



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 100 OF 2016

YUSUF ABDI ADAN.....1ST PLAINTIFF

BLUE BIRD AVIATION LIMITED.....2ND PLAINTIFF

-VERSUS-

HUSSEIN AHMED FARAH.....1ST DEFENDANT

HUSSEIN UNSHUR MOHAMMED.....2ND DEFENDANT

MOHAMMED ABDIKADIR ADAN.....3RD DEFENDANT

MOHAMMED HASSAN.....INTERESTED PARTY

RULING

1. This Ruling is in relation to a Notice of Motion Application dated, **7th June 2016** and filed in Court on the same day. It is brought under Article 50 (1), 35 (2) and 33 of the Constitution of Kenya 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 19 Rule 6 of the Civil Procedure Rules, 2010 and all the enabling provisions of the Law.
2. The Application is seeking for Orders:
 - **That this Application be certified urgent and heard ex parte in the first instance.**
 - **That MOHAMMED HASSAN the Applicant herein be and is hereby joined in this suit as an Interested Party only for purposes of prosecuting this Motion.**
 - **That this Honorable Court be pleased to strike out Paragraphs 21, 22, 25 and 46 of the Petition dated 9th March 2016 filed herein as well as any other content therein which in any way makes reference to or raises allegations against the Intended Interested Party.**
 - **That this Honourable Court be pleased to strike out Paragraph 4 (j) of the Notice of Motion Application, Paragraph 53 of the Supporting Affidavit thereto sworn by Yussuf Abdi Adan on 30th March 2016, paragraph 57 of the Complaint, paragraph 52 of the 1st Plaintiff's Witness Statement and paragraph 3 (kk) of the Witness Statement of Mr. Adbirahman Yussuf Abdi, as well as any other content therein which in any way makes reference to or raises allegations against the Intended Interested Party.**
 - **That this Honourable Court be pleased to strike out and expunge from the record and all pleadings filed herein by the 1st Plaintiff, any other material and/or allegation to the extent**

that it is libelous, disparaging of the Intended interested Party herein and/or is without evidential support whatsoever and is scandalous, vexatious and an abuse of the process of this Honorable Court.

- **That this Honourable Court grants any further, or other orders it may deem fit.**
 - **That the costs of this application be awarded to the Intended Interested Party in any event.**
3. The first prayer seeking for the Application to be certified as urgent and heard ex parte in the first instance, was dealt with on the 7th day of June 2016, when the Application was heard under a certificate of urgency, and ordered to be served for inter parties hearing on 16th June 2016.
 4. At the hearing of the Application on 16th day of June 2016, the Applicant was represented by Mr. Fred Ojiambo, SC and the Respondents by Mr. Ahmednassir. The other parties in this matter did not respond to the Application, although the record shows that the only firm served with the Application is that of Ahmednassir, Abdikadir & Co. Advocates.
 5. The Applicant herein, one **MOHAMMED HASSAN** is seeking under prayer 2 to be allowed to join in this suit as an **“Interested party only for the purposes of prosecuting the Notice of Motion.”** His Counsel submitted that, the reason for the same is that, he is not a Director or Shareholder in the 2nd Plaintiff’s company, and therefore he is not a party to the plaint or main suit herein.
 6. He further submitted that, in the course of filing the suit, the Plaintiffs have made scandalous and disparaging remarks against the Applicant to the effect that he has facilitated and has been complicity in the fraud activities against the Plaintiffs. Thus, in view of the nature of the said allegation the Applicant should be enjoined. The Counsel made specific reference to the allegations under paragraph 53 of Supporting Affidavit of Yusuf Abdi Aden, paragraphs 57 of the Plaint and paragraph 52 of the 1st Plaintiff’s witness statement. He termed them as are serious with no shred of evidence to support them which is contrary to Order 3 of the Civil Procedure Rules 2010 that requires that all documents be annexed to the plaint.
 7. Mr. Ojiambo SC responded to the Replying Affidavit filed in opposition to the Application by submitting that, the Respondent cannot object to the Applicant being enjoined in the suit, after making serious allegations against him. That, the Plaintiffs are indeed the ones who have dragged the Applicant in the suit through the said allegations, and they cannot deny him a chance to be heard and say, he would rather come in as a witness.
 8. Mr. Ojiambo SC relied on **Article 50 of the Constitution** of Kenya; and submitted that the law is clear, that a party who demonstrates an interest in a matter should be allowed in. He also made reference to the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 LN 117/2013, for the definition of an Interested Party. He also referred the Court to a list of authorities filed by the Applicant and prayed that the Application be allowed, and the identified alleged offending paragraphs in the respective documents be struck out.
 9. However, Mr. Ahmednassir for the Respondents opposed the Application and submitted that, in relation to prayer 2, where the Applicant, seeks to be allowed to join in the suit **“only for purposes of prosecuting this motion only”** amounts to engaging in a “Surgical Exercise”. That, no party can get into a suit strike out paragraphs and “parachutes”.
 10. He further submitted that, the concept of a **“Necessary Party”** does not exist under the Civil Procedure Act or Civil Procedure Rules, and that it found in the above referred to Practice and Procedure Rules, otherwise known as the **“Mutunga Rules”**. That, Order 1 Rule 10 (2) of Civil Procedure Rules, allows a Party be enjoined in a suit as a necessary party. However, for a party to be so enjoined, his presence must be necessary in determining the matter. Hence, the Applicant has to show that he has a stake in the proceedings and his presence will help determine the issues at hand. The mere mention of the Interested party does not entitle him to be enjoined as a party to the proceedings. He must also have sought for a relief in the matter. That issue defamation cannot be entertained in this derivative suit.
 11. On the issue of striking out the alleged offending paragraphs, he submitted that, the veracity or truthfulness of the alleged scandalous libelous and disparaging paragraphs can only be established through viva voce evidence and that indeed the Applicant is listed by the Plaintiffs as its third witness, therefore, he will have an opportunity to be heard.
 12. Finally, the counsel submitted that the application is vexatious, hopeless and merely intended to delay the fair hearing of the matter and should be dismissed.

13. Mr. Ojiambo SC, in reply to the Respondent's submission told the Court that, the Respondent has not responded to the main substance of the Application. That, under Order 2 Rule 15 of the Civil Procedure Rules, allows a Party to come into the proceedings only for the purpose of striking out pleadings.
14. He argued that, the Applicant is indeed a necessary party, who has as a stake in the proceedings due to the fact that he is at the centre of serious allegations of theft of funds, thus needs to be protected as he is adversely affected. That, the Applicant's rights will not be served with his being treated as a witness as he is not a compellable witness. He relied on the case of ***Trusted Society of Human Rights Alliance vs. Mumo Matemo and 5 Others (2014) eKLR***
15. He submitted that, the argument that, the "interested party" is not a concept under the Civil Procedure Act and Civil Procedure Rules does not arise, as Article 159 of the Constitution of Kenya, deals with issues of technicality and therefore the application should be allowed as prayed.
16. In a nutshell, the submissions by the Parties and in particular the Respondent clearly invited the Court to find that, an Interested Party is one who has a direct interest or stake in the case, though he or she was not a party to the cause ab initio. That, is one, who will be affected by the decision of the Court when it is made either way and who person feels that his/or her interest will not be well articulated unless he himself or she herself appears in the proceedings, to champion his or her cause. Similarly an interested party has to demonstrate that it is necessary that he/she be enjoined in the suit, so that the Court may settle all the questions involved in the matter and not just to show he has a cursory interest in the subject matter of litigation.
17. I have considered the Application, the submissions by counsels and authorities cited. In my considered opinion the issues that arise for determination are:

(i) Whether the Applicant has certified the legal requirement for enjoining a party to proceedings.

(ii) Whether a party can be so enjoined for the purposes of prosecution of a Motion and be released forthwith.

(iii) Whether the Applicant has complied with all the provision of law alongside the rules and regulations, which guide the striking out of pleadings, in particular expunging specific paragraphs of sworn Affidavits, Complaint and a Petition.

18. The oral submission by the parties raised inter alia the following issues for determination:

- ***Whether, a party seeking to be enjoined into proceeding can rely on the provision of the Civil Procedure Act and/or Civil Procedure Rules. In a nutshell whether the concept of "Interested party" exists in the Civil Proceedings.***
- ***Whether, Order 1 Rule 10 (2) Civil Procedure Rules deals with an "Interested Party or a Necessary Party" and by extension whether an Interested Party and Necessary Party are one or two distinct legal persons.***

19. I shall first deal with the issue of enjoining a party into proceedings. This is informed by an understanding that, a Party cannot have the locus standi to address the Court unless and until they are properly on record or a Party to the suit. In that regard I wish to first of all examine the Law relating to Parties being enjoined in a Suit.

20. Order 1 Rule 10(1) of the Civil Procedure Rules, provides for the substitution and addition of Parties to a suit, where the suit has been instituted in the names of the wrong persons as plaintiff or where it is doubtful whether the suit has been instituted in the name of the right plaintiff. Order 1 Rule 15 of the Civil Procedure Rules deals with enjoining of a Third Party by the Defendant.

21. I shall now deal with the issue of an Interested Party. The Civil Procedure Act is silent on the concept of "interested party". However, under Order 41 Rule 5 of the Civil Procedure Rules 2010, make a reference to the term "interested party" and states;

"The court either on its own motion or on application by any interested party, remove a receiver appointed pursuant to this order on such terms as it thinks fit"

22. The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, defines an interested party as;

“A person or an entity that has an identifiable stake or legal interest or duty in the proceedings and may not be directly involved in the litigation”

Legal Notice No 117 of 2013 further provides 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.

23. Whereas, the Black's Law Dictionary 9th Edition, page 1232 defines an interested party as;

"A party who has a recognizable stake (and therefore standing) in the matter"

24. The Black's Law Dictionary, 9th Edition defines a "Necessary Party" as being

“A party who being closely connected to a lawsuit should be included in the case if feasible but whose absence will not require dismissal of proceedings”

25. The term **“Necessary Party”** is also mentioned under Order 32 Rule 13(1) whereby a minor upon attaining the age of Majority may repudiate a suit if so desired. The court in such instance may dismiss him from the suit if it finds that he is not a necessary party. Likewise, under Order 32 Rule 4, the court may direct that a minor upon attaining the age of Majority, be made a defendant in a suit, if he is a necessary party

26. In consideration of all the aforesaid, and in view of the fact that the Applicant is alleging that his Fundamental Rights under Article 35 (2) and 33 (3) have been infringed, and then the provisions of Article 22(1) of the constitution come in play. They state:

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been infringed, denied, violated or is threatened"

I find that a person seeking to be enjoined in a suit as an interested party may be allowed under Articles 48 and 50 (1) of the Constitution of Kenya, 2010

27. Article 50 (1) of the Constitution of Kenya, states that:

"Every person has the right to have any dispute that can be resolved by the application of the law decided by the application of law decided in a fair public hearing before a court or if appropriate, another independent and impartial tribunal or body"

28. Article 48 thereof, states that;

“The state shall ensure access to justice for all persons, and if any fee is required, it shall be reasonable and shall not impede access to justice”.

29. In conclusion, I find that it is in the interest of Justice to allow Prayer 2 of the Notice of Motion dated 7th June 2016. As to whether the Applicant will leave the proceedings after the Application is concluded will await the final decision on the other prayers in the Application

30. It is so ordered.

31.

DATED AND DELIVERED AT NAIROBI ON 12TH JULY 2016.

G.L.NZIOKA

JUDGE

In the presence of:

Fred Ojiambo SC-----for the Applicant

Ahmednassir-----for the Respondent

Teresia-----Court Clerk