Regional Container Freight Station Limited & 2 others v Zum Zum Investment Ltd (Civil Case 116 of 2016) [2023] KEHC 21502 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21502 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 116 OF 2016

DKN MAGARE, J

JULY 12, 2023

BETWEEN

REGIONAL CONTAINER FREIGHT STATION LIMITED ..... 1ST PLAINTIFF

AKABA INVESTMENT LIMITED ..... 2ND PLAINTIFF

TRANSOUTH CONVEYORS COMPANY LIMITED ..... 3RD PLAINTIFF

AND

ZUM ZUM INVESTMENT LTD ..... DEFENDANT

RULING

1. This is application is a second one I am handling this month. It is a mongrel of an application that I am dismissing shortly. Though parties have filed comprehensive submissions, this one does not need a very long consideration and for a good reason.

2. The Appellant through Abdulkarim Muhsin stated that the court lacks requisite jurisdiction. He is of the view that the claim is fraudulent. It appears to be a round about way of getting an injunction the were not able to get in ELC 139 of 2020. He also states that the Application is based on a lie in that Moran have not issued a notification and the claim by the Applicants is untenable.

3. On the other hand, the respondent submitted that the deponent Abdulkarim Muhsin was adjudged bankrupt vide insolvency no 1 of 2019.

4. They have relied on many authorities on joining parties. However, they are irrelevant as they deal with active suits. This case deals with a simple question, can you add a party to concluded proceedings?

5. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as then he was discussed issue of jurisdiction in its two aspects as doth: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:
>
> > "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given"

6. It is an application made without any basis in law and in fact. It is a complete waste of judicial time. The application is primed to be under order 1 rule 10 of the C*ivil Procedure Rules*. Under that order, the court has powers to add parties to the suit. Before parties are added, they must meet a certain, criteria for addition there is absolutely no purpose served to add a party to a concluded suit to argue interlocutory applications. Order 1 rules 4 to 7 provides as doth; -

> 4. Court may give judgment for or against one or more of joint parties [order 1, rule 4.] Judgment may be given without amendment—
>
> (a) for such one or more of the plaintiffs as may be found to be entitled to relief for such relief as he or they may be entitled to;
>
> (b) against such one or more of the defendants as may be found to be liable according to their respective liabilities.
>
> 5. Defendant need not be interested in all relief claimed [order 1, rule 5.]
>
> It shall not be necessary that every defendant shall be interested as to all the relief claimed in any suit against him.
>
> 6. Joinder of parties liable on same contract
>
> The plaintiff may at his option join as parties to the same suit all or any of the persons severally, or jointly and severally liable, on any one contract, including parties to bills of exchange and promissory notes.
>
> 7. When plaintiff in doubt from whom redress to be sought

Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined as between all parties.

7. Ipso facto, there must be sought some redress before a party is joined. In this matter, there is no redress the Plaintiff/decree holder is seeking. The former plaintiff is now a decree holder.

8. On the other hand, order 1 rule 10 dealings with joining parties to the suit any time during proceedings. Proceedings terminated when judgment was rendered. The said rule provides as doth: -

    10. Substitution and addition of parties

        (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

        (2) The court may at any stage of the proceedings, either upon or without the application of either party, 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 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.

        (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

        (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

9. The subject matter of the decree is money. The land parcel number plot 1482/11/MN is not the subject matter of the suit. There is nothing joining the proposed interested party and the decree holder. The proposed interested party are neither parties or proposed defendants. Interested parties are a tenuous creation and is only useful in judicial review proceedings. In civil proceedings, we have parties, that is planetoids or defendants and or third parties. The interested parties cannot invite themselves into a suit they have absolutely no interest in.

10. At this stage of the proceedings, the only relevant order is order 22. If parties have any claim, that is known in law, then order 22 rule 51-54 comes in handy. This position was buttressed by the supreme court in the case of *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, in the introductory analysis the court stated as doth: -

    44] On the same lines of reasoning, the High Court, in *Judicial Service Commission v. Speaker of the National Assembly and Attorney General, High Court Constitutional and Human Rights Division* Petition No. 518 of 2013, 2013 [eKLR] (Odunga J.) has thus stated (paragraph 4):

        "*The Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012, defines an interested party as 'a person or entity

that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation'. From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the court to make a determination favourable to his stake in the proceedings."

11. After though analysis of the proceedings in *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [supra] the supreme court concluded as doth: -

(53) What should we make of a cross-petition fashioned as such" Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in Francis Karioki Muruatetu & Another v. Republic & 5 others, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

> "Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.
>
> Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court"

(54) In like terms we thus observed in Mumo Matemu v. Trusted Society of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012 (paragraph 24):

> "A suit in Court is a 'solemn' process, 'owned' solely by the parties. This is the reason why there are laws and Rules, under the *Civil Procedure Code*, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

12. What comes out from the foregoing is that essentially an interested party is just that interested. They have no right to seek substantive orders. Even if the suit had been live, there is nothing for them to do in the suit. They cannot make substantial applications as interested parties.

13. The supreme court concluded as doth: -

(58) Furthermore and with due respect to the Appellate Court, we are persuaded that the cross-petition was improperly before the High Court, and ought not to have been introduced by an interested party, and in that light, it should not and could not have been entertained by the Court of Appeal; neither court having proper jurisdiction to do so."

14. An application for injunction, I am required to consider the tenets set out in *Giella =vs= Cassman Brown & Co. Ltd* (1973) EA, 358, 360 the court must be satisfied in the words or of Spry VP as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

15. This consideration is not before this court. Though an injunction is sought before this court, the suit itself is not here. It is in another court. As held by the court of Appeal the consideration for issuance of an interlocutory injunction is sequential analysis of the considerations given in the Giella case(Supra). In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
>
> (a) Establish his case only at a prima facie level,
>
> (b) Demonstrate irreparable injury if a temporary injunction is not granted, and
>
> (c) All any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

16. Now, pray, how do I know that the Applicant has a prima facie case in another court where I have no jurisdiction. Article 162(2) of *the constitution* provides as thus: -

> 2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
>
> a. employment and labour relations; and

b. the environment and the use and occupation of, and title to, land.

17. In the same breath, my jurisdiction though unlimited is circumscribed in Article 165(5) and 6 of *the constitution* as thus: -

5. The High Court shall not have jurisdiction in respect of matters

a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

b. falling within the jurisdiction of the courts contemplated inarticle 162 (2).

6. The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

18. Defectively cannot supervise or issue orders to apply in that court. It is a court of equal status. Secondly, the relief sought are improperly before me. I am unable to find that there is a prima facie case. This is because there is no case. The suit herein is concluded and is only pending execution.

19. Even for argument purposes they applicants wanted to be joined as parties, they cannot be joined while there is a judgment. So long as the judgment is in situ this court is functus officio. My role rotates around order 22 of the *Civil Procedure Rules* and section 34 of the *Civil Procedure Act*.

20. The Decree holder raised the issue of locus standi as the impediment. At this stage it is not just locus standi it is the aspect of the horses have not only bolted, but also slaughtered and eaten. Simply put, vis-à-vis this matter, the Applicants are busy bodies. The court has concluded its work and closed the file.

21. The applicant needs to be disabused of the notion that execution is a bad thing. It is part of the court process. The land in issue belongs to the judgment debtor. On July 12, 2023, I had given leave for execution to proceed. It is thus not unlawful loss to the decree holder. In any case, the decree herein was obtained before the purported other suit was filed.

22. Lastly, it is not the duty of the court to advise parties, what to do but clearly they are in a wrong forum. This is a proper application to dismiss. I will however not grant costs. This is because, these were busybodies and not party to the suit. I cannot thus issue orders against nonparties, but should they be persuaded to file any other documents, they shall pay the costs of 30,000/= before taking any further step in this matter.

Determination

23. In the circumstances I make the following orders: -

a. The application dated June 19, 2023 lacks merit and is accordingly dismissed and the names of the proposed interested party expunged from the record herein.

b. The court shall not award costs since the Applicants were busy bodies and their names have been expunged form record. Should they however, be filing any further document in this matter they shall pay costs of 30,000/= to the respondent before taking any such step.

c. The file is closed save for execution that is ongoing.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 12TH DAY OF JULY 2023.

RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Peter Munyoki for the applicant

No appearance for Defendant

No appearance for proposed interested party

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