REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

Civil Suit 834 of 2005

ANTHONY GACHOKA ……..…..……. APPLICANT

VERSUS

NATIONAL HOSPITAL INSURANCE FUND …….. 1ST RESPONDENT

KENYA ANTI-CORRUPTION COMMISSION ……... 2ND RESPONDENT

ARON RINGERA ……..……...……. 3RD RESPONDENT

NATION MEDIA GROUP LTD …….……. 4TH RESPONDENT

RULING

In this application dated 22nd August, 2005 and brought under Order 1 Rule 10, and Order 6 A Rules 3, 5 and 8 of the Civil Procedure Rules, the Applicant, TG Consulting Limited, seeks to be enjoined in this suit as the Plaintiff. It seeks the following three prayers:

> ***1. THAT this Honourable Court be pleased to grant leave to the applicant, TG Consulting Limited, to be joined into this suit as a Plaintiff.***
>
> ***2. THAT the Honourable Court be pleased to grant leave to amend the plaint in terms of the draft amended plaint dated 22nd August, 2005 annexed hereto to be filed and served within such time as may be determined by the court.***
>
> ***3. THAT each Defendant be at liberty to file and serve an amended statement of defence within fourteen (14) days of service of the amended plaint.***

The application is supported by an affidavit sworn by a Director of the Applicant Company, and is based on the following grounds:

> ***(a) THAT it is necessary for the purpose of determining the question and issues raised by the pleadings that the applicant, TG Consulting Limited be joined in this suit.***
>
> ***(b) THAT proposed amendments and the addition of TG Consulting Limited as a party in this suit are necessary for the purpose of determining the real matter in dispute.***
>
> ***(c) THAT the presence of TG Consulting Limited before the court is necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in this suit.***

(d) THAT it is therefore in the interest of justice that the Plaintiff be granted leave to amend his Plaint in terms of the draft amended plaint annexed hereto.

(e) THAT the defendant herein shall not suffer any prejudice should the orders sought be granted.

Mr Miller, Counsel for the Applicant, submitted before this Court that the Applicant Company had a genuine interest in the outcome of this case, and its interest was closely connected to, and arose out of, the same issue that was at the centre of the dispute before this Court. He cited the case of ***Omondi Kokore vs The Town Clerk & Others (Kisumu HCCC No. 834 of 2005)*** and argued that the Applicant was a necessary party for the fair determination of the issues before this court.

The arguments advanced by the Respondents essentially centred on two points – that under Order 1 Rule 10 only a party to the suit, not a stranger, could apply to be enjoined, and secondly with respect to prayer 2 (which relates to the amendment of the Plaint) only a party to the suit could make such an application. They relied on the case of ***Kingori vs Chege (2002) 2 KLR 243.***

At the centre of the dispute in this suit is an alleged libel published about "a consultancy firm" which the Applicant says is identifiable with it and the Plaintiff, and that is why it is proper that it should be enjoined in the suit. Having reviewed the pleadings, I am satisfied that the claims of both – the Plaintiff and the Applicant are so intertwined that it would be just to enjoin the Applicant so that there is a fair and full determination of the issues in this dispute.

I have given anxious consideration to the meaning and interpretation of Order 1 Rule 10 (2) of the Civil Procedure Rules in the light of the two conflicting decisions before me. Justice Nambuye in the ***Kingori*** case (supra) held that only a party to the suit can move the Court to join another party. So, I ask, what if the party to the suit does not, or is simply not willing to do so? Should the party "outside" have no recourse? If we answer "no" to that question will we not just encourage a multiplicity of suits, and subsequent applications to consolidate the suits? Is that in the best interest of justice, and the litigants who appear before us?

I would certainly go along with a more "liberal" interpretation of Order 1 Rule 10 (2) adopted by my brother Warsame, J in the Omondi case (supra).

I would adopt the reasoning outlined by Warsame, J in that case as follows:-

"In my view in deciding an application for joinder, the Court must exercise a liberal approach so as not to shut out a genuine litigant who is effectively interested or is bound by the outcome of the suit, however the Court must guard against frivolous or vexations litigants whose sole motivation is to complicate and confuse issues that are before Court for determination. "It is the constant aim of a Court of Equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit to make the performance of the order of the Court perfectly safe to those who are compelled to obey it and to prevent future litigation for this purpose all persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants however numerous they be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them and future litigations may be prevented".

See MITFORD's pleading in Chancery 5th Edition (1847) at Page 190. The above demonstrates that the primary aim of the Court is to do justice between all parties by joining all parties in order to settle the rights of parties interested in the subject of the suit. The joinder must add quality to the cause of action of the plaintiff but must not be meant to subtract or expose the weakness of the plaintiff's case in a manner detrimental to his interest. It must be a genuine desire to canvass a cause or a complaint which would not be

adequately presented by the parties to the suit. The application must not be meant to prejudice or embarrass the case of the plaintiff. And the applicant must add value to the cause of action of the plaintiff. There must be evidence that the applicant is interested in a quick and fair determination of the matter but not to prolong the issues with the primary purpose of achieving a designed delay, which is hidden or calculated to serve the interest of applicant. According to order 1 Rule 10 (2), the powers of the Court wide (sic) and unlimited with an intention to enable the Court to effectually and completely adjudicate and settle all questions involved in the suit".

I, therefore, find that the joinder in this case where both parties are "related" – the Plaintiff, as he says, is the "alter ego" of the Applicant Company, is in the best interest of justice, and is not prejudicial to the Defendants. I would, therefore, allow prayer 1 of the application.

With respect to prayer 2 which relates to the amendment of the Plaint, I am unable to allow that. The Plaint belongs to another party – the Plaintiff and it is only him that can apply for its amendment, or consent to such amendment. That has not been done, but now that the Applicant has been enjoined, both parties are at liberty to apply for such amendment.

Accordingly, only prayer 1 of the Application dated 22nd August, 2005 is allowed. Costs shall be in the cause.

Dated and delivered at Nairobi this 8th day of December, 2005.

ALNASHIR VISRAM

JUDGE