

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

MISC. APPLICATION NO.982 OF 1997

SEA STAR MALINDI LTD.....PLAINTIFF

=V E R S U S=

THE KENYA WILDLIFE SERVICE.....DEFENDANT

R U L I N G

Chamber Summons dated 3rd June, 2002 is seeking leave to be granted to the Applicant to amend Notice of Motion dated 7th November, 1997 and to re-amend the Statement of Facts dated 3.12.1997 in accordance with the annexed draft annexures. It is also seeking that the amended Notice of Motion and Amended Statement of Facts annexed to the affidavit be deemed to have been amended, filed and served from the date the leave is granted subject to payment of necessary court fees. Lastly it is seeking that costs of the affidavit be costs in the cause. There are three grounds of the same Application namely that the Director of Kenya Wildlife Services Dr. Western on 20.8.1997 and 3.9.1997 left Kenya Wildlife Services and also the then Warden Malindi Marine Park and reserve died in 2001 which have necessitated the amendments; that the amendments are necessary to enable the court to issue the appropriate court orders and that the Respondents would not be prejudiced. There was also Affidavit sworn by the Advocate for the Applicant in support of it. The Application was opposed by the Respondent now on record Kenya Wildlife Service and it filed eight grounds of opposition which are in record and I need not reproduce them here.

I have considered the application and the grounds for the application as well as the supporting Affidavit. In my humble opinion, several reasons militate against the granting of this application. First, the application is clearly inordinately late. The Applicant admits that Dr. Western left Kenya Wildlife Services on 3.9.97. If that is so, then one wonders why his name was used in the Chamber Summons dated 31st October, 1997 in which the Applicant sought leave of the court to apply for orders of certiorari and other orders. Why did the Applicant use the correct name then if it was necessary to sue Director in question? In any case from September 1997 till now, now about five years later what has the Applicant been doing that necessitated such a delay in seeking to join the proposed name. And as to the new Warden, the Applicant says that the former Warden, B.K. Mwakau died in the year 2001 without giving specific date. Even if I was to accept that he died on 31.12.2001 for purposes of argument, why has it taken after six months to seek to join the present warden if that was necessary.

Second reason is that the application is defective as its seeking that the amendment he is seeking is to be as annexed in the annexed Notice of Motion, yet that Draft Amended Notice of Motion is not properly amended. This was second amendment as he had sought first amendment in May 2002 when by consent the names of Western and Mwakau were withdrawn. If I were to grant the orders as prayed it would mean that a wrongly amended document would be introduced. I do agree that if the application had only sought amendment that it would not have resulted whether the annexed Notice of Motion was properly amended or not as I would have given time to file the Amended Notice and the annexed Notice would only be guideline of the nature of amendment to be made but here the Applicant is seeking an order that the court should validify the annexed Notice of Motion which is not properly underlined as is required by Order 6A Rule 7(2) on the question of colons used in the amendment.

Thirdly, this matter started way back in 1997. The Applicant has now addressed me and has concluded his address in chief. There are voluminous documents involved. It would not be fair to the entire case and to

the parties sought to be joined, both of whom came into the scene in their present capacities after this case started to have this matter start all over. The effect of joining new parties to a suit is in effect to have these start from point zero. I do not think that would be fair. This is a 1997 case. It would be unfair to all concerned to have the matter start all over.

Further, the Applicant used the names of Western and Mwakau together with Wildlife Services to obtain leave of the court. It would not be proper to change course mid-stream after obtaining leave using different names. In any case, I have not been told why the amendment sought is necessary and its effect in the entire case.

I need not go into other reasons. The application lacks merit. It is dismissed with costs to the Respondent. Orders accordingly.

Dated and delivered this 19th July, 2002.

J. W. ONYANGO OTIENO

J U D G E