



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 115 OF 2019

IN THE MATTER OF CIVIL APPLICATION NO. 31 OF 2016

AND

IN THE MATTER OF CIVIL APPLICATION NO. 59 OF 2018 (UR 37 OF 2018

AND

IN THE MATTER OF HIGH COURT CIVIL APPLICATION NO. 245 OF 2018

JOSEPH MORARA OMOKEAPPLICANT

-VERSUS-

GERALD KIMANGA T/A KIMANGA & CO. ADVOCATES.....1ST RESPONDENT

DIAMOND TRUST BANK LIMITED2ND RESPONDENT

INVESCO ASSURANCE CO. LTD.....3RD RESPONDENT

MOMANYI AUNGA T/A MOMANYI AUNGA & CO. ADVOCATES4TH RESPONDENT

RULING

The application dated 8th October 2019 was brought by **JOSEPH MORARA OMOKE** (*“the Applicant”*), seeking joinder of the following persons to these proceedings;

- a. Diamond Trust Bank Limited;**
- b. Invesco Assurance Co. Ltd;**
- c. Momanyi Aunga, Trading As Momanyi Aunga & Co. Advocates.**

1. The reason cited by the Applicant, for seeking the said joinder was that it was only after they had been enjoined to this suit that the Court would be able to make an informed decision on all matters.

2. When the Applicant initiated these proceedings, on 11th July 2019, there was only one Respondent, namely Gerald Kimanga, Trading As Kimanga & Co. Advocates.

3. By his application dated 5th July 2019, the Applicant sought, inter alia, the review and setting aside of the orders made on 22nd January 2019, in the case **GERALD O. KIMANGA T/A KIMANGA & CO. ADVOCATES Vs INVESCO ASSURANCE COMPANY LTD, HIGH COURT MISC. CASE NO. 245 OF 2018.**

4. The other order which the Applicant herein sought by his application dated 5th July 2019, was for a return of all the amount which had been paid to the Respondent, by **DIAMOND TRUST BANK.**

5. The Applicant had asserted that the Respondent was evasive and had failed to make a full disclosure to the court, concerning the account from which the funds were paid out.
6. In particular, the Applicant had made the contention that the Respondent was fully aware that the funds in issue did not belong to the **INVESCO ASSURANCE COMPANY LIMITED**.
7. The Applicant had, in his said application, expressed the view that, because the funds had been deposited into an account at **DIAMOND TRUST BANK LIMITED** pursuant to an Order issued by the Court of Appeal, and as the said account was held in the joint names of the 1st Respondent together with **MOMANYI AUNGA & CO. ADVOCATES**; the joint signatory to the account should have been engaged in the process.
8. When the case came up before me on 23rd July 2019, the Respondent pointed out that whilst he was the only Respondent to the application, the Applicant had cited other persons as if they were also Respondents.
9. The court pointed out to the Applicant that if any person had not yet become a party to the case, such a person cannot become a party just because the Applicant had decided to add them. It was for that reason that the Applicant filed the current application.
10. The application was canvassed through written submissions.
11. The Applicant submitted that it was necessary to join the 3 other persons to the case, because it is only by so doing that the court could thereafter be able to make an informed decision.
12. The applicant expressed the view that each of the persons who had any connection with the account from which money was paid out to the Respondent, ought to be given an opportunity to state their position on the matter.
13. The 1st Respondent pointed out that the Applicant had not been a party to the proceedings in which the Court granted garnishee orders.
14. As the garnishee proceedings were said to have been lawful and regular in every respect, the 1st Respondent submitted that there is no basis for setting aside the orders made therein.
15. The 1st Respondent pointed out that the orders could only be set aside if there had been fraud or non-disclosure of material facts.
16. It was the understanding of the 1st Respondent that the orders which the Applicant sought to have set aside, did not affect him.
17. The 2nd Respondent pointed out that on 25th April 2016, a consent order was recorded in **INVESCO ASSURANCE COMPANY LIMITED Vs JOSEPH MORARA OMOKE, CIVIL APPEAL NO. 31 OF 2016**, at the Court of Appeal, Eldoret.
18. Pursuant to the said consent order, Execution was stayed pending the hearing and determination of the Appeal, however, the said stay was conditional upon the deposit of Kshs 1,100,000/= into a Joint Account at Diamond Trust Bank Kenya Limited.
19. The 2nd Respondent submitted that a person ought only to be enjoined to a suit if he was either a necessary party or a proper party.
20. The 2nd Respondent further submitted a "*proper party*" is the person whose presence would enable the court to completely, effectively and adequately adjudicate upon all the matters in dispute. As the 2nd Respondent noted;

"..... he need not be a person in favour of or against whom the decree is made,"
21. On the other hand, the 2nd Respondent noted the following, concerning a "*necessary party*";

"The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled therefore must be a question if the action cannot be effectually and completely settled unless he is a party."
22. The 2nd Respondent submitted that it was not a proper party or a necessary party.
23. It pointed out that it only paid out the funds which it had been holding, because it had an obligation to obey the garnishee orders which the court had issued.
24. Even assuming that the court was minded to set aside the garnishee order, the 2nd Respondent contends that such an order could only apply against the 1st Respondent. In effect, the 2nd Respondent believes that the issue can be determined effectively without requiring the 2nd Respondent to be enjoined to the action.
25. I have given due consideration to the submissions before me, and I make the following findings;

a. The money which was in the account at Diamond Trust Bank (Kenya) Limited was deposited pursuant to a consent order between Invesco Assurance Company Limited and Joseph Morara Omoke.

b. The signatories to the said account were M/S Kimanga & Co. Advocates, (on the one hand); and M/S Momanyi Aunga & C. Advocates.

c. The court would need to determine whether or not the said funds were being held by the bank to the order of Invesco Assurance Company Limited, at the time when the court granted the garnishee orders.

d. In order to determine the issues effectively and completely, I find that all the three proposed parties are necessary parties. Each of them ought to be given an opportunity to state their respective positions on the matter, so as to enable the court make an informed decision on all the issues pertaining to the funds hitherto held in a bank account, at the instance of a consent order made in the appeal which was pending at the Court of Appeal, Eldoret.

e. Accordingly, I direct that all the 3 proposed Respondents be enjoined forthwith to this action.

f. The costs of the application shall abide the determination of the substantive application.

g. Each of the persons who have been enjoined to the action has 14 days from today to file and serve the responses to the application dated 5th July 2019.

DATED, SIGNED and DELIVERED at KISUMU This 9th day of September 2020

FRED A. OCHIENG

JUDGE