



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT 470 OF 2004

JOHN BURNS.....1ST PLAINTIFF

VERSUS

TRUSTEES OF SISTERS OF MERCY.....1ST DEFENDANT

MARGARET O'REILLY CARROLL.....2ND DEFENDANT

ABRAHAM W. WAMBUA.....3RD DEFENDANT

RULING

The 1st defendant did file an application, by Chamber Summons, dated 31/5/2004. To this Chamber Summons the plaintiff filed a Preliminary Objection. The Chamber Summons sought the striking out of the plaintiff's suit; and the plaintiff was objecting to such an application by his Preliminary Objection of 25/1/2005.

Quite clearly, the parties in direct contest at this point are the plaintiff and the 1st Defendant.

There is a question of law arising, in respect of which counsel have cited no authorities. It is quite possible that they did not squarely address their minds to the question of law; and so they did not find it necessary to consider the relevant legal material or the relevant authorities. I am myself not aware if there are any authorities on the matter.

The question is this: *In a case which involves a plaintiff and several defendants, such as the present one, is it right in law that the plaintiff, by an interlocutory application, may take on just one of the defendants and square it out with that particular defendant, with final Court orders being made, without effecting service upon the other defendants?*

In the present matter, the 1st defendant seeks to have the plaintiff's plaint struck out. The plaintiff raises a preliminary objection contesting the application.

If the preliminary objection is upheld, then, of course, the plaintiff's suit proceeds to hearing with clear legal implications for the other defendants. If the preliminary objection is dismissed, then the application to strike out the plaint will be heard; and the Court could make final orders either striking out the plaint, or allowing the plaint to be heard: in the latter case, the other defendants will clearly be affected; I must now also hold that in the former case, i.e., where the plaint is struck out, still, the legal interests of the other defendants are affected, and there are implications for the management of legal instructions, and for costs of parties and of counsel.

This analysis leads me to find and to hold, that the plaintiff and the 1st defendant have no right in law to dispose of the 1st defendant's Chamber Summons application of 31/5/2004 without serving and involving the other defendants.

1. I now order that both the plaintiff and the 1st defendant shall, within 10 days of the date hereof, effect service upon the other defendants and in particular the 3rd defendant.
2. This matter, therefore, is stood over generally until service as ordered has been effected.
3. The Plaintiff shall serve upon all defendants the orders made herein, within 5 days of the date hereof.
4. The 3rd defendant's costs for today shall be borne by the Plaintiff and the 1st defendant in any event.
5. The Plaintiff and the 1st defendant shall jointly pay the Court's adjournment fees.

J. B. OJWANG

JUDGE

16/3/2005