REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO.320 OF 2003

DALGIT SINGH THEEMAR & OTHERS …….. PLAINTIFF

VERSUS

SURJIT SINGH SAGOO,

JASVINDER SINGH OBEROI &

A.S. PANU …….DEFENDANTS

Coram: J.W. Mwera, J

Mr. Kiarie for 1st & 3rd Plaintiffs

Mrs. Amadi for 2nd Plaintiff

Mr. Mogaka for the Respondent/DefendantS

Mr. Nowrojee for Applicant

R U L I N G

The applicant in this matter, one Mohinder Singh Sohal filed his application dated 23-12-03 desiring to be heard during the Christmas vacation for orders under O 1 rr. 10, 13, O 50 rr. 2, 17, O 39 r.4 Civil Procedure Rules and SS.63, 3A Civil Procedure Act.

The substantive prayers were to the effect that:

(i) The applicant be joined in this suit as a defendant (the 4th defendant.

(ii) The ex parte orders of 19.12.03 be set aside and vacated.

(iii) This court do make orders similar to consent orders made in H.C.C. 20/03 (before Khaminwa J on 30.9.03) That the Siri Guru Singh Sabha (MBA) hold an annual general meeting as this court may direct.

There were several grounds on which this application was based together with an affidavit in support. However before the arguments were heard Mr. Mogaka for the defendants put forth his grounds of opposition by way of preliminary objection which course Mr. Nowrojee for the applicant acceded to. Mr. Kiarie for the plaintiffs did support Mr. Mogaka when the court permitted him to rely on the contents of the letter which he had addressed to the applicant mainly intimating that his application would not lie because it had been overtaken by events, when the litigants herein (the plaintiffs and the defendants)

compromised the suit by recording consent orders dated 6.1.04.

The grounds of opposition in question were these:

1) That the application under review had been overtaken by events, the whole suit having been compromised between the parties.

2) That the court therefore lacked jurisdiction to entertain the application, and

3) That there were no good reasons advanced in support of the application.

So Mr. Mogaka was heard first, supported by Mr. Kiarie and then Mr. Nowrojee.

It was not in dispute that there was (or is) H.C.C.C. 29/03 where the parties were the present plaintiffs including the applicant against the trustees of the Siri Guru Singh Sabha (Mombasa), hereinafter, the Sabha. The disputes therein included the election of officials of the Sabha – an issue which in this case was the subject of the consent orders of 6.1.04. That that question of the elections came before Khaminwa J on 29.10.03 (with Mr. Mogaka appearing for the defendant/trustees while Mr. Oberoi with Mr. Nowrojee were for plaintiffs) and both sides signed a consent order in that suit on 30.10.03. That it was agreed inter alia that the elections of the Sabha would be held on 21.12.03. That that election date was posted on the Sabha's notice board for all to see i.e. including all the litigants herein involved, who belong to the Sabha, but that the present suit was filed and on 19.12.03 an ex parte injunction was obtained, from Maraga Ag. J. stopping the elections due on 21.12.03. It is also not in dispute that before the said 19.12.03 the defendants in HCCC 29/03 had tried to set aside the consent orders of 30.9.03 but they were turned down on the very 19.12.03. On all this and more, whose pertinent aspects will appear below, Mr. Nowrojee argued that the ex parte injunction of 19.12.03 was obtained by failure to disclose all that went on before Khaminwa J. (in HCCC 29/03) and that indeed deceit and fraud had been perpetrated on the court. And that therefore the ex parte orders of 19.12.03 ought to be set aside. The court was told that the conduct of the plaintiffs in getting that ex parte order on 19.12.03 (in this suit lately filed) was a grave abuse of the process of court which should not be left to stand because while the litigants here knew that this application was pending for hearing on 12.1.04, they nonetheless went ahead to record the consent orders which, among others, compromised the whole suit thereby shutting the applicant out and so denying him access to justice. That the applicant had genuine and justiciable issues to be settled finally in this suit. It was not also in dispute that the plaintiffs filed this suit on 19.12.03 along with the Chamber Summons of the same date by which ex parte orders were granted stopping the annual general meeting of 21.12.03 (where elections were to be held). Again it is not in controversy that the parties here knew of the applicants' present application seeking orders including being made a party here. It is further not in controversy that the parties did file the consent order of 6.1.04 which was to the effect that:

> *"By consent the ex parte injunction (of 19.12.03) be and is hereby set aside (and) by further consent the suit be marked as settled and that the annual general meeting of the Siri Guru Singh Sabha Mombasa be convened on or before 15 th March 2004 and elections of the Executive Council to take place during the annual general meeting. Each party to bear own costs."*

From the foregoing Mr. Mogaka and Mr. Kiarie put forth the position that the parties to this suit having compromised it, there was nothing more by way of litigation in/to which the applicant can be joined as a party (defendant). That the compromise in essence ended the jurisdiction of this court to entertain anything, as the applicant desires now in regard to this cause. That the reading of O 1 rr. 10(2), 13 Civil Procedure Rules together, only admits to a situation where joining a party has the effect that such a move is necessary to enable this court to effectually and completely adjudicate upon and settle all the questions involved during the trial to come. That with the suit having been compromised by the consent orders of 6.1.04 (recorded/and endorsed on 7.1.04) there is no pending trial and so considering to grant the applicants' prayer to be joined in the settled suit as a defendant, is futile. That at this point it cannot be expected that the pleadings be amended and served in the normal way.

This court heard that the applicant, all the time remained an applicant intending to be made a defendant. However without a court order that the parties to the suit should not go on with their suit, due to the applicants' application, left them at liberty to proceed with their cause as best they could including settling it. That it was not necessary to revert to this applicant at any time for any reason or step because he was not a party to the suit at all. That he could only qualify as such as and when his prayers had been granted. That by the time of the consent he was still "outside" the suit and so he could not be heard to lay any claim to what the parties did about their suit, and he cannot validly claim that whatever they did was meant to prejudice him. Or that indeed that he was prejudiced. That there was no fraud, deceit or abuse of the court process played here and none should be imputed.

Mr. Kiarie concurred with the immediate foregoing submission, save to add that their consent order indeed did set aside the ex parte orders of 19.12.03 the applicant seeks to set aside.

Mr. Nowrojee had a totally different view. After going over the undisputed facts (above) he conceded that the present plaintiffs were not party to HCCC 29/03 in which Khaminwa J. recorded the consent orders for the annual general meeting to take place on 21.12.03. But that they knew from the notice of the meeting posted on the Sabha's notice board that such a meeting was due. Here Mr. Kiarie's position was that the notice did not indicate that the expected meeting was pursuant to a court order because the notice did not state so. Mr. Nowrojee however maintained that since we were dealing with a preliminary objection here, and his clients had deponed that the notice of the annual general meeting referred to a court order, then that fact as pleaded remained so. That the applicant read mala fides in the present plaintiff's suit and orders which they had done nothing about since 30.10.03 when Khaminwa J gave the orders to hold the meeting on 21.12.03. That they only moved on 19.12.03 – about 2 days from the date of the meeting, where the applicant desired to stand for election to the Sabha's executive council.

The court was told that with Khaminwa J's orders of 30.9.03 ordering a meeting on 21.12.03 which Maraga Ag. J stopped on 19.12.03, all engendered conflict and chaos – a sure way to abuse the process of court. That the proper stance to take is to allow the applicant to show that he was a necessary party to this suit and the defendants should not shut him out by way of preliminary objection. That access to justice is a fundamental right and at all times litigants should be allowed to enjoy it. Citing O.50 r. 14 Civil Procedure Rules, Mr. Nowrojee told the court that once an application is filed in court it is deemed to have been made and until determined, no party should terminate its life by closing down the proceedings as the litigants here did by way of compromise. At this point reference was made to the case of ***Joab Omino vs. Lalji Patel & Co. Ltd. (1977) LLR 574 (CAK)*** which was cited in **NIAZSONS (K) LTD. VS. CHINA ROAD & BRIDGE CORP. (K) [2001]2 EA 502**. In the ***Joab Omino*** case a party desirous of going to arbitration, had accordingly applied after he was sued and thus not entered a defence as the law on arbitration mandated. Yet the plaintiff went ahead despite that application as mandated, and got judgment in default of filing defence. Such move to obtain judgment was however termed irregular.

The argument continued that here, like in any other case, this court had jurisdiction both inherently and by statute to entertain the matter and give orders. Orders to prevent the abuse of the court process, and orders to grant the applicant access to the machinery of justice. That the litigants had neither disclosed orders of Khaminwa J to Maraga Ag. J, nor taken heed of the present application pending yet they went ahead to compromise the suit.

The case of ***OUSEPH OUSEPH VS. MINISTER OF FOOD (1951) A.I.R. (38) Trav 226(2)*** , whose facts do not seem relevant, here was placed before the court to appreciate that:

> *"If a party, knowing that his opponent has either approached the court or taken steps to approach it for a certain specific relief, does anything to make the grant of the relief by way of prevention ineffective, the court has always jurisdiction to pass orders even in ordinary case ----- to direct restoration of the status quo ante ---"*
>
> *(underling supplied).*

The 2 above cases were followed by others but for this cause the court elects only to quote a part of the

case of ***KAMURASI VS. ACCORD PROPERTIES LTD [200)1 E.A. 90*** in that where:

> ***"There was adequate evidence of instances where it appeared that Counsel for the appellant had wished to short -circuit the court process and had engaged in deception of the trial court. The trial judge was therefore justified in his finding that there had been an abuse of the court process"***
>
> ***(pp. 91 c, d. underlining supplied)***

Having heard counsel on whether the preliminary objection ought to be upheld or rejected, the foregoing arguments need not be reproduced further, save to begin by observing that this count's jurisdiction, jurisdiction as generally understood and applied is never limited or in any way curtailed when sitting over matters criminal or civil in its original jurisdiction. S.60 of our Constitution says so. This court will at any time exercise its inherent jurisdiction to present the abuse of its process and to see that justice is done.

In the present matter the position is that the applicant had yet to successfully argue his application to be made a co-defendant in this suit. He had no orders of stay of further proceedings until his application of 23.12.03 had been determined and so the parties to this suit had all the leeway in their cause. Only parties to a suit have the right to go forward as they deem fit including compromising it. Only parties to a suit can complain and get relief when one or the other tries to "steal a match". Strangers cannot. In all the cases put forth to show that the litigants did this or that prejudicial thing to the applicant do not avail him.

In Joab Omino's case, a defendant who had not filed a defence because he had sought that the dispute in the suit be taken to arbitration, and the law provided for such state of things, and yet the plaintiff had a judgment in default of defence against him entered, convinced the court to find such a move irregular.

In the Ouseph case, it was stated that if a party knew that his opponent has applied for certain relief's, that party should not take such steps as to prevent the opponent from having his application determined. If such "preventing" move is brought to the court's attention, it has a duty to give such orders as shall revert the parties to the status quo ante so that the opponent wages his right. Again reference it to parties to a matter. Not those intending to come on board.

Then lastly the Kamurasi case: from the quotation (above) and the underlining thereto, no more need be said. It is the question of a party to a cause doing something prejudicial to the other's approach to justice which the court looks at.

So all in all the position to take here is that without more the applicant cannot proceed in his bid as he desires here. He was still endeavouring to be joined in the present cause as a defendant when the parties to it unimpeded by anything settled the suit. The ex parte orders of 19.12.03 were set aside by consent and thus it would be superfluous to go on with that prayer. And for the applicant's prayer that the consent orders of 30.9.03 be dealt with in such a manner as to enable the Sabha to hold an annual general meeting on a day to be ordered, again as with the ex parte orders of 19.12.03 which the consent order set aside, it can be said that the applicant may as well prepare for the annual general meeting the parties consented to be held on 15.3.04. Thus even if the merits of the application were not heard, focus having been on preliminary objection, the applicant seems to be safe, even where he is. This court however takes liberty to observe that as it upholds the preliminary point, why, the applicant may still consider to file his own suit and seek whatever kind of reliefs he desires there. The owners of this one have closed it down.

In sum the application dated 23.12.03 is dismissed with costs.

Delivered on 13th February 2004.

J.W. MWERA

JUDGE