



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 374 OF 2015

HON. PETER KALUMA..... PLAINTIFF/RESPONDENT

V E R S U S

CITIZEN WEEKLY LIMITED1ST DEFENDANT

TOM ALWAKA 2ND DEFENDANT/APPLICANT

JARED OPIYO 3RD DEFENDANT

CONSTATINE GEORGE SPHIKAS 4TH DEFENDANT

RULING

1. The subject matter of this ruling is the motion dated 23rd May 2016 in which the 2nd defendant is seeking for his name to be struck out from this suit as a party. The 2nd defendant filed an affidavit he swore in support of the motion. When served the plaintiff filed a replying affidavit he swore to oppose the application. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions.

2. I have considered the grounds stated on the face of the motion and the facts deponed in the supporting and opposing affidavits. I have also considered the rival submissions. The main ground put forward by the 2nd defendant in support of the motion is that the 2nd defendant is neither the proprietor/owner nor the controlling mind of the citizen Weekly Ltd as alleged in the plaint or at all. For this reason this court was beseeched to find that the plaintiff's suit as against the 2nd defendant is without factual or legal basis. The plaintiff's response is that it is common knowledge that the applicant is the owner, proprietor and the controlling mind of Citizen Weekly Ltd, the 1st defendant herein hence he is properly enjoined as a defendant to this suit. The plaintiff further averred that the aforesaid facts are within his personal knowledge. The plaintiff has also challenged the competency of the 2nd defendant's motion on the basis that the applicant failed to state the relevant provisions of the law relating to striking out of pleadings. It is argued that the jurisdiction of the court is not properly invoked. The plaintiff cited the case of **Joel Yegon & others =vs= John Rotich & others Nairobi H.C. Misc, appl. No. 995 of 2003 LL 8274 (H.C.K)** in which the court stated that an application that does not state the orders and rules under which it is brought is defective and can only be cured by way of an amendment. If not amended, such an application is liable for striking out and cannot be cured by Section 3A of the Civil Procedure Act. It is not in dispute that the 2nd defendant's motion is premised on Section 3A of the Civil Procedure Act. However the applicable law in applications for striking out a name of a party from a suit are Order 1 rule 10(2) and Order 2 rule 15(1) of the Civil Procedure Rules. It is argued by the plaintiff that the relevant provisions have not been cited on the face of the motion. However, the 2nd defendant did not seek to

amend the motion but decided to address the submission by bringing out the relevant provisions of the motion in his pleadings. For this reason, I will spare the motion for the broad interest of substantive justice as opposed to procedural technicalities. It is clear in my mind that the 2nd defendant intended to rely on Order 1 rule 10(2) and Order 2 rule 15(1) of the Civil Procedure Rules in seeking to have his name struck out from this suit.

3. Having disposed of the preliminary issue, let me now shift my attention to the substance of the motion. The 2nd defendant has categorically argued that he has no connection at all with the 1st defendant. The plaintiff is emphatic that it is a matter of common notoriety that the 2nd defendant is the owner, proprietor and controlling mind of the 1st defendant. The 2nd defendant denied being a director nor a shareholder of the 1st defendant. What is apparent from the rival arguments is that none of the parties has put forward any documents to prove the status of the 1st defendant. There is no records from the Registrar of Companies to show the shareholders and directors of the 1st defendant. It is therefore difficult at this stage to determine the question as to whether or not the 2nd defendant is a proper or necessary party to this suit. The matter is also complicated by the fact that the plaintiff has annexed to his submissions copies of previous decisions of this court in which the 2nd defendant is named as a party-together with the 1st defendant. The cases cited are:

i. Oyaró =vs= Tom Alwaka t/a Weekly Citizen & 2 others (2003) KLR 574

ii. Benaiah Sisungu =vs= Tom Alwaka T/A Weekly Citizen & Another (2007)eKLR

4. The 2nd defendant did not make any submissions over the above mentioned authorities.

5. On the basis of the above observations, I am unable to accede to

the motion. The same is dismissed with costs abiding the

outcome of this suit.

Dated, Signed and Delivered in open court this 9th day of June, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant