



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 134 of 2005**

**JOHN MUNYES SECRETARY GENERAL FORD KENYA.....1ST
PLAINTIFF**

**LAWRENCE GUMBE CHAIRMAN LIBERAL DEMOCRATIC PARTY.....2ND
PLAINTIFF**

**MUMBI NGA'RU SECRETARY GENERAL LIBERAL DEMOCRATIC PARTY.....3RD
PLAINTIFF**

VERSUS

**HON. CHARITY KALUKI NGILU
CHAIRPERSON**

**NATIONAL RAINBOW COALITION.....1ST
DEFENDANT**

**FIDELIS MUEKE NGULLI SECRETARY GENERAL (NARC).....2ND
DEFENDANT**

RULING

The Applicant comes under a Certificate of Urgency by his application of the 10/2/2005 to be enjoined in this suit as the Third Defendant. The Application is brought under the provisions of O 1 rule 10 (2) which states as follows:

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 any 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, be added.

The suit between the parties was compromised by a court order recorded on the 9/2/2005 and dated 11/2/2005 in which orders were granted in terms of orders sought in the application of the 8/2/2005. The relevant order is as follows:

(2) That there be an order of injunction restraining the Defendants/ Respondents either by themselves their agents servants or assignees or any other person or persons, organs or institutions, from recruiting individual members to NARC or calling for and conducting NARC elections pending hearing and full determination of this suit.

Thus the 1st and 2nd Defendants are restrained from recruiting individual members to NARC or calling or conducting NARC elections.

Mr. Kilukumi submitted that the effect of the order is that NARC cannot comply with the provisions of Societies Act. In particular the prayer granted that the Defendants were restrained from recruiting individual members to NARC or calling for or conducting NARC elections infringes the Applicant's rights as he claims to be a member of NARC. Although the constituent members of NARC are said to be corporate members this is challenged by the Applicant who relying on Section 2 (2) of the Societies Act which states as follows:

for the avoidance of doubt, it is declared that, for the purposes of this Act, where any body of persons, whether incorporated or unincorporated, is a member of an association, all members of that body are members of that association claims that he as an individual is ipso facto a member of NARC. He says this as he is a member of one of the constituent members of NARC. At present this is not a matter for decision as the only question is whether the Applicant is a person who has a direct interest in the orders made in this suit.

Mr. Kilukumi referred to **Mulla The Code of Civil Procedure 13th Edition** Page 599 in which is stated the third limb of what the court in the case of **Raziz Begum Vs Anwar Begum (1959) SCR 1111: AIR 1958** summarized to be the effect of Order 1 rule 10 of the Indian Code of Civil Procedure which is similar to our Order 1 Rule 10 to be:

(3)Where the subject matter of a litigation as regards status or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the court is of the opinion that by adding that party it would be in a better position effectively and completely to adjudicate upon the controversy.

The Applicant complains that as result of the court order referred to above he is now disentitled to stand for a post in NARC which he has the intention of doing. So far as his involvement in NARC is concerned his name appears on LN No. 85 of 3/1/2003 and LN 111 of 8/1/2003 showing that the Applicant was elected as a Councilor for the area specified and a member of the National Rainbow Coalition.

Mr. Kilukumi also relied on the case of **Central Kenya Ltd Vs Trust Bank Ltd (2000) 2 E.A page 365**, the first holding in which it is stated:

“The amendment of pleadings and joinder of parties are aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided, that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs.”

In reply Mr. O K'owade for the 2nd respondents submitted that the Applicant should file his own suit. Further he submitted that a party not a party to a consent order ot seek to set it aside and that the matters raised by the Applicant are not res gestae of matters contained in the Plaintiff. If granted substantial security should be ordered.

Mr. Wedo for the Plaintiff/ Respondent stated Plaintiff had no claim against the Applicant. Further that the Applicant was not a member of NARC as he had not paid the fees of Kshs 10,000 and he was one of several councilors (that is who have been added to one of the constituent bodies of NARC).

Mr. Agina for the 2nd and 3rd defendants relied on the case of **Brooke Bond Liebig (T) Ltd Vs Mallya (1975) E.A.L.R 266** in which it was held that a consent judgment may only be set aside for fraud,

collusion or any reason which would enable the court to set aside an agreement.

He also submitted that paragraphs 27, 29 and 30 of the supporting Affidavit should be expunged. These paragraphs relate to a Notice given by the Registrar General threatening cancellation of registration of societies if elections were not held by a certain date. This is not a matter germane to this application and I therefore ignore these paragraphs.

Accepting that prima facie the Applicant is a member of a society which is a constituent member of NARC. I am of the view that he has established a sufficient interest in the matters contained in the Plaint to make this application.

I further hold that the court order made will adversely affect the applicant if he indeed has a right to seek election in NARC. However can an order made in one suit adversely affect a person's rights when he had not had an opportunity to be heard in respect thereof? The courts have constantly held that a party not a party to a suit cannot be adversely affected by such an order.

In Town Council OF Ol'Kalou Vs Grange General Hardware C.A NO. 269 of 1997 where Justice A.B Shah stated as follows:

“There is a factor which was not considered by the learned judge. His order affects several parties who were not before the court nor were they given an opportunity of showing cause why they should not vacate the suit property. The common law principle of audi alteram partem is of a fundamental importance. Parties not before the court may not be bound by orders which may affect them”.

On the other hand the declarations granted in prayer (a) of the Plaint make a general statement which appears to be binding on all members of NARC. In my view the Applicant has a right to be heard on the declaration and can challenge the injunction granted.

He has however a hurdle to overcome, namely that the suit has been compromised by a consent order recorded in the file. In the first instance, I will join the Applicant as a Defendant to the suit for the purpose of applying to seek to set aside the consent order made.

The costs will be costs in the cause.

DATED and DELIVRED at NAIROBI on 15th March 2005.

P.J RANSLEY

JUDGE