



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Misc Case 84 of 2007

CURIO WELFARE ASSOCIATION APPLICANT

VERSUS

1. REUBEN KYALO KITHINGA

2. JOHN MWALIMU MUNYAO RESPONDENTS

RULING OF THE COURT

1. The applicant herein, CURIO WELFARE ASSOCIATION is the 4th Defendant in Machakos Chief Magistrate's Court Civil Case Number 722 of 2006 filed in court on 8/09/2006. In that case, the plaintiff JOHN MWALIMU MUNYAO brought the suit on behalf of the estate of JENIFER MWIKALI JOHN (deceased). The plaintiff says in paragraph 1 of the plaint that he brought the suit in his capacity as the legal representative of the estate of JENIFER MWIKALI JOHN for his benefit and that other deceased (sic) defendants pursuant to the Law Reform Act Cap 26 and the Fatal Accidents Act Cap 32 of the Laws of Kenya. At paragraph 3 of the plaint, the 4th Defendant is described as follows:-

“3. The 4th defendant is a Welfare Association duly registered in Kenya under the Societies Act and having its registered offices at Mombasa within the Republic of Kenya. (Service of Summons to be effected through the Plaintiff's Advocates Offices.”

2. The applicant also appears as the defendant in Senior Resident Magistrate's Court Civil Case Number 1 of 2006 though it is not clear from the copy of the plaint available on record, when the said suit was filed. The 1st plaintiffs in this suit are REUBEN KYALO KITHINGA suing as the legal representative of the estate of JENIFER MWIKALI KYALO (deceased). Mks CMCC No. 722 of 2006 was filed through the firm of MUOKI & CO. ADVOCATES of Mercantile House in Nairobi while the Makueni suit was filed by the firm of WAMBUA KILONZO & CO. ADVOCATES of Kasinga House, Machakos Town.

3. Upon being served with Summons to Enter Appearance together with copy of plaint in the two cases, the applicant brought this application under the provisions of Order 37 Rules 1, 2 Order 50 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

4. Order 37 in general deals with Selection of Test Suit. Rule 1 provides for staying several suits

against the same defendant while rule 2 provides for staying similar suits upon application by defendant. The two rules provide as follows:-

“Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order 1 could have been joined as co-plaintiffs in one suit upon the application of any of the parties the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.”

“ 2. Where a plaintiff has instituted two or more suits, and under rule 3 of Order 1, the several defendants could properly have been joined as co-defendants in one suit, the court, if satisfied upon the application of a defendant that the issues to be tried in the suit to which he is a party are precisely similar to the issues to be determined in another of such suits, may order that the suit to which such defendant is a party be stayed until such other suit shall have determined or shall have failed to be a real trial of the issues.”

5. The applicant therefore seeks the following ORDERS:-

- a. This application be certified as urgent and be heard ex-parte in the first instance.
- b. The court do summon REUBEN KYALO KITHINGA and JOHN MWALIMU MUNYAO to determine who has authority to sue on behalf of the estates of JENIFFER MWIKALI and MWENDWA KYALO.
- c. The court do order that in the meantime, Civil Suit Number 1 of 2006 in the Resident Magistrate’s Court in Makueni and Civil Suit Number 722 of 2006 in the Chief Magistrate’s Court at Machakos be stayed pending the inter-partes hearing of this application.
- d. The court do order that Civil Suit Number 1 of 2006 in the Resident’s Magistrate’s Court in Makueni and Civil Suit Number 722 of 2006 in the Chief Magistrate’s Court at Machakos proceedings be stayed pending the ruling in this application and determination of which of the two suits was properly filed and which one should proceed to hearing.
- e. The court do make orders as to costs.

6. The grounds in support of the application appear on the face thereof, the gist of which is that since there are two different suits by the same plaintiff in the same cause of action against the same defendant, there is a danger of the applicant being condemned to pay the two claims.

7. There is also an affidavit in support of the application sworn by one ISAAC KITUR, a legal officer at STANDARD ASSURANCE who are the insurers of the Applicant herein. He avers as to the two suits filed by the plaintiff in two different courts. He says at paragraph 3 of the affidavit that according to the advice received from their advocates on record, which advice he verily believes to be true, it is irregular for the plaintiff to have filed the two different suits arising from the same facts against the same defendant.

8. The plaintiff’s claim arises out of a road traffic accident that is said to have occurred on or about 17/07/2005 along the Mombasa-Nairobi Highway near Kaanga involving motor vehicle registration number KAQ 451 V and the plaintiff who was a passenger therein. It is alleged that the said motor vehicle was owned by the applicant.

9. The application is opposed. The 1st Respondent, REUBEN KYALO KITHINGA (Kyalo) swore an affidavit dated 19/03/2007. He is the one who filed SRMCC No. 1 at Makueni. He says that he is husband to the deceased JENIFER MWIKALI JOHN and father to JOEL MWENDWA KYALO who also perished in the accident on 17/07/2005. That accident is not disputed. Though he does not annex any evidence of marriage to JENIFER MWIKALI JOHN, he says that he is the administrator of the two estates. There are two Limited Grants **ad litem** issued at the High Court in Nairobi on 14/10/2005. Kyalo also says that he has already commenced execution proceedings in the matter and advises that the applicant should seek to have Machakos CMCC No. 722/06 struck out on the ground that it is res judicata and/or an abuse of the process of the court, and to find that his (Kyalo's) is the first in time. Kyalo also avers that the two suits are in fact different in that the parties are different.

10. I must point out here that the purported annexures to Kyalo's affidavit are not properly marked since the annexure markings are on loose pieces of paper. For purposes of this ruling, the court is not aware of such documents. The markings ought to be on the document that is for marking and not on some other mere piece of paper.

11. JOHN MWALIMU MUNYAO also swore a Replying Affidavit on 27/03/2007 in which he says that JENIFER MWIKALI JOHN was his daughter while MWENDWA MWIKALI, also deceased, was his grandson. Annexed to the Affidavit and marked "JMMI" is a copy of Certificate of Birth dated 25/01/2006 (apparently a duplicate copy) in respect of the birth of JENIFER MWIKALI born to JOHN MWALIMU MUNYAO and PENINAH KASIVA NG'ONDU on 22/11/1979. The birth was first registered on 21/02/1980. JOHN MWALIMU MUNYAO (Munyao) also says that both his daughter and grandson died in a road accident on 17/07/2005. The burial permits annexed to Munyao's affidavit give the names of the deceased persons as MWIKALI KYALO and MWENDWA KYALO – See annexures JMM2 a and 2b. Munyao also says that he paid all the funeral bills through his Welfare Association known as NYAANI. Annexures marked JMM 3 (a) and 3 (b) are copies of cash sale receipts for coffins in respect of the two deceased persons.

12. Also annexed to Munyao's affidavit and marked JMM 4 (a) and (b) are copies of Certificates of Birth dated 2/02/2006 in respect of JENIFER MWIKALI JOHN (No. 859887) and a nameless 1 ½ year old child (No.965902). He further avers that after he discovered that Kyalo had obtained the police abstract in respect of the two deceased persons, he made a report to the Commandant of the Makindu Traffic Patrol base who issued him with a letter as per the response dated 19/12/2005. Munyao also produced as evidence Limited Grants of Letters of Administration Ad Litem in respect of the two deceased persons dated 25/07/2006 and 23/06/2006 respectively. The Administrators are named as JOHN MWIKALI MUNYAO and PENINA KASIVA JOHN. Munyao avers at paragraph 13 of his affidavit that JENIFER MWIKALI JOHN was not married to Kyalo and therefore that Kyalo has no locus standi in the matter.

13. At the hearing of the application, counsels for the respective parties reiterated the averments as per the respective Affidavits for or against the application. Mr Wambua Kilonzo for the 1st respondent contended that the order under which the application has been brought is not applicable since Order 37, as seen from the details set out above, deals with a Test Suit. Mr Wambua argued that the relevant provision of the law to be applied in this case should be Section 6 of the Civil procedure Act which provides as follows:-

“6. No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.” (This provision does not affect a suit pending in a foreign court.)

14. Mr Wambua contended that the provisions of the above Section 6 of the CPA demands that the Makueni Civil Suit Number 1 of 2006 be heard before Machakos CMCC No. 722 of 2006.

15. Mr Maithya for the 2nd Respondent reiterated the averments contained in the sworn affidavit of his client Munyao, arguing that Munyao is the rightful administrator of the deceased persons' estates and is therefore the proper person to bring any suit on behalf of the deceased persons' estates.

16. The issue that is for determination by the court is whether the applicant has made out a case for the orders sought. In my view, and in light of the pleadings the law and the submissions, I have reached the conclusion that the applicant has not made out a case for the orders sought. In the first place, Order 37 of the CPR does not cover the type of situation that has arisen in this case. It is not true that either of the two suits is a test suit. The two administrators are not pursuing the interests of different deceased persons. They are pursuing the interests of the same deceased persons against the same defendant. It would appear to me that if there were no misunderstandings regarding the marriage of the deceased to Kyalo, both Kyalo and Munyao would probably be speaking jointly from the same side. This is a case of one alleged administrator outsmarting the other by running faster and getting to where the other party wanted to be much faster and earlier than the other. I believe that the applicant is not so incapacitated as it seems to imply. Section 6 of the CPA is still open to it. The applicant could also apply to set aside the judgment in the Makueni case if the door is not yet closed upon it.

17. Further, it is to be noted that though Munyao denies that Kyalo was the husband of Jennifer and father to Mwendwa, annexure JMM 2a and b would seem to suggest that he recognized Kyalo as Jennifer's husband and as Mwendwa's father. How else can one explain the presence of the name "Kyalo" in the burial permits? However, since the issue before me is not to determine the relationships between Kyalo and the deceased persons on the one hand and Munyao and the deceased persons on the other hand, I will not say more about those subtle details coming out through the affidavits.

18. In the result, I find and hold that the orders sought by the applicant are incapable of being granted under Order 37 of the Civil Procedure Rules. I therefore dismiss the application but with no order as to costs. I also leave the door open for the applicant to pursue any grievances he may have through the provisions of Section 6 of the Civil Procedure Act if he so desires.

19. It is so ordered.

Dated and delivered at Machakos this 8th day of February, 2008.

R.N. SITATI

JUDGE