



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO. 109 OF 2004**

**CLLR. OMONDI KOKORE .....**  
**PLAINTIFF**

**VERSUS**

**THE TOWN CLERK,**

**MUNICIPAL COUNCIL OF KISUMU ..... 1ST DEFENDANT**

**MUNICIPAL COUNCIL OF KISUMU ..... 2ND DEFENDANT**

**RULING**

The plaintiff is seeking two orders namely:

- 1) A declaration that the Municipal Council of Kisumu as it stands is illegally constituted and that the Annual General Meeting scheduled for 26.7.2004 and the scheduled elections of Mayor of the Council are illegal and null and void.**
- 2) A temporary order of injunction do issue directed to the Town Clerk and the Municipal Council of Kisumu, restraining him and the said Municipal Council of Kisumu or their agents or servants, or officers from holding or presiding over or conduct the Annual General Meeting of the Municipal Council of Kisumu Scheduled for 26.7.2004 or holding the elections of Mayor or Transacting any other business contained in the notice of the Annual General Meeting dated 23.7.2004 until the final hearing and determination of this suit or until further orders.**

The plaintiff is an elected Councillor of the Municipal Council of Kisumu representing Kolwa Central Ward and has a genuine desire to be the Mayor of Kisumu. According to his complaint as evidenced on his plaint, the Minister for Local Government has over nominated councillors. The required number of nominated councillors empowered by the Minister in the exercise of his powers are six (6), while currently there are eight (8) nominated councillors. He is apprehensive their presence may illegally and unlawfully determine the outcome of the election, therefore with some justifiable cause he sought and obtained an injunction stopping the election which was scheduled for 26.7.2004. According to him there are eight (8) nominated councillors instead of the six (6) permissible by the law, which would increase the composition of the council to twenty five (25) councillors instead of the mandatory required number twenty three (23) councillors. He asserts that the election would be illegal and in contravention of the Local Government Act Cap 265.

As a result of the injunction that was obtained by the plaintiff, the applicant is now seeking to be

joined into the suit as a co-plaintiff. The applicant is Prisca Auma Misachi and she claims to be the Acting Mayor of the Municipal Council of Kisumu and was an aspirant as a Mayor for the election that was stopped by the Court. It is her case that as an aspirant her legal right and interest would be best served by her inclusion in the suit as a co-plaintiff. She states that the relief sought by the plaintiff will directly affect her desire to become the Mayor of the Municipal Council of Kisumu. She made adequate preparation for the election and the plaintiff is her rival in the seat and has under his control certain number of councillors who belong to his camp. According to her affidavit the order of injunction granted to the plaintiff seriously affected her candidature as her election was put in disarray. In support of the applicant's application Mr. Ongele Advocate submitted that the legal right and interest of the applicant would be best served by her inclusion into the suit as co-plaintiff. He stated that the relief sought by the plaintiff in this suit has and will directly affect the desire of the applicant to become the Mayor of Kisumu. He further submitted that the outcome of the application and the suit would definitely affect her candidature of the seat within the stipulated period which expires on or before 15th August 2004 as per Section 74 of Cap 265 Laws of Kenya. In his humble view the applicant has, chosen to advance her cause through him and she must be given a chance to bring her concerns before Court. Hence she urged me to allow the application.

The application was vehemently opposed by Mr. Orengo Advocate for the plaintiff in that the joinder would confuse the capacity and identity on which she seeks to be joined even before the amendment of the Chamber Summons. He submitted that the injunction obtained by the plaintiff directly contradicts her interest, as it put her election preparation into disarray. There is no complaint and no cause of action against the applicant, hence he submitted that her presence cannot effectively and completely determine the outcome of the matter. In his humble view the interest of the applicant is at variance with the interest of the current plaintiff who has jeopardized her election and made her suffer loss. In his submission the applicant is not a necessary party and the determining factors are:

- 1) Her presence is necessary if there is some questions or relevant argument which she wishes to advance and which is afraid that the existing parties might not advance adequately and**
- 2) Whether there is a question in the suit which cannot be effectively and completely settled unless she is made a party.**

He stated that the applicant does not meet the above test or criteria, therefore there is no reason to allow the application, hence the application is an abuse of the judicial process which ought to be rejected with costs.

The task for me was fairly simple, which is whether to allow the applicant as a co-plaintiff in view of the available material presented to me by both parties. The primary concern of the applicant is to protect her interest, which is to ensure, that election are held and held within the shortest time possible to ensure her preparation is not lost and to have a good grip of her supporters. It is clear both the plaintiff and the applicant are protagonists for the post of Mayor of Kisumu, which means their interest is at variance and not complimentary. 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 may 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 and for that matter complete 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 and unlimited with an intention to enable the Court to effectually and completely adjudicate and settle all questions involved in the suit. Order 1 Rule 10(2) states:

***"The Court may at any stage of the proceedings, either upon or without the application of either parties 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 a 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."***

From the onset it is clear that the discretion of the Court is unfettered, but unlike all judicial discretion, it must be based on relevant material and with special emphasis in the law applicable under such circumstances. The facts must support the exercise of judicial discretion in favour of the person who is seeking to benefit from that gracious power of the Court. It is my position that under Order 1 Rule 10 (2), there is an instance where the Court has no discretion but a judicial duty to perform. In cases where a person ought to have been joined or was improperly left either as a plaintiff or defendant then in such situation the Court has no discretion but a judicial duty to join the said persons. However, in circumstances where the presence of the party is necessary with a view to assist the Court effectually and completely to adjudicate and settle all questions, then it is a judicial discretion to permit the inclusion. The case of the applicant does not fall within the first category but within my judicial discretion, therefore she must show that the parties to the suit cannot advance or canvass the legal interest she wants to bring to the attention of the Court. Her cause must not be an issue of adding to the numbers of the plaintiffs but must be able to canvass a clear legal right which is known under the law and which has actually matured. The applicants alleged right must be direct legal interest that would affect the relief the plaintiff seeking and must be capable of stopping the outcome of the cause of action as presented by the plaintiff before Court. The joinder must not be intended to abuse the judicial process by complicating or confusing the issues for determination. It is the duty of the applicant to show that the application was made in good faith and with some justifiable cause to ventilate some grievances which would not be adequately presented by the parties before Court. In my assessment one of the main objects of Order 1 Rule 10 (2) is to render unnecessary multiplicity of proceedings and the practical effect is also to allow all parties who have a legal cause to ventilate under the same proceedings. A court has powers to join a person whose presence is necessary and has no jurisdiction to join a person whose presence is not necessary for that purpose. The main purpose of the suit of the plaintiff was to stop the election that was scheduled for on 26.7.2004 and the action of the plaintiff was greatly prejudicial to the interest of the applicant who claims to have made adequate preparation for the said election. However she now claims that the outcome of the suit would affect her legal right or interest, therefore needs protection by going on the side of the current plaintiff. **In Avon Vs. Raphael Tuck & Sons Ltd. [1956] AER Page 287 it was held:-**

***"The person to be joined must be someone whose presence is necessary as a party, what makes a person a necessary party? It is not of course merely that he has relevant evidence to give in some of the questions involved. That would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some questions involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ----."***

***The only reason which makes it necessary to make a person a party to an action is so that she should be bound by the result of the action and the questions to be settled therefore must be a question in the action which cannot be effectively and completely settled unless he is a party.***

The question to be determined in the main suit or application is, the position of the two councillors who were over nominated by the Minister in the wrong exercise of his powers. And fundamentally the answers to that question would affect all the councillors of Kisumu Municipal Council and moreso the residents of Kisumu who are interested in the smooth operation of the affairs of the council. The applicant cannot now formulate any other cause of action against the defendant without seeking the permission or consent of the plaintiff who is the owner of the present cause of action which has crystallized and which is before Court for determination. The applicant cannot now bring an issue that is not existing between the parties, which means cannot raise new issues. It is not the bare facts that the applicant has a legal right but the order to be made on the final analysis of the matter must directly affect the applicant and must also curtail her interests. It was incumbent upon her to show that the grant of injunction directly and substantially impaired the exercise of her legal rights. The question that begs for answers is whether the order the plaintiff is asking would directly affect the applicant in the enjoyment of her legal rights?. It does not matter whether the applicant wishes to assert some relevant matters that is connected or related with the subject matter.

In my view the applicant wants to marry a new cause of action with that of the plaintiff which was disclosed against the defendant and which is to the benefit of all parties to the dispute. I do not understand how the answers to the questions raised by the plaintiff would curtail her legal rights. It is true that the grant of injunction may have inconvenienced the applicant and her frustration is justified, however that does not afford her a ground to enable the Court to add her as a party against the wishes of the plaintiff whom she accuses of disrupting her election victory. I cannot compel the plaintiff to proceed with a co-plaintiff whom he has no desire to be on his side or share the cause of action he brought forward before Court for determination. The joinder of a party into the suit was never intended to apply where the person to be added is a coplaintiff is a person against whom the plaintiff has no relation in terms of the cause of action and has no desire to prosecute the case with him. The danger of prejudicing the case of the plaintiff is eminent and is not without justifiable cause.

The applicant has not shown any complaint against the parties to the suit and there is no evidence to show the question of over nomination cannot be effectively and completely settled unless she is made a party. The applicant has an interest in the correct solution of some of the questions involved but the Court can decide the matter and answer all questions without the presence or relevance of the applicant and she would suffer no prejudice. She is not a necessary party contemplated under Order 1 Rule 10 (2) of the Civil Procedure Rules. Her alleged legal right is what I may call a right of anticipation or a right based on contemplated fear which has no basis. It is not real and it is not precise stake which is exclusively prejudicial to the interest of the applicant. The failure to join the applicant would not in anyway curtail a known legal right of the applicant, which would have the effect of prejudicing the legal interest of the applicant. It is my view to allow the applicant's application would mean that the Court would be bound to join all the remaining councillors of Kisumu Municipal Council if they desire to make an attempt to join. Equally all the Residents of Kisumu who have a stake in the proper management of the Council would also have an opportunity to be joined into the suit and such a situation. And would be unprecedented and the plaintiff would loose direction of his cause of action. And the Court would have no road map to resolve the dispute. To that extent the applicant's plea is misplaced and has no basis.

***Prima facie*** the applicant has not established a cause of complaint against the parties to the suit and the Court can decide and answer all questions without her presence. The applicant is claiming to protect what I may call pool rights which is not distinctly available to her alone and therefore there is nothing to be curtailed by the result of this suit.

For these reasons the application is dismissed with costs to the plaintiff.

Dated and delivered at Kisumu this 4th day of August 2004.

**MOHAMED WARSAME**

**AG. JUDGE**

**Delivered in the presence of:**

**Mr. Ongele for the applicant.**

**Mr. Orengo for the respondent.**