



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE 12 OF 2009
HAJILA BAJILA GUYO.....PLAINTIFF
VERSUS
WESTERN SUNSHINE CO. LTD.
MAISHA BORA LTD.....DEFENDANTS

R U L I N G

Mr. Ghalia, counsel for the 2nd respondent has raised a preliminary objection to the Chamber Summons application filed by the intended interested party which he terms as being fatally defective as such an application is not provided for under the Civil Procedure Rules.

It is Mr. Ghalia's submissions that there is no provision under Civil Procedure Rules allowing parties to be joined to a suit as an interested party. His argument is that under order 1 rule 10(2) which deals with substitution and addition of parties, a situation such as the one sought by the applicant is not provided for as the applicant is neither a plaintiff nor a defendant. He states that there is no application by either plaintiff or defendant to join the applicant in the suit and that the intention of the provision was very clear – that name of a party improperly joined be struck out and the name of a party necessary to be joined, either as a plaintiff or defendant; and that such an application can only be made by the parties in the suit, or the court on its own orders.

Mr. Ghalia argues that the party seeking to be joined as an interested party has no pleading nor reliefs sought and against whom.

The only other application available is to take out 3rd party proceedings but again, these are taken by a party to suit and that if applicant feels aggrieved or that his interests are under threat, then he should file his own suit, setting up the grounds and reliefs sought. Mr. Ghalia has urged this court to strike out the Chamber Summons with costs.

Mr. Maosa and Mr. Kilonzo, who appear for the 1st respondent and applicant respectively concur with Mr. Ghalia. Mr. Maosa argues that allowing the application will only go to hold back the progress of the suit as it would be impractical for applicant to participate in the same.

Mr. Kilonzo's parting shot is that the applicant is stranger to this matter.

Mr. Mouko for the applicant opposes what is proposed in the Preliminary Objection saying the

application is well covered under Order 1 rule 10(2) and that Mr. Ghalia is reading the provision very selectively. He argues that the provision is for all people who may help the court to fully adjudicate in a matter to be allowed to come on board and on that it was dishonest for the parties herein to exclude them from the matter. He explains that the subject matter in this suit is the same as in Misc. Civil 31/08, where there is an interested party allowed to join and there was no protest. He points out that Order 1 Rule 10(B) provides that the court may on such terms as appears to be just, without the application by plaintiff or defendant, make orders to join party and such party need not be the plaintiff or defendant, he lays emphasis on the phrase.

“either as a plaintiff or defendant or any other person whose presence may be necessary...”

Mr. Mouko explains that the applicant cannot file another suit when there is already a suit dealing with the same subject matter and touching on the same issues – applicant should be given a chance to be heard.

He urges the court that if Order 1 Rule 10 does not apply, then the court should use the provisions of section 3A and 63(e) of the Civil Procedure Act to allow the application to proceed as that section gives the court a wide jurisdiction to ensure the ends of justice are met.

Mr. Ghalia’s response is that applicant has failed to show under which provision they seek to come in as an interested party and that there is no provision which states that anyone who thinks they can assist the court should be allowed to join in a suit.

Order 1 Rule 10(1) provides:

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake and it is necessary for the determination of the real matter in dispute to do so, order any person to be substituted or added as plaintiff upon such terms as the court thinks fit”

(2) The Court may at any stage of the proceedings, either upon or without 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 be joined, whether as plaintiff or defendant, or whose presence before the court, may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.”

Strictly speaking Order 1 rule 10 for the substantive parties in the suit i.e either the plaintiff or defendant – which applicant is not. Yet there may well arise circumstances in which a party’s interest is likely to be affected by whatever orders the court will make and it is from this situation that the party now notoriously referred to as interested party cropped up – and that party’s participation may well be necessary in order to enable the court effectually and completely adjudicate upon and settle – all questions involved in the suit – it would be upon the applicant to demonstrate that he is justified to be joined into the suit, such a party cannot be shut out from first making out the position sought.

I will therefore take cognizance of the fact that in the absence of any specific provision under the Civil Procedure Rules, this court has powers under section 3 and 3A to allow the applicant to pursue the application so as to ensure that the ends of justice re met.

The preliminary objection is therefore overruled.

Costs to the applicant and to be borne by the 2nd respondent.

Delivered and dated this 11th day of **June 2009** at Malindi.

H. A. Omondi

JUDGE

Mr. Kilonzo for plaintiff

Mr. Gekonde holding brief for Mr. Mouko for interested party

Mr. Maosa and Mr. Ghalia absent