



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT NO. 779 OF 2009

KENYA PLANTERS COOPERATIVE UNIONPLAINTIFF

- VERSUS -

KENYA COMMERCIAL BANK LIMITED1ST DEFENDANT
HARVEEN GADHOKE2ND DEFENDANT
DANIEL MUTISYA NDONYE.....3RD DEFENDANT
ROBERT KINUTHIA MUNGAI4TH DEFENDANT

RULING

1. By a notice of motion dated 18th July 2011, Michael Mungai, the interested party, prays to be joined into the suit. The principal grounds are set out at paragraphs (a) to (j) of the motion as well as paragraphs 1 to 9 of his supporting affidavit sworn on even date.
2. In a synopsis, the gist of the application is that the plaintiff belongs to coffee farmers and co-operatives whose incomes are greater than the debt claimed by the 1st defendant. It is also averred that the 1st defendant owes the plaintiff “ a lot of money in profits, undelivered income, losses and damages” and accordingly the 1st defendant or its receivers should not interfere with the plaintiffs assets. The applicant avers that he has sued the 1st defendant or obtained decrees and that by virtue of his payments to the 1st defendant by “bills assignment” he and his family are now “*de facto* owners” of the plaintiff. The affidavit contains lengthy annexures to demonstrate the alleged payments, decrees or correspondence in support of the averments in the motion. The applicant has also filed written submissions dated 5th December 2011 to plead his case to be joined into these proceedings.
3. At the hearing of the motion and according to directions of the court of 2nd November 2011, Michael Mungai gave sworn evidence. He confirmed he is the decree holder in Nairobi HCCC No 17 of 2001 *Kenya Commercial Bank Vs Housing Finance Company of Kenya*. He also testified that Inducom Business Services which has authored two letters annexed to his affidavit dated 5th January 2010 (annexures MM 1 pages 4 and 5) is a business name owned by Inducom Promotional Services Ltd. He said he is a director of the latter and that he executed the two letters in question. Upon cross-examination by the 1st defendant’s counsel, he conceded he learnt of the dispute in this case through the press and that he has no claim against the plaintiff as a creditor. He acknowledged he has no account with the 1st defendant bank or bills of exchange or other evidence to support the allegation that he paid Kshs 19.9

billion to the 1st defendant. Finally he did concede that the property in the other suit is Nairobi/111/530. The applicant's further response was that that property is at play in this suit by extension.

4. As is clear from the above cross-examination, the application was opposed by the 1st defendant's counsel. Counsel for the other parties did not cross-examine the applicant and left it to the discretion of the court to determine the merits of the matter.

5. My view of the matter is as follows. The applicant is lay and is acting in person. He has expressed the application to be brought under the sales of Goods Act, section 22 of the Civil Procedure Act as well as articles 22 and 23 of the constitution. Where the law provides a clear procedure for bringing an action, a litigant should follow that procedure. The Civil Procedure Act in Order 1 rule 10 (2) provides that the court may either *suo moto* or an application by a party join in a party into the suit who "may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit". This is a clear procedure.

The references by the applicant to the Sale of Goods Act or section 22 of the Civil Procedure Act are thus misplaced. Articles 22 and 23 of the constitution in turn would apply very well if the applicant were alleging that any of its fundamental rights or freedoms in the bill of rights were being violated. But I understood the applicant to be applying to be joined into this commercial suit for the reasons in his pleadings.

If the applicant wishes to avail himself of fundamental rights and freedoms in the bill of rights of the constitution, article 22 of the constitution is abundantly clear. What I have said is not novel at all. It has been consistently held by the courts. See Electoral Commission and another Vs Paul Waweru Mwangi Civil Application No NAI 130 of 2011 (Court of Appeal, unreported), Republic Vs Industrial Court of Kenya ex parte Kenya Bankers Association Nairobi Misc. Appl. No 1143 of 2004 (High Court of Kenya, unreported), and Bedrock Holdings Limited Vs Chemelili Sugar Company Limited Nairobi HCCC No 11 of 2009 (unreported).

6. The question here is whether the applicant in the eyes of the court is a necessary party to assist the court to effectually and completely adjudicate the dispute in this suit. Sadly, the applicant placed reliance on the two letters of Inducom Business Services dated 5th January 2010. The first of those letters states;

*"The Managing Director
KPCU, Nairobi
Dear Sir*

We enclose a payment order to KCB in your favour to enable you reorganize yourselves.

The goodwill gesture will be repaid inform of your shares at their current market value.

Yours faithfully

*MICHAEL MUNGAI
Decree Holder"*

The second states;

*"To The Manager
Kenya Commercial Bank Ltd
Kencom House
Nairobi*

Dear Sir

Please pay Kenya Planters Co-cooperative Union Ltd (KPCU) the sum of Kshs.1 billion (Kshs. One billion). Being payment for their shares.

This amount should be paid from the Kshs.19.98 billion bills presented to Kenya Commercial Bank Ltd and Housing Finance (HFCK/KBS/PROPERTY POINT) by the undersigned.

You may deduct their undisputed bills.

The High court Authority to take this appropriate action is hereby enclosed (has been served).

Yours faithfully

MICHAEL MUNGAI

Decree holder".

The applicant did not present any cogent evidence of such payment of such huge amounts of money. Certainly not in bank statements, bills of exchange or even acknowledgement of payment by the 1st defendant. His demeanour in court during the cross examination betrayed him and granted the evidence and circumstances, I formed the clear impression that he was either lying under oath or that the court should not take him seriously on those allegations. But there is the important matter of perjury and contempt by the applicant in making such allegations. Article 159 of the constitution as read together with sections 1A and 1B of the constitution enjoin this court to do substantial justice to the parties. One element of the overriding objective is to use existing judicial resources in an efficient and cost effective manner.

Courts of law should be taken seriously. Judicial time is precious and should not be wasted by the parties or by a person seeking to be added as a party without good reason. Under other circumstances and for the reasons I have given, I would have been persuaded to cite the applicant for contempt of court. At any rate perjury remains a serious crime against the administration of justice. But seeing as it is that the applicant is lay and has strong but unfounded allegations of connection with the suit, it will not advance the cause of justice to proceed that way. It will only delay this suit further. I have not seen evidence that the applicant is a member of the plaintiff co-operative or its creditor. I have already said the applicant has been unable to substantiate his claims of payments to the 1st defendant or the receivers. I have no doubt that the applicant is as passionate as the public over the matters in issue in this case. But that alone cannot be the platform for the application for joinder. And I am also minded that this is not a representative suit. From 18th July 2011 to date, or at any rate from 19th October 2011 when I became seized of the matter, the primary dispute between the key parties has been held in abeyance by this motion. That is not in tandem with the overriding objective of the court to do substantial justice to the parties.

7. For those reasons I would dismiss the notice of motion by the interested party dated 18th July 2011. As the applicant is unrepresented and considering the number of parties in the suit that were respondents to his application, I shall not order costs. In the further interests of justice I also order that Michael Mungai shall not by himself or his agents or assigns file any other pleading in this suit without leave of the court.

It is so ordered.

DATED and DELIVERED at NAIROBI this 20th day of December 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

Mr. Michael Mungai for the Interested party/Applicant.

Mr. Wambugu for Kingara for the Plaintiff.

Ms Odari for Kamau for the 1st Defendant.

No appearance for the 2nd and 3rd Defendants.

Mr. Wesonga for the 4th Defendant.