



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

CIVIL SUIT 555 OF 2008

MEDISEL (KENYA) LIMITED.....PLAINTIFF

VERSUS

PHARMACY & POISONS BOARD1ST DEFENDANT

ARISTO PHARMACEUTICALS

PRIVATE LIMITED.....2ND PROPOSED

DEFENDANT

R U L I N G

The Applicant has filed a Chamber summons application dated 26th November, 2008 under section 3 and 3A of the Civil Procedure Act, Order 1 rule 10(2) and 22 of the Civil Procedure Rules seeking five prayers as follows:

1. That this application be certified urgent.
2. That this application be heard in priority to the Plaintiff's amended Chamber summons dated 24th September, 2008.
3. That ARISTO PHARMACEUTICALS PRIVATE LIMITED be enjoined in this suit as the 2nd Defendant.
4. That the orders made on 25th day of September, 2008 be reviewed and set aside.
5. That the costs of this application be provided for.

Prayer 1 and 2 are spent.

The application is supported by an affidavit sworn on 26th November, 2008 by Wilson D'Souza the Proposed 2nd Defendant/Applicant.

This application was opposed. There is a replying affidavit sworn by Ajay Patel, the Director of Plaintiff Company, dated 15th January, 2009.

I have considered the application together with the affidavit sworn for and against this application.

Mr. Mubea argued this application on behalf of the Applicant/Proposed 2nd Defendant, while Mr. Etemesi argued the application on behalf of the Plaintiff/Respondent.

The Applicant seeks to be joined in this suit as the 2nd Defendant. Under order 1 rule 10(2) the court has the power either *suo moto* or on application of either party and on such terms as may appear to be just, order that a party be joined to the suit whether as a Plaintiff or as a Defendant. The Applicant has to show that its presence in this suit is necessary in order to enable the. Court effectually and completely adjudicate upon and settle all questions involved in the suit.

The Applicant has deponed through its Country Manager in East Africa that the subject matter in issue in this suit includes an agreement entered into between the Plaintiff and itself. It has also deponed that the interim injunctive orders issued against the Defendant, who is the proposed 1st Defendant, adversely affected it and that the injunction has far reaching adverse effect on it.

The Respondent, who is the Plaintiff, has opposed this application expressing its concern that if the injunctive orders so far granted were set aside, it would cause the Plaintiff to suffer adversely. The Plaintiff also contends that as a party, it is at liberty to elect whom to sue and whom not to sue and that it cannot be compelled to sue any party against its wishes.

I have considered the arguments by both advocates and it is very clear to me that the Respondent has misunderstood the powers of the court under order 1 rule 10(2) of the Civil Procedure Rules and has therefore opposed this application due to a misapprehension of the provisions of the said rule. Order 1 rule 10(2) provides as follows: -

“(2) The court may at any state 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 plaintiff or defendant, be struck out, and that 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.”

I am satisfied from the averments in the affidavit in support of this application, and from the submissions by the Applicant’s counsel, that the Applicant is a necessary party to this suit and that it will be important to have it enjoined to the suit in order to enable the court to effectively adjudicate on the questions involved in the suit. For this reason, I will allow the application in terms of prayer 3. As far as prayer 4 is concerned, I direct that after the parties have amended their pleadings to include the Applicant as a Defendant to the suit, it can then file a formal application for review or setting aside of the orders of 26th September, 2008. In the result,

1. Prayer 3 of the Chamber Summons application dated 26th November, 2008 be and is hereby granted.
2. Each party to amend their pleadings to reflect (1) above.
3. The Applicant herein to make a formal application for review or setting aside of the orders of 25th September, 2008.
4. Costs of this application will be in the cause.

Dated at Nairobi this 6th day of February, 2009.

LESIT, J.

JUDGE

Read, delivered and signed in presence of:

Ms. Njeri holding brief Mr. Mubea for the Applicant/Proposed 2nd Defendant

Mr. Ibrahim holding brief Mr. Etemesi for the Plaintiff/Respondent

LESIIT, J.

JUDGE