



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 6062 OF 1992

KALID MAHMOOD BUTT1ST PLAINTIFF/RESPONDENT

EVANSON JIDARAPH KAMAU2ND PLAINTIFF/RESPONDENT

BERTHA WANJIRU KAMAU 3RD PLAINTIFF/RESPONDENT

THE CHURCH COMMISSIONERS

OF KENYA.....4TH PLAINTIFF/RESPONDENT

BOARD OF GOVERNORS,

LIMURU GIRLS SCHOOL 5TH PLANTIFF

VERSUS

EDWARD RURII KANJABI1ST DEFENDANT

RACOM LIMITED2ND DEFENDANT/APPLICANT

DAVID NYIKA3RD DEFENDANT/APPLICANT

RULING

The Chamber Summons application of the second and third defendants, dated and filed on 2nd June, 2004 was brought under Orders I rule 10(2) and IXA rules 10 and 11 of the Civil Procedure Rules. The applicants prayed as follows:-

- (i) that, the interlocutory judgment of 31st August, 2000 be set aside;
- (ii) that, the applicants do file their defence and counterclaim within seven days;
- (iii) that, the Board of Governors, Limuru Girls School, be added as fifth plaintiff in the suit;
- (iv) that, costs be provided for.

The grounds stated are that, both applicants had been joined as parties to this suit in their absence, on 29th September, 1999; that both were never served with summons to enter appearance, or with hearing notice; that conditional *ex parte* interlocutory judgment was entered on 31st August, 2000 and the condition of

serving hearing notice was never complied with; that both applicants have good defences, and the second defendant has a counterclaim against the Board of Governors, Limuru Girls School and the fourth plaintiff; that, addition of the said Board of Governors as plaintiff is necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit.

In further support of the application and on behalf of both applicants, *James Njuguna Mwaniki* the second defendant's managing director, swore an affidavit dated 31st May, 2004. He deposes that, earlier on, HCCC No. 1161 of 1999 had been filed against the second defendant, but it was subsequently abandoned. He believes to be true the information received from the first defendant's advocate, that the second defendant was made a party to the instant suit on 29th September, 1999 when an amended plaint had been filed and interlocutory judgment entered *ex parte* on 31st August, 2000 against the third defendant. It is averred that the second defendant has never been served with any hearing notice in this suit or summons to enter appearance. It is further averred that both defendants/applicants have a good defence and counterclaim which would justify the application to set aside the *ex parte* interlocutory judgment. The counterclaim is against the fourth plaintiff and the Board of Governors, Limuru Girls School, in the sum of Kshs. 152,786/80. The deponent avers that at all material times, the secretary to the Board of Governors, Limuru Girls School, had acted as servant or agent in the course of her duties, in relation to the Board and to the fourth plaintiff.

To the application and the depositions, the respondents filed (on 4th August, 2004) their notice of objection dated 29th July, 2004.

It emerged that this matter entailed several suits which had been consolidated in the past. The first plaint had been in respect of Civil Case No. 1791 of 1991, to which the second and third defendants were not parties; and even when Civil Case No. 6062 of 1992 was filed, the second and third defendants, who were land surveyors, were not parties. The second and third defendants had surveyed the land in relation to which suit arose, in 1999; and in the course of the litigation the first and fourth plaintiffs thought it necessary to join them in the suit. At that stage the first and fourth plaintiffs were ordered to file an amended plaint, which they did on 29th September, 1999 bringing in the second and third defendants. In September, 1999 *Mr. Justice Oguk* ordered five different suits to be consolidated; and it is the amended plaint following consolidation, that brought in the second and third defendants on 29th September, 1999. The second defendant claimed that it is only on 31st May, 2004 that they learned that they had been enjoined in the suit; and they now wanted to defend themselves and to put in a counterclaim. They say it is at that point in time that they learned that an interlocutory judgment had been entered against them; and in this regard they alerted the third defendant who had been their agent. And *this is the background to the second and third defendants' Chamber Summons application of 2nd June, 2004*. In the meantime hearing had been in progress, on the main suit, against the first defendant; the suit was part heard and four witnesses had already been heard, before the Honourable **Mr. Justice Mbito**.

The Chamber Summons application of 2nd June, 2004 was heard before me on 5th October, 2004 when the applicants were represented by **Mr. Owuor**, while the respondents were represented by **Mr. Mutinda**.

Mr. Owuor for the second and third applicants presented the application seeking, firstly, the setting aside of the interlocutory judgment of 31st August, 2000; and secondly, leave to file defences and counterclaim. He based the application on the supporting affidavit of *James Njuguna Mwaniki*.

Mr. Mutinda in his response contended that the application was incurably defective, in particular because of its caption reference to the fifth plaintiff, when the records showed not the existence of such a party. No leave had been sought to bring in such a party. I would agree with counsel that the mention of a fifth plaintiff by the name, "Board of Governors, Limuru Girls' School" was a mistake as no authority had been given for such joinder; and even if it is taken into account that the second defendant could well have had a good case to make a counterclaim against the alleged fifth defendant, *the second defendant lacked the capacity to cause such a party to sue the second defendant so and as to provide a basis for a counterclaim*. It has to be clear that the only recourse the second defendant could in the circumstances

have, was to file *an independent suit* based on a plaint bearing the content of the proposed counterclaim. It was not open to the second defendant to surreptitiously lodge its suit by passing it off as a counterclaim, and the attempt to do so was a clear case of abuse of the process of the Court. I must, therefore refuse the attempt to file a counterclaim against an entity which is not a party to the suit.

I am in agreement with counsel for the respondents that it is unknown in law that a party may command another party to be joined in a suit in the capacity of *plaintiff*. It would also be right, as *Mr. Mutinda* submits, that a plaintiff comes to assume that status of his own volition. Counsel has also suggested a further alternative for the second defendant, that it was open to that party to seek to join in the alleged fifth plaintiff as a co-defendant; and I think that submission has merit.

Mr. Mutinda also disputed the role of the third defendant in the instant application. This defendant has no affidavit, and it is merely claimed that the second defendant's affidavit is also sworn on his behalf. I would uphold this objection as there is no credible evidence of the third defendant's involvement in the present application.

Learned counsel questioned the *bona fides* of the application, in view of the fact that the impugned interlocutory judgment has been on record now for *three* years; and there is no evidence brought before the Court to show when exactly the defendants came to know of the judgment. Counsel submitted that as the main suit has been substantially heard, setting it aside will serve no purpose. He observed that the second and third defendants had no material grounds for causing interruption to the trial process, as no substantive orders were being sought against them in the suit, the focus of which is *rights of way*.

Learned counsel, *Mr. Owuor* contended that his clients were not nominal defendants, as they must have been sued on grounds substantive in nature. The second and third defendants, therefore, were now seeking leave to defend themselves.

Counsel submitted that although the name of the alleged fifth defendant was included in the applicants' papers, this was not fatal to the application, as the Court could *suo motu* strike it out.

Mr. Owuor supported his application for the interlocutory judgment to be struck out by citing this Court's decision in *Kenya Safari Lodges & Hotels Ltd. V. Tembo Tours & Safaris Ltd* [1985] KLR 441. The following passage appears in the judgment of *Harris, J* (p.445):

“The defendant contends that it has both a good defence on the merits to the plaintiff's claim and a valid counterclaim for a sum of Kshs. 16,000 paid by it to the plaintiff, each of these being based upon an alleged mistake of law and of fact. This brings into the picture the decision of the House of Lords in *Evans v. Bartlam* [1937] A.C. 473, where the principles governing the setting aside of default judgments were considered. ‘In a case like the present’, said Lord Wright (at p. 489), ‘there is a judgment, which, though by default, is a regular judgment, and the applicant must show grounds why the discretion to set it aside should be exercised in his favour. The primary consideration is whether he has merits to which the Court should pay heed; if merits are shown the Court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication.....”

Mr. Owuor contended that his application had merits which justified the setting aside of the interlocutory judgment in question.

Counsel maintained that it was clear from the affidavit evidence that the second and third defendants had not been served with the amended plaint which joined them as defendants; and he maintained that this fact could not be disputed merely because the respondents had responded to the instant application not by depositions, but by grounds of opposition. This would, I think, be a valid argument.

I have read the application and the prayers, as well as the depositions made in support. I have also heard the submissions of counsel; and on that basis I would dismiss the prayer regarding joinder of the alleged fifth defendant, as well as the application for leave to file a counterclaim. I am also not convinced that

the application of the third defendant is properly before the Court, even though I think it is right to adopt the position that neither the second nor the third defendant had received summons to enter appearance, or indeed the hearing notice.

I will make the following orders:

- 1. The interlocutory *ex parte* judgment dated 31st August, 2000 is hereby set aside.**
- 2. The second and the third defendants/applicants shall file and serve their defences within seven days of the date hereof, provided that they shall not include the counterclaim which they had proposed.**
- 3. The prayer that the Board of Governors of Limuru Girls' School be enjoined as fifth plaintiff is refused.**
- 4. With regard to this application, each party shall bear its own costs, in any event.**

DATED and DELIVERED at NAIROBI this 21st day of January 2005.

J.B OJWANG

JUDGE

Coram : Ojwang, J

Court Clerk – Mwangi

**For the Applicants : Mr. Owuor, instructed by M/s
Michael Owuor & Co. Advocates**

**For the Respondents: Mr. Mutinda, instructed by M/s
Flavia Rodrigues & Co. Advocates**