Institute Limited – Vs – Attorney General & South Easter University college.***
- c. ***Petition Number 96 of 2011 between the Registrar of Titles, South Eastern University College and the Defendant.***
- d. ***Miscellaneous application number 578 of 2010 between the Defendant and National Bank of Kenya.***
- g. By a Ruling of this court dated 29th June 2012 the suit property was vested to the Plaintiff pursuant to a pending transaction between the Plaintiff and the Defendant. The Interested Party/Applicant submits that it became aware of the said Ruling long after it was delivered. The Applicant also submits that only its trustees have the mandate to dispose off the suit property and that they are holding the original title for L.R. No. 209/10350, the suit property. In that regard the said vesting order directly affects them and so they need to be joined as party herein to protect their interest.
- h. Through their Notice of Preliminary Objection and Grounds of Opposition aforesaid, the Respondent avers that the suit herein is filed without due authority from the proposed Interested Party, and that there is no resolution or valid resolution by the University Council of South Eastern University College to appear in the proceedings and that the firm of Kilonzo & Company Advocates have not been validly instructed to institute this suit for and on behalf of the Interested Party and that the proposed Interested Party did not authorise Professor Geoffrey M. Muluvi to swear the supporting affidavit herein. On those grounds the Respondent submits that the application is fatally defective, is frivolous, vexatious and an abuse of the process of the court and should be dismissed.
- i. In my view, the grounds of objection raise serious issues of law which need a determination. At paragraph 1 of his supporting affidavit Professor Geoffrey M. Muluvi depones that he is the Principal of the South Eastern University College and has the authority of the board to swear the affidavit. However, that authority of the board is not shown in the affidavit.
- j. Under Section 3 (1) (2) of the University of Nairobi Act under which the Applicant University is established it is stated that:-

(2) “The University College shall be a body corporate with perpetual succession and a common seal . . .”

That being so any authority donated to any organ or persons to act on the behalf of the University must be conveyed under the University Seal. The purpose of this rule is to create certainty about persons or entities that can represent a body corporate by ensuring that they act at the prompting of the Board and not at their own whims. In addition, there are no resolutions appointing the firm of M/s Kilonzo & Company Advocates to act for the Applicant in this matter, and so the proceedings before the court emanating from that firm of advocates are not validly before the court and I strike them out accordingly.

7. What I need then to say is that not all technicalities of procedure are curable under Article 159 (2) (d) of the Constitution which demands that the court lays less emphasis on matters of procedural technicalities in favour of the determination of substantive issues. In my view, a party must first properly be or appear before the court before such a party can rely on the said Article 159 (2) (d). A party cannot be outside the court, then shout through the window to be allowed in when the door is open. He must come through the door and then raise any other issues while inside the court. In other words, a party must procedurally come before the court before it can hope to benefit under article 159 (2) (d) of the Constitution. The Applicant seeks to come before the court without satisfying this court that indeed, it is the Applicant, or that it has authorised the commencement of these proceedings or that it has appointed a firm of advocates to represent it. Without a proper procedure it is not easy to establish the authenticity of the current proceedings, and I hereby strike out the same.

8. However, the issues raised by the Applicant, that they are Interested Parties in this matter need serious attention. In that regard I will grant the Applicant the leave to file proper proceedings before the court if it still interested in the orders sought herein. That application shall be filed within 30 days from today.

9. For the foregoing reasons the chamber summon application dated 5th December 2012 is dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Kago for Plaintiff/Respondent

M/s Makobu for Defendant/ Applicant

Teresia – Court Clerk