



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. 100 OF 2016

YUSUF ABDI HASSAN.....PLAINTIFF

VERSUS

HUSSEIN AHMED FARAH.....1ST DEFENDANT

HUSSEIN UNDHUR MOHAMED.....2ND DEFENDANT

MOHAMED ABDIKADIR ADAN.....3RD DEFENDANT

BLUE BIRD AVIATION LTD.....4TH DEFENDANT

MOHAMED HASSAN.....INTERESTED PARTY

RULING

1. On 30/3/2016, the plaintiff commenced these proceedings for permission to proceed with a derivative suit against the 1st to 3rd defendants. He made various allegations in his supporting affidavit which touched, amongst others, the interested party.

2. Pricked with those allegations, the interested party took out a Motion on Notice dated 7/6/2016 wherein he sought to be enjoined as an interested party and for the striking out of certain paragraphs in the plaint, Notice of Motion dated 30/3/2016 and the supporting affidavit thereto.

3. Of relevance to this ruling is prayer no. 2 of that Motion and the subsequent two rulings arising from that Motion. In prayer no. 2 thereof, the interested party prayed as follows: -

“2. THAT MOHAMMED HASSAN the applicant herein be and is hereby joined in this suit as an Interested Party only for purposes of prosecuting this Motion”.

4. That prayer was allowed in a reasoned ruling made on 12/7/2016 by Nzioka J. In that ruling, the Judge held:-

“In conclusion, I find that it is in the interest of Justice to allow Prayer 2 of the Notice of Motion dated 7th June 2016. As to whether the Applicant will leave the proceedings after the Application is concluded will await the final decision on the other prayers in the Application”.

5. That Motion was finally heard and a ruling thereon on the other prayers made on 23/7/2018. In that ruling, the Judge delivered herself thus: -

“In this regard, I am inclined to disallow the Application at this stage to allow the plaintiff an opportunity to present the evidence(d) alleged to be available”.

6. It is against that background that when the matter came up for the further hearing of the plaintiff's Motion for permission on 5/5/2021, **Mr. Ahmednasir (SC)** Learned Counsel for the plaintiff objected to **Mr. Ojiambo (SC)** Learned Counsel for the interested party from being heard.

7. Counsel submitted that since the interested party had been joined in the proceedings to argue his Motion of 7/6/2016 which had been dismissed, he is no longer a proper party in these proceedings. That being neither a shareholder nor director of the 4th defendant but a mere interested party, he has no interest in the proceedings and should therefore not be heard in the plaintiff's Motion for permission.

8. **Mr. Ojiambo SC** opposing the objection submitted that Counsel for the plaintiff had misled the two rulings of Nzioka J. That there were two aspects of the interested party's Motion, joinder and striking out of certain paragraphs of the pleadings filed by the plaintiff that attacked the person of the interested party.

9. That the Court held in paragraph 63 of the ruling of 23/7/2018 that the interested party is not a mere spectator. That he had the right to participate in the proceedings as an interested party. In his view, the interested party has a right under **Articles 25 and 50 of the Constitution** to be heard. That he needs to be heard on the allegations made against him as they are intertwined with the allegations made against the defendants.

10. Counsel further submitted that there will be no prejudice to be suffered by the plaintiff if the interested party is heard. That to the contrary, if he is not heard, he will suffer great prejudice as he will not have an opportunity of being heard on the allegations that are of criminal conduct on his part. Counsel urged that I dismiss the objection.

11. The Court declined to hear the other Counsels as the contention was between the plaintiff and the interested party. I have carefully considered the record and the submissions of Learned Counsel.

12. I agree with **Mr. Ojiambo SC** that an individual's rights under **Articles 23 and 50 of the Constitution** must be vigorously protected. That when allegations are made against a party in any forum, such a party is entitled as of right to rebuttal.

13. In the present case, the interested party was properly joined in these proceedings. He himself convinced the Court that he only needed such joinder as an **'an Interested Party only for purposes of prosecuting'** the Motion dated 7/6/2016.

14. The Court joined him and allowed him to prosecute that Motion. However, he was unsuccessful in that Motion. The Court found that the plaintiff was entitled to have the allegations in the impugned paragraphs retained in the pleadings until the hearing.

15. It should be noted that, in declining the Motion by the interested party, the Court considered the competing rights of both the interested party and the plaintiff. In paragraph 62 of the ruling of 23/7/2018, the Court observed: -

"However, I find that this is a matter of competing interests, the Applicant is entitled to the above stated rights but the plaintiff too, is entitled to be heard and access to justice under Article 48. At this stage I will invoke what I term as, the rule of 'the lesser evil'. It simply begs the questions: If the impugned information is expunged at this stage, who amongst the parties would more adversely affected and/or prejudiced. What if the case proceeds and during the trial, there is evidence adduced to support the allegations complained against and at that stage the material has been expunged? What if there is no evidence adduced to support the same; will the Applicant be justly compensated in damages? Will the Applicant have an opportunity to be heard to rebut the said allegations".

16. I believe that in making the foregoing observations, the Court was alive to its earlier ruling of 12/7/2016. In that ruling, it had reserved the right of the interested party to continue participating in the proceedings pending the determination of his motion. The Court observed: -

"As to whether the Applicant will leave the proceedings after the Application is concluded will await the final decision on the other prayers in the Application"

17. In determining the Motion, the Court dismissed the same and said nothing about the Interested Party's right to continued participation in the proceedings. That being the case, where does that leave the interested party.

18. In **David Sironga Ole Tukai v. Francis Arap Muge & 2 Others [2014] Eklr**, the Court of Appeal held: -

"In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded".

19. In the present case, the interested party told the Court and the plaintiff in his Motion of 7/6/2016 that he only wished to be joined in the proceedings only for the purpose of being heard in that Motion. He was joined and heard on it. In my view, that was it. He was joined, heard and the matter ended there.

20. In the circumstances, it must not have been in the contemplation of the plaintiff that he will meet the interested party later on in these proceedings. According to the ruling of 23/7/2018, the interested party should leave the plaintiff present any evidence he has at the trial of the suit and if he fails, he will have a remedy in damages.

21. On the contention of being condemned unheard, the interested party will have an opportunity, if any, of being heard at the trial. He may choose to be called as a witness for either side either to confirm or contradict the allegations he seeks to fight.

22. In view of the foregoing, I uphold the objection by **Mr. Ahmednasir SC** and hold that the interested party has no right of audience at this stage. His right to be heard was subsumed in his Motion that was dismissed.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY, 2021.

A. MABEYA, FCI Arb

JUDGE