



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 1480 of 2005

MANAZ HABIB GHULAM FATHIEL PLALINTIFF

VERSUS

ARSHAD UL-HAQ NIAZ DEFENDANT

RULING

Before the court is a Notice of Motion dated 25th June, 2009 brought under Sections 3A & 63 (e) of the Civil Procedure Act, Order 1, Rules 10(2) & 11, Order 50 Rules 1 & 3 of the Civil Procedure Rules. The same is supported by the affidavit of **Mohamed Abdullahi Abdi** and on the grounds on the face of the application.

The application is seeking for the said **Mohamed Abdullahi Abdi** to be enjoined as an interested party in this suit.

The Plaintiff objected to the said application by filing a lengthy affidavit dated 10th July, 2009.

I have considered the submissions by learned counsel. For the courts consideration is whether or not to allow the interested party to be enjoined to this suit.

The Applicant/Interested Party contends that it is in the interest of justice for him to be enjoined as a party to the suit in order for him to safeguard his interest. That he has been occupying the suit premises since 2006. That he has invested heavily and had he been aware of this suit earlier, he would have applied to be enjoined as a party. He states that if enjoined he will apply to set aside the Judgment, as he has a pending suit **No.264 of 2008** in which he has orders of injunction pending hearing of the suit against **Al Haq Holdings Limited** where the Defendant is a Director. He also has another case between him and **Al Haq Holdings Limited** which suit is pending at the Business Premises Tribunal.

The Plaintiff in objecting to the application contends that there is no relationship between him and the applicant/interested party, nor the Defendant in the suits alluded to by the applicant. The Plaintiff urges the court not to deny him the fruits of the Judgment in his favour.

It is noteworthy that the Defendant in this matter did not appear in court, nor file any response. It is not clear to me whether he was served with the current application or not. Neither the plaintiff, nor the applicant/interested party raised the issue.

It is a fact that this matter as between the Plaintiff and the Defendant has already been heard and

determined. A decree was issued and the same acted upon. The Plaintiff deponed in paragraph 4 & 6 of his Replying Affidavit that he took possession of the suit premises on the 17th of June, 2007, I take note that the cases alluded to by the applicant are against **Al Haq Holdings Limited**. The said entity is not a party to this suit.

Order 10(2) 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 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, he added.”

(Emphasize mine)

The said rule refers to proceedings, and the question I must ask is whether there are proceedings, where the Applicant/Interested party is capable for being enjoined. I am of the considered view that the court adjudicated and finally determined the issues placed before it by the parties to this suit, that is the plaintiff and the defendant. I am also of the view that the phrase ‘**At any stage of the proceedings**’ means that the court can only exercise its discretion when the proceedings are alive and pending and once the adjudication of matters in dispute has taken place this provision of the Law cannot be applied.

Secondly even if the suit were alive and pending I am of the considered opinion that a person cannot be added merely because he would be incidentally affected by the Judgment. The court cannot just join the party as a matter of course but on condition that the presence of the person sought to be added is necessary in order to enable the court effectually and completely adjudicate upon all questions involved in the suit.

The said Rule lists those who can cause to enjoin a party; the said parties are the Plaintiff, the Defendant and the Court on its own motion. In **BUSIENEI vs. TRANSNATIONAL BANK LTD** (2002) I KLR at 784 in dismissing an application seeking to enjoin a party Tunya J. held –

“By a close scrutiny of the Applicant’s reasons for being enjoined, the provisions of O.1 Rule 10 of the Civil Procedure Rules and the cause of action for the Plaintiff’s suit and prayers therein, and also the cause of action and prayers in the Applicant’s draft plaint, there could be doubt that the Applicant was not a necessary party as envisaged in the Rules and that he had not sought to come by application of any party therein or on the court’s motion.”

It is notable that neither of the parties in this suit applied to enjoin the Applicant, nor is the proposed enjoinder at the instance of the court.

For the reasons above stated, I hereby dismiss the application with costs to the Plaintiff.

Dated and delivered at Nairobi this 8th day of October, 2009.

ALI-ARONI

JUDGE