



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (Milimani Law Courts)

Civil Suit 806 of 2003

IN THE MATTER OF AN APPLICATION BY STANDARD

ASSURANCE KENYA FOR

DECLARATORY ORDER,

DIRECTION AND WRITS.

BETWEEN

PIEDMONT INVESTMENTS LIMITEDPLAINTIFF

AND

STANDARD ASSURANCE KENYA LIMITEDDEFENDANT

R U L I N G

(1) This Chamber Summons was filed by Standard Assurance Kenya Ltd., the Defendant, on the 28th February 2006. It is brought under Order 1 rule 10 and Order 6A Rules 3 and 5 of the Civil Procedure Rules. The Orders sought are: —

“(1) THAT leave be granted to the Defendant/Applicant to enjoin WILSON KIPKEMBOI KIPKOTI as a Co-Defendant/Applicant in the Application/suit herein;” and

“(2) THAT leave be granted to the Defendant/Applicant to amend the Notice of Motion dated 22nd June 2004 in terms of the amended draft herein.”

(2) These Orders are sought on the grounds that: —

“1. The application herein is for the enforcement of the Constitution of Kenya (protection of individual rights and freedoms of the individual).”

“2. The Defendant/Applicant can only enforce its Constitutional rights through its individual Directors in terms of the High Court findings and judgments.”

“3. It is in the interests of justice that the Defendant/Applicant herein be granted leave to amend its Notice of Motion to include a director so that all issues between the parties in respect of the subject-

matter may be determined.”

(3) The supporting affidavit dated the 28th February 2006 was sworn by Wilson Kipkemboi Kipkoti who is a Director of the Defendant. He claims to be personally aggrieved by the Plaintiff’s conduct in filing a fresh application on the 2nd June 2004 in a matter already adjudicated, which conduct he claims infringes his Constitutional rights guaranteed by Sections 70 — 84 of the Constitution. He also says that he has been advised by his Advocates that in an application for enforcement of individual rights and freedoms, it is required that an individual be involved in the enforcement of these rights where a company is a party. He has also been advised that there are decisions of the High Court to that effect. And finally, the deponent says that the amendment is necessary for the adjudication of the real issue in controversy.

(4) The Notice of Motion which the Defendant seeks leave to amend was filed on the 22nd June 2004 and among the reliefs sought therein are eight declaratory orders. The Notice of Motion is based on twelve grounds and like in the present application, the supporting affidavit dated the 22nd June 2004 was also sworn by Wilson Kipkemboi Kipkoti. It runs into some nine fullscaps and contains thirty paragraphs.

(5) The application is opposed on the grounds set out in the replying affidavit of Maxwell Otieno Odongo, the Managing Director of Piedmont Investments Ltd., the Plaintiff in this case. It is dated the 9th March 2006 and he deponed, *inter alia*: —

“5. That pursuant to an injunction application filed by the Plaintiff simultaneously with the Plaintiff, the High Court, in a ruling made on 26th February 2004 found as a fact that the Defendant had committed a fraud in the acquisition of the title, and that the ownership was illegal. The Court issued a final order for the cancellation of title and restoration of ownership to the Plaintiff. I am aware of the full terms of the ruling, from my reading of it, and from the explanations given to me by the Plaintiff’s advocates on record.”

“6. That I am aware that there was no appeal or attempt by the Defendant for review of that decision, which therefore remains a final determination of the dispute on ownership of Land Reference Number 209/2582.”

“9. That I am advised by the Plaintiffs Advocates, and I verily believe the same to be correct in law, that the present application seeking to join a Mr. Wilson Kipkemboi as a party to the suit is incompetent and is otherwise an abuse of the process of the court because:

“(i) a final determination of the property dispute between the Plaintiff and the Defendant has been made by virtue of the ruling made on 26th February 2006 and there is no further question, either of a constitutional or civil nature outstanding by virtue of which Mr. Kipkoti would participate in the suit.”

“(v) The issue of joinder of Mr. Kipkoti in the suit has been raised too late in the day.”

“(vii) No proposed amended Plaintiff has been displayed to show any potential dispute between the Plaintiff and Mr. Kipkoti, were he to be joined in the application or in the main suit; and it is not legally possible to join him in the reference at this late stage.”

(6) At the hearing of this application, Mr. Imanyara, learned counsel for the Defendant, submitted that the amendment sought is necessary because as the Chief Executive Officer of the Defendant and also its Director, Mr. Kipkoti was involved in all the transactions which are the subject of the Notice of Motion. He said that on the 22nd June 2004, the Defendant took out a Notice of Motion under the Constitution of Kenya seeking various declaratory orders and prayers. In his opinion, since the reference was filed by the Defendant, a corporate body, it is necessary to enjoin its Director or shareholder. He submitted further that since the operative word is “**individual**”, by enjoining Kipkoti, who is an individual whose rights and freedoms he wishes to protect, Mr. Imanyara will thereby in his own words —

“intend to cure the defect in the Motion.”

Learned counsel further submitted that the intended amendment is not likely to prejudice the Plaintiff.

(7) In opposing the application, Mr. Rachuonyo, learned counsel for the Defendant, pointed out that in the Amended Plaintiff filed on 15th January 2004, it was averred that the Defendant had acquired title to the Plaintiff's property by fraud and the Plaintiff sought cancellation of the Title. He said Emukule, J. found as a fact that the transfer of the property to the Defendant was illegal and reckless and the learned Judge ordered the cancellation of the Title. The Defendant did not appeal against the decision of Emukule, J. nor did the Defendant apply for the review of the learned Judge's decision.

(8) Mr. Rachuonyo also submitted that Mr. Kipkoti has no *locus standi* in this matter because the dispute over the property was between two corporate bodies namely Piedmont Investments Ltd. and Standard Assurance Kenya Ltd. — Mr. Kipkoti has no right to come in as a director, a shareholder or an individual. And that before he can enlist the assistance of the court to protect or enforce any right, Mr. Kipkoti must specify what those rights are which he claims were infringed. He should also explain what value his presence as a party would add to the reference.

(9) Mr. Rachuonyo also submitted that if a new party is added to the proceedings, the Plaintiff will be prejudiced because the new party will seek to challenge the decision of Emukule, J. through the back door and delay the execution of the decree and orders of the learned Judge.

(10) The Defendant has not denied the claim by the Plaintiff that it did not appeal against the decision of Emukule, J. made on the 26th February 2004. The Defendant instead chose to lodge the Notice of Motion filed in court on the 22nd June 2004. That Motion is still pending. The Defendant then sat for twenty-one months before taking out the present Chamber Summons filed on the 28th February 2006, seeking leave to join Wilson Kipkemboi Kipkoti as a Defendant and Applicant in the Notice of Motion. Right from the beginning, Mr. Kipkoti was the Director involved in the transactions which gave rise to the litigation. He swore all the affidavits on behalf of the Defendant and dealt with Maxwell Otieno Odongo, the Managing Director of the Plaintiff. He has not offered any explanation whatsoever why it took twenty-one months before it was deemed necessary to make the application for the amendment of the Notice of Motion. Apart from adding the name of Wilson Kipkemboi Kipkoti as a Second Defendant, no specific reliefs or prayers sought by him are indicated. The ground that the amendment is sought so that all issues between the parties in respect of the subject matter may be determined must ring hollow, because those rights have already been determined by a court of competent jurisdiction (Emukule, J.) and the Defendant has not appealed against the decision of the learned Judge. In these circumstances, there is merit in the contention by Mr. Rachuonyo that the application is merely intended to delay the execution of the decision of Emukule, J.

(11) With respect, we find no substance in Mr. Imanyara's submission that a corporate body cannot enforce its fundamental rights unless a director or a shareholder thereof is made a party. A company acts and speaks through Directors and Officers. It seems to us that what Mr. Kipkoti is trying to do is to get himself joined as a Defendant in the Notice of Motion so that if the reference succeeds, he will be in a position to claim that his rights or interest were prejudiced by the decision of Emukule, J. because he was not heard and consequently not bound to give effect to the judgment passed against the Defendant.

(12) Mr. Imanyara is on record as stating that unless Mr. Kipkoti is joined as a Defendant, the Notice of Motion is defective. If indeed that is his understanding and appreciation of the legal position, we do not see how the defect can be cured merely by bringing Mr. Kipkoti on board.

(13) For these reasons, the application must fail and we order that the Chamber Summons dated and filed on the 28th February 2006 be and is hereby dismissed with costs to the Plaintiff.

Dated and delivered at Nairobi this Fourteenth day of June 2006.

1.R.P.V. Wendo

Judge

2. P. Kihara Kariuki

Judge