



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 147 OF 2008

(Formally ELC NO. 1400 OF 1994)

PROFESSOR DAVID M. NDETEI.....PLAINTIFF/APPLICANT

=VERSUS=

ORBIT CHEMICAL INDUSTRIES LTD.....1ST DEFENDANT/RESPONDENT

=AND=

GRIT REAL ESTATE INCOME GROUP.....INTERESTED PARTY

RULING

1. This is the Notice of Motion dated 22nd June 2020 brought under Section 3A of the Civil Procedure Act, order 5 rule 21, 22 and 25 of the Civil Procedure Rules and all other enabling provisions of the law.

2. It seeks:-

1. Spent.

2. That this honourable court be pleased to grant leave to serve the notice of motion dated 3rd December 2019 upon the interested party, a foreign company registered in Port Louis, Mauritius outside the jurisdiction of this honourable court.

3. That in the alternative, leave be granted to the plaintiff to serve the notice of motion dated 3rd December 2019 by means of advertisement in one of the leading local daily newspaper.

4. That the costs of this application be borne by the defendant herein.

3. The grounds are on the face of the application and are set out in paragraphs (a) to (e).

4. The application is supported by the affidavit of Prof. David M. Ndetei, the plaintiff/deed holder sworn on the 20th June 2020.

5. The application is opposed. There is a replying affidavit sworn by Sachin Chandaria, Chief Executive Officer of the Defendant/respondent sworn on the 15th July 2020.

6. The application was canvassed by oral submissions on 13th October 2020.

7. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit and the oral submission. The issue for determination is whether this application is merited.

8. **Prayer No. 2** of the Notice of Motion seeks orders:-

“That this honourable court be pleased to grant leave to serve the notice of motion dated 3rd December 2019 upon the Interested Party a foreign company registered in Port Louis Mauritius outside the jurisdiction of this court”

In my view the plaintiff/applicant seeks to introduce a new party to these proceedings at this stage. The Court of Appeal is now seized of this matter for the hearing of the substantive appeal. Orders of stay of execution have already been granted pending the hearing and determination of the said appeal.

9. This court is *functus officio* and has no jurisdiction to entertain any more applications in light of the pending appeal. In the case of **Telkom Kenya Limited vs John Ochanda suing in his own behalf and 996 others [2014] eKLR** the Court of Appeal stated thus:-

“Functus officio is an enduring principle of law that prevent the reopening of a matter before a court that rendered the final decision therein. The general rule that a decision of a court cannot be reopened derives from the decision of the English Court of Appeal in re St Nazarine Co. [1879] 12 CHD 88. The basis for it was that the power to rehear was transferred by the Judicature Act of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered and was subject to two exceptions.....”

I am guided by the above authority.

10. The upshot of the matter is that I find no merit in this application and the same is dismissed with costs to the defendant/respondent.

It is so ordered.

Dated, signed and delivered in Nairobi on this 11th day of February 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mrs. Gichuki for Mrs Kamau for the plaintiff

Mr. Tole for the Respondent

Phyllis – Court Assistant