



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

MISC. CIVIL SUIT NO 459 OF 2015

J.M NJENGA & CO. ADVOCATES.....APPLICANT

VERSUS

FRANCIS CHEGE MAINA.....1ST RESPONDENT

JOSEPH MACHARIA MAINA.....2ND RESPONDENT

JAMES MUTHAIGA MAINA.....3RD RESPONDENT

DEDAN MUTHAIGA MAINA.....4TH RESPONDENT

AMBASSADEUR INVESTMENT (K) LTD.....5TH RESPONDENT

LLOYD MASIKA LIMITED.....6TH RESPONDENT

AND

JOHN KAGUMA MAINA.....1ST PROPOSED INTERESTED PARTY

CHARLES KANYUGA MAINA.....2ND PROPSOED INTERESTED PARTY

STANLEY KARIUKI MAINA.....3RD PROPOSED INTERESTED PARTY

RULING

1. The subject application herein is dated 8th November 2019, based on the provisions of; section 1A, 1B, 3 and 3A of the Civil Procedure Act (cap 21) Laws of Kenya, Order 40 rule (7), Order 51 Rule 15 of the Civil Procedure Rules, Article 159(2) (d) of the Constitution of Kenya and all other enabling provisions of the law.

2. The Applicant is seeking for orders that

a) That this Honourable court be pleased to review and/or set aside orders issued herein dated 24th November 2015 and 9th October 2019;

b) That the 1st to 3rd proposed interested parties be granted leave to join these proceedings as 1st to 3rd interested parties;

c) That this Honourable court be pleased to direct that Dorcas Wangui Maina; be joined in these proceedings as the 4th interested party;

d) That in the alternative, this Honourable court be pleased to direct that all sums being held by the 6th Respondent pursuant to the order issued on the 9th October 2019; be released to the parties herein in the following ration

i) 50% to be released to the applicant and/or the 1st to 3rd Respondent or as may be determined in Civil Appeal No 345 of 2019: Francis Chege Maina & Another vs J. M. Njenga & Co. Advocates & 2 others

ii) 50% released to the 1st to 3rd proposed interested parties and Dorcas Wangui Maina to be shared equally among them

e) That this Honourable court do issue an injunction order against the 6th Respondent restraining them from releasing any money held on behalf of the 5th Respondent to either the Applicant or the 1st to 3rd Respondents;

f) That the court be at liberty to issue any other order it might deem fit to grant.

3. The application is supported by the grounds thereto and the affidavit dated even date sworn by; John Kaguma Maina. He avers that, he has authority of the 2nd and 3rd proposed interested parties to swear the affidavit. That he is a director and a shareholder of the 5th Respondent and the proposed interested parties are beneficial owners and shareholders of the 5th Respondent.

4. That, on 23rd November 2015, the firm of; J.M Njenga & Co Advocates, obtained orders against the 5th Respondent, without disclosing to the court that, the funds held by the 6th Respondent belong to eight (8) different shareholders including the proposed interested parties. The firm having acted for the 1st to 4th Respondent in; Nairobi High Court Succession Cause No 361 of 2001: In the Matter of the Estate of Samuel Maina Gatonga knew that, the 5th Respondent had other shareholders other than the 1st to 4th Respondents and did not disclose this fact to the court to enable the court arrive at a fast and fair decision.

5. As a result, the court was misled to issue a blanket order against the 5th Respondent, to the detriment of the 1st to 3rd proposed interested parties. Further, pursuant to a consent order issued on the 31st May 2019, the parties herein acknowledged the existence of the 1st to 3rd proposed interested parties as shareholders of the 5th Respondent; with a beneficial interest with the funds held by the 6th Respondent.

6. The proposed interested parties averred that, the orders of the court of 24th November 2015 and 9th October 2019 are in conflict with orders issued by the High court in the HCCC No. 394 of 2011 Francis Chege Maina & 4 others vs John Kaguma Maina & 2 others consolidated with HCCC No. 539 of 2011 Kenwide Investments limited vs Francis Chege Main & 4 others, which directed the 6th Respondent to release all monies collected on behalf of the 5th Respondent into an account jointly held by the 1st to 4th Respondents together with the 1st to 3rd proposed interested parties.

7. Thus, the consent order issued on 9th October 2019, was irregular as the 5th Respondent was not a party thereto and/or did not consent to the order; contrary to; Order 34, Rule 5 of the Civil Procedure Rules. That, it also amounts to grave miscarriage of justice if the Applicant is paid using the funds belonging to any other person other than his clients without their consent.

8. Finally, it was submitted that there was no delay in making the application and no prejudice will be suffered by any other party herein.

9. However, the Applicant/Respondent filed a replying affidavit dated 21st January 2020, and averred that the application is being made over four years, therefore it is an afterthought, legally misplaced and lacks merit. That, the order of; 24th November 2015, was interim in nature and the same lapsed when the matter came up for hearing inter-parties on 19th January 2016. Therefore, no order to be reviewed.

10. Further, the consent order of; 28th May 2019 cannot be subject of review as no grounds have been laid out as to why the order should be set aside. There is also no evidence that they are shareholders of the 5th Respondent. Additionally, there is no explanation why the interested parties want to be enjoined in the matter. That, their joinder is of no legal consequences in view of the consent order made on 9th October 2019. Further the applicant cannot seek for one Dorcas Wangari Maina to be enjoined as she is not one of the applicants and this prayer is misconceived.

11. The Applicant averred that, the proposed interested have always been aware of the proceedings and participated through the firm of; Muchemi & Co Advocates. The claim of non-disclosure of material fact is baseless as there is no evidence that the monies collected by the 6th Respondent belongs to the 5th Respondent solely or otherwise or that the proposed interested parties are entitled to a share thereof.

12. The order of 9th October 2019 is to secure the subject money pending the appeal and therefore there is no miscarriage of justice. Any pending dispute thereof between the applicants and the 5th Respondent or shareholding should be taken to another court and not in the subject matter. Therefore, there is no basis for grant of any of the orders sought therefore the application should therefore be dismissed with costs.

13. The 1st and 2nd Respondents objected to the application vide the affidavit dated 18th December 2019, sworn by oh Joseph Macharia Maina; the 2nd Respondent on his own and on behalf of the 1st Respondent. He averred that, the application is defective as the interested parties have not been enjoined to the proceedings as required by an order of the court. In the circumstances therefore the interested parties lack locus standi to seek the orders of review or setting aside of the orders made by the court on 24th November 2015 and 9th October 2019.

14. The interested parties are directors of the 5th Respondent and have all along been aware of the proceedings herein and delayed in bringing the application for review after five (5) years when the order was made.

15. The Proposed interested parties and the court order dated 24th May 2015 and therefore there is no reason as to why they did not seek a

review of the order earlier and as evidenced by the Replying affidavit of the 1st proposed interested party John Kaguma Maina dated 25th May 2018 in which he confirms knowledge of the court order of 24th November 2015. Further the grounds being relied on in the subject application were the same grounds relied on in his affidavit of 25th May 2018 and which issues have been fully ventilated and cannot be brought up again.

16. He averred further that, the proposed interested parties have not been candid in their averments as the order of 24th November 2015 was to secure amounts for payment to the Applicant/Respondent and not for the benefit or distribution to the proposed interested parties or even the Respondents. Further, the consent of 9th October 2019, was to release part of the secured sums to the Applicant/Respondent and not available for distribution to the proposed interested parties. Therefore, there are no reasons to review or set aside the consent order of 9th October 2019.

17. That, the proposed interested parties have not shown any justifiable grounds to set aside the consent order as set out in the case of; Flora N. Wasike v Destimo Wamboko (1982-88) J KAR 625.

18. In the circumstances thereof, the proposed interested parties have not made out a case to be enjoined as parties as their interests have been adequately represented through the 5th Respondent and they have not satisfied the grounds for reviewing the court order of 24th November 2015 nor setting aside of the consent order dated 9th October 2019.

19. The 3rd to the 6th Respondents did not participate in the hearing of the application. The parties filed their submissions in support of their averments herein. I have considered the same and find that the following issues have arisen for determination: -

- a) Whether the Applicants have satisfied the conditions for joinder as interested parties;
- b) Whether, they have met the criteria for setting aside the subject consent order;
- c) Whether the applicants are entitled to the prayers herein, and
- d) Who will bear the costs?

20. I have considered the application in total and I find that first and foremost, the proposed interested parties should have first sought to be joined in the suit before seeking for any other prayer. For any person to seek for and be granted any order in a suit, that person must be a party to the suit. It was therefore imperative that the Applicants first obtain orders for leave to join these proceedings before seeking any orders. On that ground alone, the other prayers are not available for consideration.

21. Be that as it were, the provisions of; Order 1 Rule 10 (2) of the Civil Procedure Rules provide that: -

“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.

22. The proposed interested parties relied on the case of; Judicial Service Commission vs Speaker of the National Assembly & another (2013) eKLR. to argue that, the court can allow joinder of a party who may be necessary into a suit at any stage of the proceedings in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

23. The proposed interested parties further relied on; Legal Notice No 117 of 2013, which provides inter alia that “a person with leave of the court may make an oral or written application to be joined as an interested party or the court, on its own motion, may also join an interested party to the proceedings before it”

24. Further reliance was placed on the case of; Yusuf Abdi Adan & Another vs Hussein Ahmed Farah & 3 others (2016)e KLR where the provisions of Article 50 (1) of the Constitution were quoted to aver that, every person has a right to a fair hearing before a court or another independent tribunal or body. Thus Dorcas being a sister of the proposed interested parties and/or 1st to 3rd Respondents and a beneficial shareholder of the 5th Respondent should be allowed to join the suit.

25. Finally, the proposed interested parties relied on the provisions of; Section 1A, 1B, 3 and 3A, which implores upon the court to exercise the inherent powers of the court to do justice, Further, Article 159(2) of the Constitution which requires the court in exercising judicial authority to be guided by the principles that; justice shall be done to all, irrespective of status, justice shall not be delayed and justice shall be administered without undue regard to procedural technicalities.

26. I have considered the prayer for joinder and I find court order made on 28th May 2019, by consent of the parties herein. It was ordered that, provided inter alia that, a sum of Kshs 9,000,000 be released to the firm of; Muchemi & Company Advocates on behalf of the shareholders of the 5th Respondents, including the proposed Interested parties. This clearly shows that; they have an interest in this matter as alleged. In the circumstances it is in the interest of justice I grant the application for joinder of the 1st to 3rd proposed interested parties which I hereby do. However, the proposed 4th interested party is not an applicant to the applicant herein and cannot benefit from the orders of joinder as a party to the suit.

27. Be that as it were, I wish to uphold the substantive justice and consider the other prayers in line with Article 159 (2) of the Constitution, 2010. Even if the application is considered on merit, I find that there are two orders sought to be set aside, the order dated 24th November 2015 and 9th of October 2019. The first order is actually dated 23rd November and not the 24th November, 2015. The order was given to subsist until, 16th January 2016. Therefore, it expired on that date and is not available for extending. That deals with the issue of that order.

28. Similarly, the order of 9th of October 2019, was recorded by the consent of the parties. The law on setting aside a consent order was set out in the case of; *Mbogo & Anor vs Shah (1968) EA 93*, that generally, a court of law will not interfere with a consent judgment/order except in circumstances such as would provide a good ground for varying or rescinding a contract between parties, as further set out in the case of; *Flora N. Wasike vs Destimo Wamboko (1988)*.

29. The proposed interested parties want the order set aside due to non-disclosure of material facts and/or lack of participation of the 5th Respondent. It is further argued that, the order is contrary to; Order 34 rule 5 of the Civil Procedure Rules. I further note that, the proposed interested parties have produced an extract of the court order marked "JKM" arising out of the subject consent. That extract shows that, the counsel for the 5th Respondent participated in the consent settlement.

30. The 5th Respondent has not denied having been represented in the matter and/or consent. Even then, the proposed interested parties are not a party to the consent and cannot apply to set aside the consent. If the consent excluded the 5th Respondent, it should be the 5th Respondent that should apply to set aside it. Finally, the Applicants have not cited the provisions for setting aside the orders or met the criteria thereof. In that case, I decline to grant the prayer for setting aside the subject orders.

31. In the same vein, the proposed interested parties cannot be granted the alternative prayer as it is based on the order of 9th October 2019, and the sums which is the subject matter herein are to be held in a fixed interest earning account until the appeal is finalised and the funds released accordingly. The order does not order the release of the sum to either the Advocate/Respondent or to the 1st to 3rd Respondent as alleged.

32. Finally, as stated the proposed interested cannot seek for substantive orders before becoming parties to the suit, therefore prayer 6 cannot be granted and neither have they shown any the authority from the 5th Respondent to pray for the order of an injunction. How can an injunction be granted when the proposed interest parties have no substantive suit?

33. In conclusion, the application is allowed only in terms of prayer (3), of joinder of the 1st to 3rd proposed parties as parties to the suit. All other prayers are dismissed with costs to the Advocate/Applicant and the 1st and 2nd Respondent.

34. Those then are the orders of the court.

Dated, delivered virtually and signed on this 7th September, 2020.

GRACE L NZIOKA

JUDGE

In the presence:

Wambua for the Respondent/Advocate

Mr. Kilonzi holding brief for Mr. Wena for the 1st and 2nd Respondents

Mr. Gitau holding brief for Mr. Njenga for the 3rd and 4th Respondents

Mr. Obura holding brief for Mr. Muchemi for the 5th Respondent

Mr. Kabugu for the 1st, 2nd and 3rd proposed interested parties

Robert -----Court Assistant