REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 63 of 2001

WILSON OGOT.....PLAINTIFF

VERSUS

1. AMOS KASASIRA.....1ST DEFENDANT

2. SIMON N. NGUGI LTD.....2ND DEFENDANT

RULING

1. This is the Plaintiff's Chamber Summons application dated 15th February, 2011 seeking to join the Trustees of the Baptist Convention of Kenya into the suit as the 3rd– 7th Defendants. Earlier, by a Ruling of 5th December 2008, the court had struck out the suit against the 3rd, 4th, 5th, 6th and 7th Defendants for misjonder. They had been sued as the registered Trustees of Mombasa Baptist High School instead of Trustees of the Baptist Convention of Kenya.

2. The 1st Defendant filed written submissions. However, I am not able to find in the file any grounds of opposition or replying affidavit to the application. 1st Defendant's argument is that the Plaintiff's attempt to seek to enjoin the very same individuals against whom an order to strike out had earlier been made, is an abuse of the court process. This is particularly because it took the Plaintiff four years since the striking out to file this present application.

3. Further, the 1st Defendant argues that the defence of time bar has accrued because after the striking out of the suit against 3rd to 7th Defendants, the Plaintiff should have brought the libel suit within one year of the cause of action arising which is stated to have been 19th December, 2000. Counsel relies on M**ulla on the Code of Civil Procedure**, 17th Edition Volume 2 at page 356 where it states:

"Name of a party should not be allowed to be added by amending the plaint where -

(i) the suit is already barred by limitation against the party so proposed to be added, and

(ii) the omission to join him originally is not due to bona fide and mistake"

4. I think the answer to the 1st Defendant's argument is contained in the underlined portion of the above quote from **Mullla.** Thus, where a *bona fide* mistake is evident, the plaint may be amended by adding the name of a party. **I**t is clear that the Plaintiff sued the 3rd to 7th Defendants on the assumption they were not correctly named. It turned out that they were not, and the court struck out the claim against those Defendants. In my view that qualifies as mistake, so that the Plaintiff's omission to properly enjoin the 3-

7th Defendants originally was clearly a *bona fide* mistake. On that basis the Plaintiff would not be caught by the above prohibition outlined in **Mulla**.

5. Further, as argued by the Plaintiff, this is not a fresh suit or action barred by the Limitation of Actions Act. The suit is an ongoing one and only an amendment thereto is desired.

6. The Plaintiff's response to all the objections of the Defendants is simply as follows: Firstly, that the court has unfettered discretion to allow a party to be enjoined pursuant to Order 1 Rule 10, and could even do so on its own motion. Secondly, that the 3rd-7th Defendants were merely struck out of the suit because they were not members of Mombasa Baptist High School but instead Trustees of the Baptist Convention of Kenya. The Applicant relies on **Kenya Commercial Bank Limited vs Osiebo Trading Co. Ltd & 2 Others** (2010) e KLR in which Njagi J, followed **Kuloba vs Oduol** [2001] e KLR 647 where it was held that periods of limitation do not confer a right on a Defendant but only an obligation on a Plaintiff to bring his claim within the stipulated time.

The **Kenya Commercial Bank** case held that amendments outside the limitation period may be allowed where they flow from the same set of facts with the claim originally pleaded.

7. I agree with the holdings in the **Kuloba** and **KCB** cases. Accordingly, I find that the 1st Defendants objections do not hold.

8. The 2nd Defendant filed grounds of opposition which include:

- that the delay in making the amendment is time barred by the Limitation of Actions Act and

that the application is an abuse of the court process as the Plaintiff's suit had been struck out with costs rendering the matter *res judicata* pursuant to Order 8 Rule 5(1) and (2) of Civil Procedure Rules, and Section 7 of Civil Procedure Act.

9. The 2nd Respondent's submissions are to the effect that the joining of the 2nd Defendant is belated and barred under the Limitations of Actions Act. He asserts that the joining in is belated because the cause of action occurred about twelve years ago. Further, he argues that the fact that the Plaintiff waited to file the application after the striking out of the plaint against the 3-7 Defendants, is an abuse of the court process.

10. I think I have already dealt with the objections on limitation, and I will not repeat them. The only remaining question is whether the Applicant's application is an abuse of the court process.

11. The Applicant's answer is in its reliance on Order 1 Rule 10 which gives the court unfettered discretion:

"... 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 person who ought to have been joined or whose presence before the court may be necessary ...[to] be added." (underlining mine)

12. It does not seem to me that, in light of this expansive discretion, the Applicant's application would justifiably be said to amount to an abuse of the court process. If the delay had arisen despite, or inspite of, an order or direction of the court perhaps the court would take a different view of the application. In this case however, there had been no orders or condition. As such a party can enjoin another at any stage of the proceedings.

13. Accordingly, I do not accept any of the Defendants objections as tenable, and hereby allow the Applicant's application.

14. Costs will be in the cause.

Dated, signed and delivered this 11th day of February, 2013

R.M. MWONGO
JUDGE

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: R. Matano

In Presence of Parties/Representative as follows:

a).....

b).....

c).....

d).....