



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 55 OF 2012

{FORMERLY CIVIL CASE NO. 63 OF 2009}

MANCHESTER OUTFITTERS LIMITED.....PLAINTIFF

VERSUS

PRAVIN GALOT.....1ST DEFENDANT

RAJESH GALOT.....2ND DEFENDANT

GANESH GALOT.....3RD DEFENDANT

KEVIN GALOT.....4TH DEFENDANT

MANCHESTER OUTFITTERS {EAST AFRICS} LIMITED.....5TH DEFENDANT

AND

MOHAN GALOT.....1ST INTERESTED PARTY

GALOT LIMITED.....2ND INTERESTED PARTY

TITLE BY WAY OF COUNTERCLAIM

MANCHESTER OUTFITTERS LIMITED.....1ST PLAINTIFF

PRAVIN GALOT.....2ND PLAINTIFF

RAJESH GALOT.....3RD PLAINTIFF

GANESH GALOT.....4TH PLAINTIFF

VERSUS

MOHAN GALOT.....DEFENDANT

AND

JOHNSON OTIENO ADRES.....PROPOSED INTERESTED PARTY

RULING

The Application

1. By a Notice of Motion dated **28th** January 2021, Mr. Johnson Otieno Adera (hereinafter “the Applicant”) seeks to be enjoined in these proceedings as an Interested Party. He also prays for costs of the application to be provided for.
2. The application is supported by the grounds on the face of the application and his supporting affidavit annexed thereto. The core grounds in support of the application are that he previously served as an Assistant Registrar and Assistant Registrar of Companies between 2004 and 2011. He states that on **24th** February 2012, the court directed that the issue of directorship and shareholding of Manchester Outfitters Limited be heard before a three-judge bench and pursuant to the said order on **14th** March 2017 this court directed that parties do file Witness Statements and bundles of documents.
3. Mr. Adera states that he has learnt that Mohan Galot, the **1st** Interested party in his further Witness Statement dated **18th** January 2021 at paragraphs **20, 21, 123, 129, 131, 135, 144, 156, 165, 166 & 167** has referred to him both directly and indirectly and other officers of the Offices of the Registrar of Companies and the Attorney General as fraudsters, criminals, members of criminal gangs, errant and makers of illegal annual returns.
4. He states that during his tenure at the said offices, and in his official capacity, he handled the Manchester Outfitters Limited file and issued letters and positions that are now part of the permanent records of the file at the Registrar of Companies. He also states that in the said capacity he gave professional legal opinions to his superiors among them the Attorney General, Solicitor General, Registrar General and the Senior Deputy Registrar General all of whom agreed with his opinion which prevails to date **15** years later.
5. The applicant states that he enjoys immunity for official functions and it is untenable for the Mohan Galot to attack him. He states that he is an irrelevant person to these proceedings and that the defamatory material against him will form a permanent record of this court which is prejudicial to him and he has no way of protecting his right to dignity and privacy. Additionally, he states that he has the right to be heard with respect to the adverse statements and as an officer of this court the said statements are injurious to his reputation, hence it is in the interests of justice that his application be allowed.

The Plaintiff’s grounds of opposition

6. The Plaintiff filed grounds of opposition dated **4th** February 2021 in opposition to the application through the firm of George Gilbert Advocates stating that: -
 - a. That** the application is an abuse of court process intended to scuttle the hearing dates.
 - b. That** the applicant had admitted that he is irrelevant to these proceedings, hence he has no interest in the matters before this court.
 - c. That** the application is the product of collusion and a fishing expedition by Pravin Galot and Rajesh Galot.
 - d. That** the issues raised are strictly against the **1st** Interested Party and must not be used to derail this case.
 - e. That** the applicant has several live suits against the **1st** Interested Party being HCC Nos. **441** of 2010, **259** of 2011 and **51** of 2016.
 - f. That** this court has no jurisdiction to entertain defamation suits and in any event the statements in question were made in the course of judicial proceedings and cannot be the subject of defamation.
 - g. That** the Registrar of Companies can authenticate the documents.
 - h. That** this court has a duty to ensure expeditious disposal of cases.

The first Interested Party’s Replying Affidavit

7. Mohan Galot, swore Replying Affidavit dated **1st** February 2021 in opposition to two applications filed in this case. Relevant to the instant application, he averred that the application is a side show aimed at delaying the case, and that the applicant has admitted that he is not a relevant party to these proceedings. He also averred that apart from the joinder, he has not sought any relief from this court.

The Submissions

8. Mr. Osiemo, the applicant’s counsel essentially highlighted the grounds cited in the application and the applicant’s supporting affidavit. He singled out the paragraphs touching on the applicant in the Witness Statement of Mohan Galot and argued that the applicant desires to respond to the allegations. He submitted that if the allegations are left unchallenged, the applicant risks being prejudiced in future because the material can be used against him. Alternatively, Mr. Osiemo urged the court to strike off the offending paragraphs. He argued that parties should not knowingly defame others who are not parties to the proceedings. He dismissed the contention that the applicant ought to file civil proceedings arguing that court proceedings are privileged.
9. Mr. Kenyatta, appearing for the **2nd** defendant, Mr. Kaka, counsel for the **3rd** defendant, Mr. Were, counsel for the **1st** defendant, Mr. Kago counsel for the Plaintiff and Mr. Njenga, counsel for Galot Limited all supported the application.

10. Mr. Tiego, counsel for Mohan Galot relied on his client's replying affidavit sworn on 4th February 2021 and submitted that this court has no jurisdiction to determine defamation allegations because it is a commercial court. He cited the doctrine of qualified privilege and litigation privilege and submitted that issues arising in a litigation cannot be used as a ground for defamation.

11. Mr. Tiego also submitted that other than asking to be enjoined, the applicant did not state what he wants the court to do for him. He submitted that the applicant acted in his official capacity, hence he is barred from contradict his employer. Also, he cited possible conflict of interest and breach of the Official Secrets Act, the Public Officers Ethics Act and the Public Code of Conduct and argued that an employee cannot give evidence to contradict the office he served.

12. Miss Maumo adopted her grounds of opposition and Mr. Tiego's submissions and argued that the applicant has not demonstrated any justifiable ground to be enjoined. It was her submission that the application is an abuse of court and that it is aimed at delaying these proceedings. She urged the court to dismiss the application.

13. Mr. Oddiambo, counsel for Registrar of Companies urged the court to subject the application to the guidelines set out by the Supreme Court in *Francis Kariuki Muruatetu & Another v Republic & 5 Others*[1] and urged the court to decline the application.

The Determination

14. The Supreme Court of Kenya has on several occasions laid down the tests to be considered by courts while addressing applications such as the one before us. Article 163 (7) of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme court. The binding nature of the Supreme Court decisions under Article 163 (7) of the Constitution is absolute. Article 163 (7) is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[2] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.[3]

15. In *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others*[4] the Supreme Court had the following to say:-

“...Consequently, an interested party is one who has a stake in the proceedings, though he or she was not a party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

16. In *Francis Kariuki Muruatetu & another v Republic & 5 others* (Supra), the Supreme Court also addressed the same issues. The Supreme Court defined an intervener and an interested party as defined in the Black's Law Dictionary as follows: -

“Black's Law Dictionary, 9th Edition, defines “intervener” as one “who voluntarily enters a pending lawsuit because of a personal stake in it.”

“A party who has a recognizable stake (and therefore standing) in a matter”

17. The Supreme Court was categorical that ‘enjoinment is not as of right’ and proceeded to lay down the basis upon which an application for joinder of an interested party is to be considered. It laid down the following considerations: -

a. The personal interest or stake that a party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.

b. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.

c. Lastly, a party must, in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the others parties will be making before the Court.

18. Consistent with the above considerations, we may usefully add that the test is not according to or against the wishes of the applicant or any of the parties in the proceedings. It is whether the the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings and must satisfy the above considerations.

19. In determining whether or not an applicant has a legal interest in the subject matter of an action sufficient to entitle him to be joined as an interested party, the true test lies not so much in an analysis of what are the constituents of the applicant's rights, but rather in what would be the result on the subject-matter of the action if those rights could be established.[5]

20. Paraphrasing the words of the Supreme Court in *Francis Kariuki Muruatetu & another v Republic & 5 others* (Supra), an applicant is required to demonstrate the personal interest or stake he has in the matter and must set it out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral. The prejudice to be suffered must also be demonstrated to the satisfaction of the court and it must be clearly outlined and not something remote. Lastly, an applicant must in its application, set out the case and/or submissions it intends to make before the court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court.

21. We have carefully studied the above tests. The applicant has not demonstrated that he has an identifiable stake in the subject matter before this court. He is merely aggrieved by the alleged defamatory allegation. In our considered view, this does not meet the threshold for joinder of an interested party as set out herein above. Additionally, matters of defamation are not within the scope of determination by this court.

22. In fact, the applicant has said nothing about the subject matter. He did not set out his case or the submissions he intends to make before the court in conformity with the tests laid down by the Supreme Court. He has not demonstrated the relevancy of the submissions (if any) or established that they are not merely a replication of what the other parties will be making before the court touching on the contested allegations. Our reading of the application is that the applicant seeks to block part of evidence intended to be tendered in the proceedings on grounds that it may injure him. The court will be descending into the arena of the dispute if at this stage it determines the kind of evidence parties should bring forward to prove their respective positions. The applicant has not demonstrated that the application meets any of the tests laid down by the Supreme Court.

23. The alternative prayer by Mr. Osiemo that we strike out the offending paragraphs was made from the bar. It is not contained in the application. We cannot consider it.

24. We find and hold that the Notice of Motion application dated 28th January 2021 is not merited. We dismiss the said application with no orders as to costs.

Orders accordingly

SIGNED, DELIVERED, DATED AT NAIROBI THIS 5TH DAY OF FEBRUARY, 2021

L. MUTENDE

G. NGENYE

J. MATIVO

JUDGE

JUDGE

JUDGE

[1] [2016] e KLR. (Supra)

[2] Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR

[3] See Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in *Dodhia vs National & Grindlays Bank Ltd & Another* {1970} E.A. 195

[4] [2015] e KLR.

[5] See *Dollfus Mieg et Compagnie S.A.V. Bank of England*, 1950-2 All ER 605 at p. 611. **See also:** *Gokaldas Laximidas Tanna v. Store Rose Muyinza*, H.C.C.S No. 7076 of 1987 [1990 – 1991] KALR 21.