



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (NAIROBI LAW COURTS)

Misc Civ Appli 201 Of 2004

CATHERINE NDINDAPLAINTIFF

VERSUS

WILHAM (K) LIMITEDDEFENDANT

AND

SLOK CONSTRUCTION LIMITED3RD PARTY

KANTI NARAN4TH PARTY

AND

1. PHYLLIS OPILI

2. EVERLYNE NAFULA.....INTERESTED

PARTIES/APPLICANTS

3. RAEL AMISI

RULING

The three interested parties moved the Court by Notice of Motion dated 23rd July, 2004 and filed on 28th July, 2004. The application was brought by virtue of ss. 3A and 63(e) of the Civil Procedure Act (Cap. 21), and Orders L, rule 2 and *XLIV*, rule 1 of the Civil Procedure Rules. The applicant’s prayers were –

- (a) That, the Court be pleased to grant leave to the interested parties to be enjoined in the proceedings;
- (b) That, the Court be pleased to set aside upon review its orders of 5th March, 2004;
- (c) That, the costs of this application be borne by the defendant, Wilham (K) Limited.

The application was premised on the grounds that the interested parties have already filed their own substantive claims in the subordinate Court at the Milimani Commercial Courts in Nairobi, namely –

- (i) RMCC No. 3742 of 2003 – *Phyllis Opili v. East African Growers Limited & Wilham (K) Limited & Another*;
- (ii) RMCC No. 3744 of 2003 – *Everlyne Wafula v. East African Growers Limited & Wilham (K)*

Limited & Another;

(iii) RMCC No. 3745 of 2003 – **Rael Amisi v. East African Growers Limited & Wilham (K) Limited & Another**

It was contended that given the fact that the interested parties have filed the aforementioned suits, they were destined to be adversely affected by the orders of 5th March, 2004 which had been made without the interested parties being heard – and they were not heard even though the advocate for the defendant was at all times privy to the fact that the several suits had already been filed in the Subordinate Courts. A ground for the application is that the defendant, Wilham (K) Limited, had concealed from the Court important material which ought to have been disclosed – namely the existence of the suits filed by the interested parties, and also the fact that there **was** another defendant, namely East African Growers Limited.

A further ground for the application is that Wilham (K) Limited has yet to comply with the mandatory provisions of Order I, rule 18 of the Civil Procedure Rules: and consequently it lacks the locus standi to seek prayers 2, 3 and 4 in its Notice of Motion of 23rd February, 2004 which led to the orders now sought to be set aside.

The applicant herein contends that due to failure on the part of the defendant to comply with Order I, rule 18 of the Civil Procedure Rules, there is no issue to be tried between the defendant and the third party or the fourth party, and between the 3rd party and the 4th party which is a prerequisite for the selection of a test-suit.

Lastly it is contended that the interested parties are not privy to the averments that have been pleaded in CMCC No. 7279 of 2002 or the issues arising therefrom; and so it would be inequitable to subordinate their claims to the claim in CMCC No. 7279 of 2002 (now marked as test-suit) on the basis that the issue in that suit are similar to those in the suits filed by the plaintiffs.

Evidence in support of the application is in the affidavit of **Everlyne Nafula**, one of the interested parties who depones on her own behalf, as well as on behalf of the other interested parties. She depones that she has filed RMCC No. 3744/2003, **Phyllis Opili** has filed RMCC No. 3742/2003, and **Rael Amisi** has filed RMCC No. 3745/2003 – all in the Subordinate Courts; and that in each case **default judgment** has already been entered against **East African Growers Limited**. The deponent believes to be true the information received from her advocates, that the 2nd defendant in the said three Subordinate Court suits, namely **Wilham (K) Limited**, has taken out **Third Party Notices** against M/s. Slok Construction Limited, but to date the said Third Party Notice has not been served upon the advocates for the interested parties who are the plaintiffs in the three suits in the Subordinate Courts. The deponent believes to be true the information received from her advocates, that M/s. Slok Construction Limited has taken out a notice to join in Naran Rabadia trading as Nakil Enterprises as 2nd third party; and again the said notice is yet to be served upon the advocates for the interested parties herein.

It is deponed that the suits by the interested parties in the Subordinate Courts were filed on **23rd April, 2003**; and several months thereafter, on **25th June, 2003** in each case M/s. B. M. Mutie & Company Advocates for the **2nd defendant** in those suits applied for leave to take out 3rd party notices in respect of RMCC No. 3742 of 2003; RMCC No. 3744 of 2003; and RMCC No. 3745 of 2003: and this leads to the conclusion that at all material times the advocates for M/s Wilham (K) Limited (the said 2nd defendant) were aware of the existence of the suits – and consequently the three interested parties were entitled, as a matter of **right**, to be served with any applications that were filed and which were bound to affect the three suits in the Subordinate Courts.

The deponent believes to be true the information received from her advocates, that Wilham (K) Limited had not taken out an application for 3rd party directions in the three suits filed in the Subordinate Courts; and that on this account Wilham (K) Limited is delaying further progress in the instant suit.

It is deponed that by a Notice of Motion dated 23rd February, 2004 filed under H.C. Misc. Application No. 201 of 2004 – **Catherine Ndinda v. Wilham (K) Limited**, M/s B. M. Mutie & Company Advocates moved to the High Court and sought orders of withdrawal and transfer to the High Court CMCC No. 7279 of 2002 – **Catherine Ndinda v. Wilham (K) Limited** for trial and disposal, and in the same application purported to seek orders that **the transferred suit be selected as a test-suit** in respect of all suits which were filed following the industrial accident which is the subject-matter of the suits by the three interested parties.

The deponent believes advice from her advocates: that it was not open to the advocates for M/s. Wilham (K) Limited to move surreptitiously as they did, to seek of the Court orders that were bound to affect the three interested parties, without giving them due notice.

The deponent similarly believes to be true the advice of her advocate, that the defendant herein ought not to have sought the orders under a Miscellaneous Civil Application as they did; under the provisions of Order **XXXVII** the application should have been brought within the frame-work of the substantive suit.

On the first occasion of hearing the instant application, on 12th October, 2005 the interested parties were represented by **Mr. Amolo**, while the defendant was represented by **Mrs. Odhiambo**.

Mr. Amolo sought orders enjoining the interested parties in the instant proceedings, for the reason that the Court orders of 5th March, 2004 affected them, yet they were not accorded an opportunity to be heard. Those orders of 5th March, 2004 had **stayed suits in which the interested parties were the plaintiffs** – without them being heard. Learned counsel urged that the orders of 5th March, 2004 be set aside. The application leading to those orders had been made by the defendant on 24th February, 2004 and the defendant at that time **well knew of the existence of the three suits by the interested parties** herein, in the capacity of plaintiffs. Although quite clearly the fundamental interests of the interested parties, as plaintiffs in the said other suits, were destined to be gravely affected, learned counsel submitted, the defendant had not disclosed this fact when the orders of 5th March, 2004 were sought and obtained; and the defendant failed to serve notice on the interested parties herein.

Mr. Amolo urged that it would be inequitable for the interested parties, thanks to the orders of 5th March, 2004 to be compelled to respond to a test-suit which was selected entirely without their participation, at a time when it was well known to the defendant that they had already filed their own suits, on the basis of which they were making specific claims. It was not right, learned counsel urged, for the defendant to proceed, and in a state of darkness, to **select its own test suit**; counsel considered that such action by the defendant could be a manoeuvre to compromise the determination of liabilities. In learned counsel's contention, had the plaintiff herein, **Catherine Ndinda** been the one seeking determination of the test suit, it would lead to a more objective judicial outcome than where, as in the instant case, it was the defendant who chose the test suit, and did so without disclosing that there were **three** other cases (in which the interested parties herein were the plaintiffs) arising from the same accident.

Mr. Amolo urged that even if it was to be, in the end, the suit No. 7279 that must be determined to be the test case, the interested parties ought to be accorded an opportunity to come to Court, and tender evidence. **Mr. Amolo** submitted that by Order L, rule 2 no motion was to be brought without **notice thereof being served** upon the affected parties. The Notice of Motion being challenged ought to have been served upon the interested parties, counsel urged: because these parties were victims of the industrial accident which has given rise to legal proceedings; they suffered injury; and their evidence is crucial in establishing liability.

Mr. Amolo submitted that the interested parties were motivated, given the injuries they had suffered in the said accident, to proceed **ex abundanti cautela**, as they did not know whether **Catherine Ndinda**, the plaintiff in the suit under which the defendant had obtained orders for test-suit status, was a genuine plaintiff, or an instrument or agent of the defendant; and therefore they were seeking to be heard on the defendant's application for test-suit status in respect of one particular claim.

According to learned counsel **Mrs. Odhiambo** it was not possible that the interested parties can obtain orders setting aside the earlier orders of 5th March, 2004 and at the same time secure orders enjoining them in the proceedings of the impugned application. In the words of counsel: “If the orders are set aside, there will be no test case for them to be enjoined in”.

In his response, **Mr. Amolo** urged that the first prayer was for the interested parties to be enjoined; and then, the orders of 5th March, 2004 be set aside, or **reviewed**; once a review had taken place, then it could be ordered that the interested parties do participate. Participation by the interested parties, learned counsel urged, will enhance the transparency of the proceedings.

Counsel contended that if the orders of 5th March, 2004 are maintained, then it is conceivable that the test-suit plaintiff therein, **Catherine Ndinda**, may well be unable to place sufficient evidence before the Court to lead to a determination that liability exists; but if **Catherine Ndinda's** case is dismissed on liability, then the defendant will produce that decision in Court, to support the position that there is **no liability**; and as a result the interested parties herein would lose everything.

The issues raised in these proceedings by the interested parties, I think, raise a valid gravamen which the Court cannot overlook. The defendant's prayers in its Notice of Motion of 23rd February, 2004 were of a far-reaching character. Firstly, those prayers had sought transfer of CMCC No. 7279 of 2002 from the Chief Magistrate's Court to the High Court; and it is now known that the transfer process left in the Subordinate Court several other suits founded on the same subject-matter; there was no opportunity to view the whole set of cases together; the plaintiffs (now the interested parties) in the three cases left behind in the Subordinate Court, were not served with hearing notice in the High Court. Yet at the High Court, the applicant went on to seek and to obtain **ex parte** test-suit status for one single case, the outcome to affect the three other cases left in the Subordinate Court.

There is an **irregularity**, quite clearly, in the defendant's Notice of Motion of 23rd February, 2004. Non-service upon parties who would have been affected, was an irregularity. Had the interested parties been duly served, certain relevant questions would certainly have arisen: for instance why is it that of these suits which arose from one accident, **only one** was being transferred to the High Court? Why were all the suits left in the Subordinate Court being **stayed**, and yet the parties in those other cases knew nothing about it? Who was the right **party to seek test-suit status**? If it is true, as I believe it is, that the defendant when it came before the High Court, did know of the existence of the suits based on the same subject-matter and pending in the Subordinate Court, why was this important fact not sufficiently **disclosed**?

With such questions unanswered, I can only see **ex parte** Orders (of 5th March, 2004) which were improperly obtained. It is an abuse of the judicial process to seek and obtain orders improperly in an **ex parte** application. Although, on 5th March, 2004 counsel then representing the applicant, **Mr. Ogweno** represented in Court that “All other parties have been duly served”, it has become quite clear that the plaintiffs in RMCC No. **3742 of 2003**, RMCC No. **3744 of 2003** and RMCC No. **3745 of 2003**, who without a doubt were interested parties, were never served and so for them, the hearing of 5th March, 2004 took place **ex parte**.

Therefore I hereby now order as follows:

1. **The orders of the Court made on 5th March, 2004 are hereby set aside.**
2. **A party in either of the following suits, that is to say –**
 - (i) **CMCC No. 7279 of 2002;**
 - (ii) **CMCC No.10127 of 2002;**
 - (iii) **PMCC No. 6212 of 2002;**

(iv) RMCC No. 3742 of 2003;

(v) RMCC No. 3744 of 2003;

(vi) RMCC No. 3745 of 2003,

or any other suit instituted or to be instituted at the Milimani Law Courts in Nairobi, or at any other Court, *may apply* for test-suit status to be ordered in the discretion of the Court, and any such application shall be made within 30 days of the date hereof, being served upon all interested parties, and shall heard and determined within the Civil Division of the High Court as may be directed by the Duty Judge.

3. The costs of this application shall be borne by the defendant,

Wilham (K) Limited, in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 24th day of February, 2006.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court Clerk: Mwangi

For the interested Parties/Applicants: Mr. Amolo,

Instructed by M/s. Amolo & Co. Advocates

For the Defendant: Mrs. Odhiambo, instructed by

M/s. B. M. Mutie & Co. Advocates