



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 1345 of 2005

IN THE MATTER OF INSURANCE ACT, CAP 487

AND

**IN THE MATTER OF THE ENFORCEMENT OF FUNDAMENTAL RIGHTS & FREEDOMS
UNDER SECTION 84 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 60 (1), 65 (2), 75 (1), 84 (1) & (6) AND 123 (8) OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF RULE 10 AND 11 OF THE CONSTITUTION OF KENYA
(PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL)
PRACTICE AND PROCEDURE RULES, 2001**

AND

**IN THE MATTER OF THE INSURANCE
(THIRD PARTY RISKS) ACT, CAP 405**

AND

IN THE MATTER OF COMPANY'S ACT, CAP 486

AND

IN THE MATTER OF

KENSLIVER EXPRESS LIMITED 1ST PETITIONER/RESPONDENT

SIMON KIMUTAI CHEPKWONY 2ND PETITIONER/RESPONDENT

PETER NJUGUNA NJATHI 3RD PETITIONER/RESPONDENT

NANCY WANJIRU KIMANI 4TH PETITIONER/RESPONDENT
(and other additional Plaintiffs)

- VERSUS -

THE COMMISSIONER OF INSURANCE 1ST RESPONDENT

THE MINISTER FOR FINANCE 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

STATUTORY MANAGER OF UNITED INSURANCE CO. LTD.

KENYA REINSURANCE CO. LTD. 4TH RESPONDENT

R U L I N G

1. There are two applications before the court. The first one is dated **10th October 2012** by **L.M. KAMBUNI & ASSOCIATES, ADVOCATES** seeking as the main order the leave of this court for the firm of **L.M. KAMBUNI & ASSOCIATES ADVOCATES** to come on record for the 1st Respondent in place of the Honorable the Attorney General.

2. The application is premised on the ground set out therein the gist of which is that there is already an order and/or judgement of the court dated **18th December 2007** and as such a leave of this court is necessary before the Applicant can come on record for the 1st Respondent and secondly that there are proceedings already filed under Certificate of Urgency in this matter which the 1st Respondent need to respond to and defend and finally that in the interest of justice the 1st Respondent has a right to a counsel of choice to represent it. The application is supported by affidavit sworn by **KAGENI MBUGU** dated **10th October 2012** which mainly amplifies the above grounds, stating that the firm of L.M. Kambuni has already been instructed by the 1st Respondent and that the leave of this court is now required to endorse the same.

3. The second application is dated **3rd October 2012**. It is filed by M/s Millimo Muthomi & Company Advocates. They also seek to come on record for the 4th Respondent. The application is based on the grounds that the 4th Respondent has instructed the firm of Millimo Muthomi & Company Advocates to act for it in this matter after Judgement and as such the leave of the court is required. The application is supported by **MUMUT OLE SIALO** dated **3rd October 2012**.

4. Both applications are opposed by the Plaintiff vide separate grounds of opposition filed in court on **15th November 2012** by J. Harrison Kinyanjui & Co. Advocates for the Plaintiff.

5. The applications were heard together. The Applicants submitted separately. Mr. Millimo for the 2nd Applicant submitted that his application was filed under **Order 9 Rule 9** of the **Civil Procedure Rules**. He applied to amend his pleadings which referred to **Order 9 Rule 3** (instead of **Rule 9**). I herewith, for record purposes, allow that amendment. Mr. Millimo submitted that the 4th Respondent has already instructed them to come on record, as is stated in the supporting affidavit of MUMUT OLE SIALO, and that since there is already Judgement on record, the leave of this court is necessary. He further submitted that the application was served upon the former advocates of the 4th Defendant M/s Muriu Mungai & Co. Advocates and an affidavit of service was filed in court on **9th October 2012** to the effect. The said advocates received the application and have not objected to the same.

6. In reply to this application Mr. Kinyanjui stated that it was filed under a wrong procedure and should be dismissed. He further submitted that the entire application was not served upon the previous advocates, but only the front page of the application and this rendered the service void.

Thirdly, the counsel submitted that there was no Board Resolution by the 4th Respondent to authorize the appointment of new counsel on the matter. The said Mumut Ole Sialo did not state in his affidavit that the

board of the 4th Respondent had authorized him to swear the affidavit. Mr. Kinyanjui submitted that if the application was allowed, and the advocates came on record, it would highly prejudice the Plaintiffs in terms of any costs payable especially in the event that both the Applicant and the former advocates claimed costs. He submitted that the application should not be allowed until proper authority was obtained from the 1st and 4th Respondents. Mr. Kinyanjui relied in the case of **EAST AFRICAN SAFARI AIR LIMITED – VS – ANTONY AMBAKA KEGODE & ANOTHER [2006] e KI** where the court held that:-

“In matters where orders of cost are to be made against an Advocate or firm of Advocates personally, the court must be satisfied that indeed the Advocate . . . had no authority to institute suit against the Defendant.”

However, this case concern a suit by one set of directors against another set, and the court advised that where such is the case, instructions to one firm of advocates need to be verified by a Board Resolution.

7. In response to the 1st application by M.L. Kambuni, Mr. Kinyanjui submitted that the affidavit in support is sworn by the advocates instead of their clients, and that the said affidavit is *inchoate* as it starts at paragraph 4 instead of paragraph 1.

Finally, he submitted that there was no consent from the outgoing firm of advocates.

8. I have considered carefully the two applications in light of the stiff opposition. Normally an application to come on record does not meet such stiff opposition especially from a party who is not the immediate former advocate. In the present two cases, the Honourable the Attorney General for the first application and M/s Muriu Mungai for the 2nd second application have not opposed the applications. Indeed it is on record that the previous advocates on record for the respective parties have been served with the application and they have chosen not to respond, and in my view, they have no objection to the application. There is affidavit of service on record which has not been disputed by Mr. Kinyanjui. I think the issue for this court to determine and to ask itself is the prejudice to be suffered by the Plaintiffs if the applications are allowed.

Order 9 Rule 9 of the **Civil Procedure Rule** does not state that a Board of Director’s Resolution is required for the application to be granted. It is the leave of the court that is required. The duty of the court is to satisfy itself that the application has been served upon the previous advocates. If the previous advocates have not opposed the same, then the court clearly has the legal duty to grant the application. In this matter it is not clear to me the prejudice to be suffered by the Plaintiff’s, if any or at all. To the contrary, the appointment of the new advocates will enable the matter to proceed so that the issues in question are determined without any further delay. In any event, should it later on transpire that the Applicants misled this court, and that indeed they had no such instructions to come on record for their various clients, there are remedies available, including an order of costs, which this court can impose upon the Applicants. As for now, there are no reasons advanced in opposition to the application which can make me to refuse the same. I also appreciate the learned submissions of Mr. Kinyanjui in this matter and his desire to uphold to the letter the rule of law. I also appreciate his concern that the Plaintiffs may suffer unnecessary costs should this court allow the application and then it later transpires that the previous advocates are still on record.

To address that misgiving, the previous advocates cannot continue to be on record when new advocates have been given the leave of this court to come on record. In other words, there cannot be any confusion as to who is or who is not on record for which parties.

In the upshot I herewith allow both Notice of Motion applications dated **10th October 2012** and **3rd October 2012** and grant leave to the firms of L.M. Kambuni & Associates Advocates, and the firm of Mulimo Muthomi & Company Advocates come on record for the 1st and 4th Respondents respectively in this matter. Parties should bear own costs of this application.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 7TH DAY OF DECEMBER 2012

E. K. O. OGOLA

JUDGE

PRESENT:

Kinyanjui for the Plaintiffs

M/s Mbigu for the 1st Respondent/Applicant

Millimo for the 4th Respondent/Applicant Defendant

Teresia – Court Clerk