



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 164 OF 2009

RAHANS INVESTMENTS LIMITED.....PLAINTIFF

-VS-

AMARANTH ENTERPRISED LIMITED.....DEFENDANT

AND

KENYA NATIONAL CHAMBER OF COMMERCE.....THIRD PARTY

RULING

1. This ruling is in respect of the Third Party's Notice of Motion dated 27th May, 2019. The third party essentially seeks leave to tender its evidence. The application is supported by the affidavit of Mustafa Ramadhan sworn on 27th May 2019. The application is premised on the grounds:

i. That Mr. Mustafa Ramadhan the Chairman of the Kenya National Chamber of commerce and Industry Mombasa Chapter was elected into office on 30th April 2019;

ii. That Mr. Mustafa Ramadhan became aware of the existence of this case on 10th May 2019 when a copy of mention notice dated 1st April 2019 was forwarded to him and he noted that the then Advocates on Record Messrs. R.M Mutiso & Co. Advocates for the Third Party had received the same under protest on the grounds that they no longer had instructions;

iii. That he instructed the new Advocates on Record Messrs. JWM Law LLP to attend court on 13th May 2019 when the case was scheduled to be mentioned.

iv. That during the mention the new Advocates on Record Messrs. JWM LLP applied for the proceedings and court process in the matter.

v. That they were granted leave to file written submissions herein.

vi. That the proceedings and court process were duly received and it is apparent that the Third Party's previous Advocates had not taken any step in the matter save for filing of the third party defence and their mistakes ought not to be visited on the third party.

vii. That from the documents available on the record the third party's previous advocates are likely to have been conflicted.

viii. That the third party will suffer great prejudice if the extension of time to hear its case is not granted and the matter determined on its merits.

ix. That this application has been made without unreasonable delay; and

x. That the application ought to be granted in the interests of equity and justice.

2. In opposing the application, the plaintiff filed a replying affidavit sworn by Rupen Haria on 26th September, 2019. It is the plaintiff's contention that the application is not merited because the Third Party has not sought the re-opening of the case which was closed on 17th

December 2018; that the third party is a corporate body that has always been operational and cannot reasonably say that it only became aware of the matter when the current chairperson was elected to office; that the Third Party's desire is fill gaps in the defendant's case; that the Third Party is not candid and its conduct has been lethargic.

3. I have perused and considered the application and the submissions made as well as the authorities relied on. This case proceeded to hearing on 17th December, 2018 when the case between the plaintiff and the defendant was closed. The third party did not attend court although they were duly served. The present application is not seeking to re-open the case that was closed on 17th December 2018. All that the Third Party seeks is an extension of time to hear the third party's case and for leave to file third party witness statements and the availing of those witnesses to give evidence and to be cross-examined and re-examined. The third party further seeks for extension of time to file submissions.

4. I agree with the plaintiff's submission that all the above cannot be done unless the case that was closed is re-opened. The case can only be re-opened if the orders made on 17th December 2018 are set aside. There is no request to set aside those orders and it is settled law that a court cannot grant a relief which has not been sought by any party to a suit.

5. Further, the application herein is by a Third Party. No application for directions has been made by the defendant as required by the provisions of Order 1 Rule 22 of the Civil Procedure Rules. Under that rule, the court has discretion to order the question to be tried at or after the trial of the suit. As such application has not been filed and considered by the court, in my view the plaintiff's claim against the defendant can still be tried independently of the defendant's claim against the third party. I am persuaded by the finding of Gikonyo J in the case of **Kenya Commercial Bank –v- Suntra Investment Bank Ltd (2015) eKLR** where he stated thus:

“The way I understand the law on third parties, such issues of third parties are issues and triable only between the third party and the defendant, and cannot be a bona fide issue triable between the defendant and the plaintiff.”

6. In this case, each of the parties was afforded an opportunity to present their case. The third party chose not to attend court during the hearing and cannot now be heard trying to derail the finalization of the case between the plaintiff and the defendant. This is a very old matter that was filed in the year 2009 and was only heard and concluded in December 2018. The cardinal tenets of the overriding objective principle under Section 1A and 1B of the Civil Procedure Act is that justice must be delivered in an efficient and expeditious manner. In my view, the third party has not given genuine reasons to warrant grant of the orders sought. In any event, the third party will not suffer prejudice as issues between it and the defendant can still be decided after the trial. In the premises, and for the above reasons, I find not merit in the third party's application dated 27th May, 2019 and the same is dismissed with costs to the plaintiff. As the parties have already filed their submissions the court will proceed to prepare judgment for delivery on a date to be given.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of February 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms Nzamba for 3rd party

Wafula holding brief for Kongere for Plaintiff/Respondent

No appearance for Mwawasi for Defendant/Respondent

Yumna Court Assistant

C.K. YANO

JUDGE