



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**HCC. NO.113 OF 2015**

**TAIB ALI TAIB.....PLAINTIFF**

**VERSUS**

**AMINA ADEN ABDI.....DEFENDANT**

**HASSAN ALI JOHO.....1<sup>ST</sup> INTERESTED PARTY**

**GIOVANNI FAZZINI.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. There are before court two applications brought by way of Notices of Motion dated 15.9.2015 by GIOVANNI FAZZINI(henceforth 2nd interested party) and that filed in court on the 14.10.2015 but undated, by one HASSAN ALI JOHO (henceforth the 1st interested party).
2. The 2nd Interested party's application is supported by an affidavit sworn by the said party which exhibits copies of th title showing that the said interested party is the registered proprietor and was so registered on the 5.4.1990. As a result of such registration the 2nd Interested party avers and contends that unless joined to the proceedings he stands to suffer prejudice and substantial financial loss in that he will not have been granted an opportunity to be heard.
3. The 1st Interested parties application is however not supported by an affidavit but gives the grounds of interest as the fact that he has entered into an agreement for sale of the properties and has paid a deposit but neither consideration of such sale not a copy of the agreement for sale have been exhibited to prove the existence of such a contract.
4. The applications were resisted by the plaintiff who filed two separate replying affidavits, sworn by the plaintiff on 7.10.2015 before one R.C. Murigi commissioner for oaths.
5. The suit herein was commenced by the plaintiff against the defendant and grounded on a retainer agreement dated 10.12.2001 between the two parties as advocate and client respectively.

6. Together with the plaint dated 30/8/2015 and filed in court on 31.8.2015 was filed a Notice of Motion of even date seeking a charging order against some 4 properties alleged to belong to the defendant.
7. When the application came before court under certificate of urgency on the 1.9.2015 the application was certified urgent and interim charging order was granted pending the hearing and determination of the notice of motion dated 30/8/2015.

### **The submissions by the parties**

8. When the two application came up for hearing Mr.Abeid appeared for the 2nd interested party and held brief for Asli for the 1st interested party.
9. He urged the two applications together and pointed out that the 2nd interested party being the registered proprietor of the property against which a charging order had been granted had entered into an agreement with the 1st interested party on the basis of which agreement some payment had been made and therefore it was important to give a hearing to the interested parties to participate at the hearing of the suit in order that no orders are given to their detriment without their participation. He however conceded that there had not been exhibited any document to show that indeed there had been an agreement for sale.
10. On behalf of the defendant who supported the application by interested parties. Mr.Mureithi submitted that the 2nd interested party had demonstrated that he was the Registered proprietor and hence entitled to be party to the suit. On the decree exhibited by the plaintiff, the Mr.Mureithi submitted that there was no evidence that the decree had been effected by adding the defendant as a co-proprietor but that the 2nd interested party had remained the sole proprietor. He supported the interested parties applications and reiterated that should this matter proceed without interested parties participation, then their rights to be heard shall have been violated. Equally it was submitted that no prejudice had been demonstrated to be capable of being visited upon the plaintiff if the interested parties were allowed to be joined in the suit.
11. On his part, in opposing the application, Mr.Taib pointed out that the suit before the court was a straight toward case deserving not much argument for it merely concerned a retainer agreement between the plaintiff and the defendant to which the interested parties were not privy. His position was that by invoking the title, the interested parties were generating more heat than light. He relied on his replying affidavit sworn on the 7.10.2015 and grounds of opposition dated 16.10.2016. He also relied on his list of authorities as follows:

(i) **MWALA LAND DISPUTE TRIBUNAL & ANOTHER -VS- KIILW MATHONA & OTHERS** to the effect that an application by notice of motion which is not supported by an affidavit is bad in law and incapable of being granted. He stressed the point that the fact of sale ought to have been factually proved by way of a sale agreement to show the terms thereof including the purchase price. To him it was not an option to exhibit the document of sale. He went into the decree in the family division matter and pointed out that the decree declared the subject property as a multinational and declared the defendant's share therein and that the 2nd interested party could only retain the full interest in them by paying the defendant the sum of Kshs.24,000,000/= which he had not done and the decree remained unsettled in the sum of Kshs.40,000,000/=. He clarified that the decree placed a prohibitory injunctive orders against the properties hence the same could not be sold as alleged by the interested parties prior to settlement of the decree.

12. He then referred the court to the decision in **SKOV ESTATES LTD. -VS- AFC [2015] eKLR** which according to him sets out the parameters to be considered prior to joining a party as an interested party and **DORIS AUMA -VS- HITAN C. MAJEDRIA [2014] eKLR** on who is an interested party.
13. Lastly Mr.Taib submitted that the provisions of section 52 Advocates Act placed no burden on an advocate seeking to recover fees to establish ownership of a property provided he has worked in

relation to that property. That Mr.Giovani would only be a necessary party if the property had not been attached pursuant to the decree.

14.To the submissions by the plaintiff and the authorities cited, both Mr.Abeid and Mr.Mureithi preferred not to give any response.

### **The law on interested parties:**

Order (1) Rule 10 (2) of the Civil Procedure Rules Provides:-

***“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 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.”*** (emphasis added)

15.I have provided the emphasis on the words I consider operative on courts consideration of an application to be joined as an interested party. To me a party has to prove that his presence before court may be necessary in order to enable the court effectually and completely adjudicate upon and settled all questions involved in the suit.

16.For the matter before me I have posed the question as to what are the questions involved in the suit between the plaintiff and the defendant, and upon reading the pleadings filed, come to the view that it would have to be the enforceability or otherwise of the retainer agreement and therefore recovery of legal fees, if any, from the defendant by the plaintiff.

17.Taking that position I have reviewed the law in the statute as well as the decided cases as against the submissions offered by the parties. I have come to the finding that the broad considerations to be taken by the court is whether the outcome in the suit should bind the person sought to be joined in a manner that curtails his legal rights (see **AMON -VS- RAPHAEL TULK & SONS LTD. [1955] 1 ALL ER 273**).

18.For the matter before the court instantly, there is exhibited to court a decree between the defendant and the 2nd interested party. That decree declares that the defendant owns a portion of the properties sought to be protected by a charging order to the extent valued in the sum of Kshs.24,000,000 as at 22.3.2012. No evidence has been laid before me to suggest that the decree has been set aside reviewed or adjusted. It therefore stands that the defendant has an attachable interest in the property on the strength of the provisions of section 44 of the Civil Procedure Act. The interest determined by consent of the parties is therefore ascertainable and severable from those of the 1st interested party even if he remains the registered proprietor. The interest of the defendant being such ascertainable and severable and there being no dispute or issue established to exist for determination in the suit between the plaintiff and any of the interested parties, I see not necessity in joining the said parties as interested parties in this suit. In coming to that conclusion I am guided that the charging order is merely an ancillary interlocutory relief sought for the purposes of preserving the property which the plaintiff say are the only known assets of the defendant.

19.I take cognisance that if this case was to end in favour of the plaintiff and were he to seek to attach the property to satisfy a resultant decree and if any of the proposed interested parties were to be aggrieved, appropriate proceedings would still be available for them at that time, when the question of proof of ownership of property under attachment could be considered.

20.Otherwise to order the joinder of those two persons at this juncture would be in my view to muddle the hearing of this suit by letting in parties who shall be merely bystanders.

21.In conclusion, I find and hold that the two applicants GIOVANI FAZZINI and ALI HASSAN JOHO are not necessary parties to the proceedings before me currently and the two applications

are therefore ordered dismissed with costs to the plaintiff who opposed them.

22.It is so ordered.

**Dated, signed and delivered at Mombasa this 4th day of March 2016.**

In the presence of:-

Mr.Ondego for Taib for Plaintiff.

No appearance for Defendant.

**P.J.O.OTIENO**

**JUDGE**