



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc. Crim. Appli. 547 of 2006

ALOIS S. K. KALAAAPPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

By an Application dated 30th October, 2006 and expressed to be brought under Section 66 as read together with Section 137 of the Criminal Procedure Code and any other enabling provision of the Law, the Applicant, **ALOIS S. K. KALAA** sought Orders in the following terms that:-

“.....*The Honourable Court be pleased to issue Order for substitution of the Defendant’s name in the charge sheet under private Prosecution No. 40 of 1999 and the on going Criminal Application 547 of 2006 respectively as follows:-*

A. Substitution and enjoinder under Private Prosecution No. 40 of 1994 Republic of Kenya. In the Chief Magistrate’s Court at Nairobi Private Prosecution No. 40 of 194 republic of Kenya through:-

Alois Stephen King’ola

KalaaApplicant

Versus

Hilton 1st Defendant

Oliver Vetter 2nd Defendant E. Stephen Mwiti3rd Defendant

Omari K. Amin 4th Defendant

B. Substitution and enjoinder under

Criminal Application No. 547 of 2006

Republic of Kenya

In the High Court of Kenya at Nairobi Criminal Division Criminal Application No. 547 of 2006, Republic

of Kenya through

ALois Stephen King'ola

KalaaApplicant

Versus

Hilton1st Defendant

Oliver Velter2nd Defendant

E. Stephen Muti3rd Defendant

Omari K. Amin..... 4th Defendant..”

Although on the face of it the Application is verbose, wordy and vague it is however my understanding that the Applicant is seeking the substitution of the Defendants in private Prosecution case number 40 of 1994 as well as the Respondents in the instant Application. In the private Prosecution case the initial Respondents or rather the subjects as the Applicant referred to them were Hilton International, Nairobi and Hassan Hamza. In the instant Application the initial Respondent and whom the Applicant refers to as the Defendants are Hilton International and Hassan Kamel Hamza. The Applicant now wishes the said Respondents in the two matters to be substituted with Hilton, Oliver Vetter, E. Stephen Mwati and Omari K. Amin.

The Application is supported by an Affidavit sworn by the Applicant in which gives the reasons for the intended substitution. Basically the reasons are that Hilton International or Hilton has no mind of its own and therefore can only act or sue or be sued through its General Manager, Oliver Vetter. That Hassan Kamel Hanza has since passed on and hence the need for him to be substituted by the current General Manger, Oliver Vetter. That Hilton International has since changed its name to Hilton and hence the need for substitution to reflect the current name of the 1st Respondent. That when he filed the private Prosecution case and the instant Application he failed to include the Human Resources Manager who was behind the termination of his services. He now wishes to do so and that is why he has brought in E. Stephen Mwati as the 3rd Respondent. Finally the Applicant wishes to have enjoined in the proceedings property Manger/legal, which position was created to defeat the position of the executive Assistant Manager that the Applicant had been promoted to. That post is currently held by one, Omari K. Amin whom the Applicant wishes to be enjoined in the proceedings as the 4th Respondent.

The Application was opposed by Mr. Muli, Learned Counsel for the Respondent. In opposing the Application, Counsel submitted that there is no provision under the law for this sought of Application. The provision cited in the Application were inapplicable. That Criminal charges are not transferable and finally that the Application was an abuse of the process of Court and embarrassing to the Respondent. Mr. Makura, Learned State Counsel, who appeared amicus curie fully associated himself with the submissions of the Learned Counsel for the Respondents.

I have carefully considered the Application, the supporting Affidavits, grounds of opposition and rival oral submissions in favour of and in opposition of the Application. To start with it does appear to me that the Applicant is under the illusion that this is a Civil matter where parties can be enjoined and or substituted in proceedings will nilly. This is a Criminal matter and to the best of my knowledge, there can be no room for substitution and or joinder of parties. Crimes are committed and attach personally and are not transferable. If a crime for instance, is committed by a father and he passes on, before the trial is concluded, that Criminal responsibility cannot be passed on to the wife, son, daughter or whoever would have taken out the letters administration. Criminal responsibility or culpability passes on with whoever would have committed the offence. Further if an employee commits an offence in the course of his employment and thereafter leaves employment, Criminal responsibility cannot be transferred or attach to

the incoming employee who takes over his position or a position which initially had specifically been created for him. Similarly it is incredible to seek to join a person in a Criminal proceeding whose only alleged crime is that he took over a position which was meant to be the Applicant's before he was sacked. It is indeed ridiculous to join such person when he had no hand at all in what befell the Applicant. In any event is dismissing an employee from employment a Criminal Act? Why should someone be imprisoned for an offence committed by someone else in his absence. As for the charge of name, we are not told the terms of the said change and whether the assets and liabilities of Hilton International were transferred to Hilton.

I have looked at the provisions of the law upon which the Application is grounded. These Sections as correctly submitted by the Learned Counsel for the Respondent are irrelevant and inapplicable in the circumstances of this case. I may also point out that there is no valid private Prosecution number 40 of 1994, the same having been struck off on 11th November, 1995. The parties therefore cannot be substituted and or enjoined in a vacuum and or in a non-existent proceedings. To my mind the Application is fatally defective and an abuse of the process of Court. Accordingly it is for dismissal. The Application stands dismissed.

Dated at Nairobi this 5th day of February, 2007.

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MAKHANDIA

JUDGE

Ruling read ,signed, delivered in the presence of:-

Applicant

Mr. Makura for State

Erick Court Clerk

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MAKHANDIA

JUDGE