CIVIL PRACTICE AND PROCEDURE

- **Considering the provision of the Constitution, that technicalities should not hinder attainment of justice.**
- **Consider Order 1 Rule 10 of the Civil Procedure Rules and allowing parties to be joined after judgment**
- **Are there parties known as interested parties?**

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

HIGH COURT CIVIL APPEAL CASE NO. 109 OF 1998

ANDREW GITONGA MWONGERA..........................PLAINTIFF

VERSUS

MT. KENYA PETROLEUM DISTRIBUTORS...1ST DEFENDANT

ZAKARIA WAWERU......................................2ND DEFENDANT

RULING

Judgment was entered for the plaintiff against both defendants jointly and severally on 20th June 2008 for Kshs. 340,930/=. The costs were taxed on 20th January 2010 at Kshs. 92,789/=. That taxation took place in the presence of both the plaintiff and the defendant's counsels. The first defendant has presently pending before court two applications. One is dated 8th June 2010 which seeks orders of stay of execution and for the release of an attached motor vehicle registration number KAY 482Q. The 2nd application is dated 15th June 2010 and it is a Notice of motion. The latter one is the subject of this ruling. By that application, the first defendant has joined two parties Mafuko Industries Ltd as the first interested party and Samuel Mugendi t/a Clear Real Traders as the 2nd interested party. By that application, the first defendant seeks injunction to restrain the first interested party from transferring to its name or dealing in any manner with the motor vehicle KAY 482Q. Further, it seeks that the court do set aside and reverse the sale of the first defendant's motor vehicle by the second interested party to the first interested party. In the alternative, the first defendant seeks that the court do order the first defendant to be paid by both interested parties Kshs. 2,750,000/=. The second interested party filed a preliminary objection which is the subject of this ruling. That preliminary objection is dated 24th June 2010. It relates to the application dated 15th June 2010 and is in the following terms:-

1. That the 2nd interested party is not a party to the suit and can not therefore be a party to these proceedings as commenced.

2. That there is no application made to join the 2nd interested party to the suit and is an incompetent party to be joined in these proceedings.

3. *That the 2nd interested party is not a representative of any of the parties to suit."*

Learned counsel Mr. Murango Mwenda in support of that objection argued that the provisions of section 34 of the Civil Procedure Act do not relate to a person who is not a party to a suit such as the 2nd interested party. He argued that the 2nd interested party was a court broker who executed warrants that were issued to him. That the act of executing those warrants did not make him a party to this action as envisaged by section 34. According to the submissions by learned counsel, the 2nd interested party ought to have formerly been joined as a party before the application could be made against him. Learned counsel Mr. Mwirigi for the first interested party submitted in support of the objection and stated that the first interested party only featured in this case when the auction of the first defendant motor vehicle took place. First interested party according to counsel was joined into these proceedings unprocedurally without substantive order of the court. In opposition to the preliminary objection, learned counsel Miss Nderitu submitted that section 34 envisaged a question arising in respect of a decree between the parties and their representatives. She further argued that accordingly the 2nd interested party who is an auctioneer was one such representative. She submitted that section 34 required a question for determination touching on the execution of the decree to be heard in the same suit and not in a different one. Further, that section 34 also provided for the court to treat an application such as the one before court as a suit.

Although Mr. Mwenda learned counsel in response to the arguments of the first defendant's counsel, attempted to narrow down the definition of the word, "*representative"* as seen in section 34 by applying the definition as in section 2 of the Civil Procedure Act. I find that the same is not correct. It ought to be noted that section 2 defines, *"legal representative"* and not *"representative"* as in section 34. That argument therefore is rejected. I then ask myself, is there a merit in the preliminary objection raised by the 2nd interested party. The interested party's argument is that they were not formally included in this action and therefore the first defendant's application must fail. I refer to Order 1 Rule 10 (2) of the Civil Procedure Rules where it is provided that with or without an application a party may be joined in an action. That rule provides as follows:-

"10 (2) 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 a plaintiff or defendant, be struck out, and 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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."

It is clear that from that Rule that at any stage of the proceedings even after judgment as in this case a party can be joined in an action. I am of the view that the application of section 34 by the 2nd interested party's counsel was erroneous because neither the first or the second interested parties were representatives of the decree holder, that is the first defendant. The first interested party purchased a motor vehicle at an auction conducted by the 2nd interested party. The 2nd interested party was appointed by this court to execute the warrants and at no time were either of them representatives of the decree holder. The reason that the first defendant gives for joining the interested parties in this action is that they were both involved in the auction of its motor vehicle in execution of the decree herein. The first defendant raises in the Notice of Motion dated 15th June 2010 very serious allegations against the 2nd interested party. Bearing in mind that Article 159 (2) (d) of the Constitution I am of the view that the technicality of failing to obtain a formal order to join the interested parties should not be allowed to be a hindrance to the attainment of justice. That Article is in the following terms:-

"Article 59 (2) - In exercising judicial authority, the courts and tribunals shall be guided by the following principles –

(a) ………………………..

(b) ……………………….

(c) ………………………

(d) Justice shall be administered without undue regard to procedural technicalities."

To strike out the application as sought in the preliminary objection would only delay the resolution of this matter. I am obligated by the provisions of that Article to ensure that justice is administered and that the administration of justice is not hindered by an due regard to procedural technicalities such as the one raised in this matter. Also, bearing in mind the overriding objectives of the Civil Procedure Act as provided under section 1 A (1) the fact that the interested parties were not formally joined in this action can be disregarded. Section 1A (1) provides as follows:-

"1A(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act."

It was argued on behalf of the 2nd interested party that the Civil Procedure Act does not envisage a party called interested party. That indeed is correct but a practice has evolved by parties who appear before court who name parties who are not directly involved in the dispute as interested parties. Order 1 of the Civil procedure Rules envisages plaintiffs defendants and third parties. As much as those are the only parties recognized by that order, it does not follow that the giving of a title, *"Interested parties"* to a party would lead to striking out of an action. Bearing in mind the practice that has evolved and in view of the fact that there was no prejudice that was shown that would follow from the use of the term *"Interested parties"* and also bearing in mind the provisions of the Constitution referred to before, I find that there is no merit in the objection raised by the 2nd interested party. For the reasons stated above, the preliminary objection dated 24th June 2010 is dismissed and the costs thereof shall abide with the outcome of the Notice of Motion dated 15th June 2010. At the reading of this ruling, I shall give a hearing date of that Notice of Motion.

Dated and delivered at Meru this 22nd day of October 2010.

MARY KASANGO

JUDGE