



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MILIMANI COMMERCIAL COURTS
CIVIL CASE NO.39 OF 2003

SHIRINKHANU SHARIFF.....PLAINTIFF

VERSUS

RAFIQ SULTNATLI SHARIFF.....1ST DEFENDANT

NOORDIN SULTANALI SHARIFF.....2ND DEFENDANT

FIROZ KABIRUDIN SHARRIF.....3RD DEFENDANT

ASHTON INVESTEMNTS LIMITED.....4TH DEFENDANT

MASKALL LIMITED.....5TH DEFENDANT

SHALVIK INVESTMENTS LIMITED.....6TH DEFENDANT

ZYLOG ENTERPRISES.....7TH DEFENDANT

LONGONOT AGENCIES LIMITED.....8TH DEFENDANT

ASHTON SERVICES LIMITED.....9TH DEFENDANT

ALIBHAI SHARIFF & SONS LTD.....10TH DEFENDANT

RULING

The application for hearing today is the one dated 28th November, 2003 and filed on 1st December, 2003. Before commencement of submissions for or in opposition thereto I enquired about service upon all the defendants mentioned in the Notice of Motion. Mr. Oyatsi for the applicant/plaintiff admitted that some of the defendants have not been served with the application for hearing.

They have not even been served with summons to enter appearance. I accordingly asked counsel to address me on this point.

Mr. Ngatia submits that the plaintiff decides who to sue. But once the decision has been made all the defendants enjoined must be served with court process. He emphasizes that on the face of the Notice of Motion prayers are sought that will affect all the defendants some of whom have not been served and are unaware of the present proceedings. It is elementary that a party will not, be condemned unheard. In his view the plaintiff should have elected who to sue if he does not want to proceed against the parties that have not been served.

Mr. Kyalo agreed with Mr. Ngatia. In reply Mr. Oyatsi stated that the defendant does not speak for another. In Mr. Oyatsi's view a plaintiff chooses who to proceed against. In any event the nature of the application is such that the law gives the applicant right to choose against whom to proceed. As far as Mr. Oyatsi is concerned, he has served the relevant parties and those that he has not served are not relevant for purposes of this application. In his view any aggrieved parties are at liberty to come to court for redress and as it is a derivative action joinder of the defendants is merely a procedural requirement. In his view failure to serve only works against the plaintiff. The matter should therefore proceed with the parties served.

Mr. Ngatia and Mr. Kyalo in brief replies reiterated their earlier submissions and emphasized that the plaintiff seeks reliefs against the defendants jointly and severally and he cannot in the present application decide whom to proceed against. In their view failure to serve is prejudicial to the defendants as well as the plaintiff.

On my part I thought this matter is elementary. The simple issue is: should this application proceed the way it is without service upon all the defendants?

In my view once a matter is in court and is up for hearing it is the responsibility of the court to be satisfied that all the necessary parties have been properly served with court process. The requirement for service can only be removed by law. True there are circumstances when matters proceed ex-parte. But this is only if the law says so. I have not been referred to any Section or rule or regulation that would make me proceed with the application aforesaid ex-parte against parties that have not been served.

The pleadings in this suit and the Notice of Motion for hearing today seek prayers against parties that are not in court. The plaintiff has not discontinued or withdrawn the suit against some of the defendants. All she has done is select the defendants to be served. Yet it is the plaintiff who let us know the defendants.

Under the circumstances the application dated 28th November, 2003 should only proceed when service is effected/upon all the defendants mentioned.

Alternatively the plaintiff is at liberty to discontinue these proceedings against the defendants whom he does not seek relief against. Matter stood over generally.

F. AZANGALALA

JUDGE

30.1.2004