



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 916 OF 2013

MASTERS KENYA LIMITED.....1ST PLAINTIFF

STEPHEN KAMAU NDUNG'U.....2ND PLAINTIFF

=VERSUS=

DESERT RUNNERS SERVICES COMPANY LIMITED.....1ST DEFENDANT

JOHN SALEH OKECH.....2ND DEFENDANT

SYLVIA ALIVISTA LITUNDA.....3RD DEFENDANT

HOUSING FINANCE CORPORATION OF KENYA.....4TH DEFENDANT

RULING

1. This is the Notice of Motion dated 10th February 2020 brought under order 9 rule 1 of the Civil Procedure Rules, 2010 and Section 1A, 1B and 3A of the Civil Procedure Act and other enabling provisions of the law.

2. It seeks orders:-

1. That this honourable court be pleased to substitute the 2nd and 3rd Defendants with Mr. Stephen Macharia and further allow the Defendant so substituted to file affidavits, defence and witness statement.

2. That the costs of this application be in cause.

3. The grounds are on the face of the application and are:-

(a) That the 2nd and 3rd Defendants are no longer directors of the 1st Defendant.

(b) That having ceased to be directors the 2nd and 3rd Defendants lack the requisite legal capacity to act, testify for and on behalf of the 1st Defendant company.

(c) That it is in the interest of justice that Stephen Macharia be substituted as a witness in order for the court to effectively adjudicate all the issues in controversy once and for all.

(d) That no prejudice will be occasioned to the 1st Plaintiff and 2nd Plaintiff with the grant of this application.

4. The application is supported by the affidavit of Stephen Gakere Macharia, a director of the 1st Defendant, sworn on the 10th February 2020.

5. The application is opposed. There is a replying affidavit sworn by Stephen Kamau Ndungu, the 2nd Plaintiff herein and a director of the 1st Plaintiff sworn on the 16th March 2020 and a supplementary affidavit sworn on the 11th June 2021.

6. There is also a replying affidavit sworn by Joseph Lule, legal officer-litigation with the 4th Defendant, on the 17th February 2020.
7. The application was canvassed by oral submissions on 5th June 2021 and 23rd June 2021.
8. I have considered the application and the affidavit in support. I have also considered the affidavits in response and the oral submissions. The issue for determination is whether this application is merited.
9. A casual look at the notice of motion shows that the same is brought under order 9 rule 1 of the Civil Procedure Rules. I have gone through the said provision and I find that the same does not provide for substitution. This would mean that the application is brought under the wrong provisions of the law. During submissions, counsel for the 1st – 3rd Defendants urged this court not to dwell on the technicalities but instead look at the substance the application. I do not agree with this position. Where there are specific provisions the same ought to be quoted.
10. Counsel then stated that he was relying on **order 1 rule 10(2)** of the Civil Procedure Rules. The same provides that:-
- “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.”***
11. This provision does not afford the applicants any reprieve as it is clear who the Plaintiffs wanted to sue. There was no mistake.
12. Pursuant to the court order granted on 5th July 2018 the 2nd and 3rd Defendants signatures were subjected to investigation and there is a report on the court record confirming the issues under inquiry.
13. The dispute herein involves allegations of fraud, illegality and irregularities to which the 2nd and 3rd Defendants have been adversely mentioned. They are therefore necessary parties to these proceedings.
14. I agree with the Plaintiffs and the 4th Defendant’s submissions that the 2nd and 3rd Defendants are sued in their individual capacities and not as representatives of the 1st Defendant.
15. I also find that the party sought to be substituted Stephen Gakere Macharia has not given any reason why he wants to be substituted as a Defendant leaving out his co-director William Kiarie Wambai.
16. All in all, I find that this application has not been brought in good faith. In any case the 1st Defendant can seek leave to substitute a witness if need be.
17. I find no merit in this application and the same is dismissed with costs to the Plaintiffs and the 4th Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 11TH DAY OF NOVEMBER 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. Meenye for the Plaintiffs

Mr. Masaviru for the 1st – 3rd Defendants

Mr. Kamindo for Mr. Ayieko for the 4th Defendant

Steve - Court Assistant