

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 435 of 1999

MARGARET WAIRIMU & 118 OTHERS.....PLAINTIFFS

VERSUS

UNGA GROUP LIMITED.....DEFENDANT

RULING

The applicants have made an application under the provisions of **Order I Rule 10 of the Civil Procedure Rules** and **Section 3A of the Civil Procedure Act** to be made parties in this suit as co-plaintiffs. The application is supported by the grounds stated on the face of the application which are that the applicants aver that they were former employees of the defendant. They state that the matters leading to the cause of action in this suit by the Plaintiffs similarly touched and related to the applicants. They further state that they were inadvertently left out of the suit when this suit was originally filed. They thus pleaded with court to allow them to be enjoined in this suit as the issues in dispute between the plaintiffs and the defendant were similar to that of the applicants. The application is supported by annexed affidavit of Kimani Kitela, one of the applicants, and who claims to have the consent of his co-applicants to swear the affidavit. The application is opposed. Vitalis Ojode the defendant's group finance director has sworn a lengthy affidavit in opposition to the application.

At the hearing of the application, Mr Karanja learned counsel for the applicants reiterated the contents of the application and the supporting affidavit. He submitted that the cause of action of the applicants were similar to the cause of action of the plaintiffs in this suit. He submitted that it would save the court's time if the application to enjoin the applicants in this suit was allowed as it would prevent multiplicity of suits being filed. He argued that the issue of *res judicata* could only be raised by the defendant after the applicants had been enjoined to this suit. He denied the submission by the defendants that the applicants' suit was barred by the **Limitation of Actions Act**. He urged this court to allow the application with costs.

Mr. Kibanya, learned counsel for the defendant opposed the application. He submitted that if the applicants were to be enjoined in the suit, their claim would be time barred in accordance with the provisions of **Section 4(2) of the Limitation of Actions Act**. He further submitted that the intended claim by the applicants was *res judicata* because the issue had been adjudicated upon by the industrial court and the decision rendered. He argued that it would be futile to enjoin the applicants in the suit because a similar suit filed by the applicants co-employees was dismissed by the High Court sitting at Nakuru. He submitted that there were no legal grounds that would make this court to grant the order to enjoin the applicants to this suit. He urged the court to dismiss the application with costs.

I have carefully read the pleadings filed by the parties to this application in support of their respective positions. I have also considered the submissions that were made by the counsels of the parties to this application. The issue for determination by this court is whether the applicants have established a case to enable this court grant them the order sought. The applicants have moved this court under the provisions of **Order 1 Rule 10 of the Civil Procedure Rules** which provides that;

“(1) Where a suit has been instituted in the names 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 that 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 the application of either party, and on such terms as may appear to the court to be just, order that the name of the party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, to be added.”

The above rule grants jurisdiction to this court to include a party to a suit who was wrongly left out due to a bona fide mistake. It also grants this court power to enjoin a party to a suit so that the issues in dispute may be properly and effectively adjudicated. Therefore, in my view, the jurisdiction of this court under the above rule can only be invoked in the two circumstances where a party has been wrongly enjoined in the suit and requires his name to be struck out or where the court is of the opinion that it would be necessary to enjoin a party to the suit for the effective determination of the matters in dispute.

In the present application, the applicants desire to be enjoined as plaintiffs in this suit because they claim that they were inadvertently left out when this suit was originally filed. They further urged this court to favourably consider the application so that the court’s time may be saved by avoiding multiplicity of suits being filed. I have carefully evaluated the reasons advanced by the applicants why they wished to be enjoined in this suit. Unfortunately the reasons put forward do not fall within the ambit of the provisions of **Order 1 Rule 10 of the Civil Procedure Rules**. The applicants were not excluded from the suit as plaintiffs when the suit was originally filed in 1999. It can not therefore be said that they were excluded due to a bona fide mistake. Further their presence in this suit is not necessary for the just determination of the pending suit between the plaintiffs and the defendant.

Whereas it is acknowledged that the applicants’ claim may be similar to that of the plaintiffs in this suit, that very fact does not necessarily mean that the applicants’ claim should be adjudicated in the same suit as that of the plaintiffs in this suit. The applicants are at liberty to file an independent suit against the defendant. In my considered opinion, the applicants misconstrued the provisions of **Order 1 Rule 10 of the Civil Procedure Rules** when they brought this application. It is clear that the reasons put forward by the applicants are not contemplated by the said rule.

In the circumstances therefore it would be unnecessary for this court to delve into the arguments in opposition to this application. The application obviously lacks merit and it is hereby dismissed with costs to the defendant.

DATED at Nakuru this 9th day of August, 2006

L. KIMARU

JUDGE