



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

**Civil Case 183 of 2005**

**TRITON PETROLEUM LTD. ....PLAINTIFF**

**VERSUS**

**CHARTER HOUSE BANK LTD.....DEFENDANT**

**RULING**

The current applicant in the first instance moved to this court vide an application presented to this court by way of notice of motion dated 28<sup>th</sup> day of February 2006 and filed on 01.03.2006. The major relief was that the applicant be joined to the proceedings as a defendant in the suit.

That application was argued exparte as the same had not been opposed by the parties already on board. This court delivered a ruling on 21.09.2007. The reason advanced by the intended party for seeking to be enjoined to the proceedings are set out in the said ruling running from page 4 line 4 from the bottom to page 5 line 6 from the bottom. In summary it was contended that the applicant who was the intended party to the proceedings was in fact the beneficiary of the subject matter of the proceedings.

At page 10 of the said ruling line 10 from the bottom this court made the following observations:-

*“It is not disputed that the offended party is the beneficiary of the money held by the defendant which money the plaintiff is seeking. Neither party has moved to bring in the intended party despite both pleadings acknowledging that the intended party is the proper party to be brought in. In fact the plaintiff pleaded so, but has developed cold feet. The defendant has done the same. The conduct of these two parties looks mischievous and if left unchecked might result in miscarriage of justice being rendered to the intended party. The only way that mischief can be curbed is by opening the door for the applicant to come in. This is inevitable because if the matter herein is finalized and then the intended party attempts to resuscitate it, he will be caught up with the rule of indolence, larches, and Res judicata. It is right for them to take the action taken to forestall the aforesaid consequences.”*

At page 11 line 5 from the bottom, the court went on to state thus:- *“the net result of the foregoing is that the application has merit. The same is bound to succeed notwithstanding that the court could have moved on its own motion to add the said applicant. The application dated 28<sup>th</sup> February 2006 and filed on 1.03.2006 be and is hereby allowed in terms of prayer 1 thereof”.*

The court then went on to make the following orders and or directions:

*“(2) In terms of prayer 1, thereof, the plaintiff is given 45 days from the date of the reading of this ruling to file an amended plaint and serve the same onto the current defendant and the incoming*

*defendant who will be a second defendant.*

**(3)** *The first defendant, Charter House Bank Ltd. will have 14 days from the date of service upon them of the amended plaint to amend its defence accordingly if need be.*

**(4)** *The second defendant will have 14 days from the date of service upon them of the amended plaint to enter appearance and file defence.*

**(5)** *Thereafter parties to proceed according to law.*

**(6)** *There will be liberty to apply if need be.*

*Dated, Read and Delivered at Nairobi this 21<sup>st</sup> day of September 2007”.*

The said orders were neither appealed against nor sought to be reviewed and set aside. The applicant intended second defendant has come back to this court once again by way of notice of motion dated 13<sup>th</sup> March 2008 filed on 4<sup>th</sup> March 2008. It is brought under Order 6 Rule 13 (b) (c) and (d), 39 Rule 4 of the Civil Procedure Rules and Section 3 A and 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya. The prayers sought are three namely:-

- (a).** The plaintiffs’ application dated 17<sup>th</sup> February 2005 and the suit herein be struck out and dismissed.
- (b).** In the alternative the order of temporary injunction issued herein on 18<sup>th</sup> February 2005 against the defendant be set aside and or vacated.
- (c).** That the costs of the application and the suit be borne by the plaintiff.

The grounds in support are found in the body of the application, supporting affidavit, annexures and oral representations in court. The major ones are as follows:-

- (1)** The plaint herein was filed on 8.02.2005.
- (2)** Interim application was filed and interim orders of injunction granted.
- (3)** Since then the beneficiary of the injunction orders who is the plaintiff has not taken any steps in the matter.
- (4)** The parties on board though realizing the importance of the second defendants participation in the proceedings neither of them found it fit to join him to the proceedings.
- (5)** The applicant feeling aggrieved applied to this court for an order to enjoin him to the proceedings which orders were granted by this court on 21.09.2007 and since then the plaintiff has not moved to amend the plaint to include the applicant as a defendant.
- (6)** They content that the plaintiff has not moved to bring on board the applicant to prevent payment of the subject matter of the proceedings to the 2<sup>nd</sup> defendant.
- (7)** They maintain that by reason of what has been demonstrated herein, there is sufficient proof to show that the plaintiff misled the court, into granting the temporary orders granted herein. To them this is not what an injunctive order is meant to serve in any proceedings in a court, of law. As such the conduct of the plaintiff herein is nothing but an abuse of the due process of the court.
- (8)** This court, has power to prevent the process of the court from being used in an abusive manner.

The plaintiff respondent in response to that application put in a notice to the effect that they would

oppose the applicant's application on the basis of points of law which were not disclosed in the notice. In his oral submissions in court, counsel raised the following points in opposition to that application as follows:-

- (1) The plaintiff has no cause of action against 2<sup>nd</sup> defendant and so there is no way the plaint can be amended to include the 2<sup>nd</sup> defendant.
- (2) The applicant has no locus standi as it has not been joined to the proceedings.
- (3) It is necessary for the second defendant to file a counter claim in court, reveal their own cause of action against the parties on board and then on the basis of that lodge an application in the manner sought.
- (4) This court has no authority to compel a party sue another if it feels it has no cause of action against that other party.
- (5) They maintain their plaint cannot be struck out because it discloses a cause of action.
- (6) That the defendant is under statutory management and as such no order can be issued against it.
- (7) Case law cited by the applicants is distinguishable as there was nexus between the plaintiff and the defendant in the cited cases, whereas herein no such nexus has been shown to exist.

In response to the respondent's submissions, counsel for the applicant stressed the following points in addition to the earlier submissions, that this court, should involve its inherent jurisdiction to prevent the process of the court, from being abused.

On the courts assessment herein it is clear that:-

- (1) The parties on board herein are Triton Petroleum Limited as the plaintiff and Charter House Bank Limited as the defendant.
- (2) There is no dispute that despite the now 2<sup>nd</sup> defendant being mentioned in the plaint as the entity that was scheduled to benefit from the said award of tender, the plaintiff did not find it necessary to join them to the proceeding then and has not found it fit to joint hem upto this point in time.
- (3) The defendant too has mentioned the 2<sup>nd</sup> defendant in its defence and has not found it fit to bring it into these proceedings as a co-defendant.
- (4) It is on record that the above aforementioned scenario is what prompted the current applicant to move to court, to seek leave of court, to be enjoined to these proceedings. It is not disputed that sufficient ground was demonstrated to the court, leading to the issuance of the orders issued on 21.09.2007 to the effect that the plaintiff do amend the plaint to include the applicant as the second defendant.
- (5) It is not disputed that as at now the said plaint has not been amended. As mentioned earlier on in this ruling, the amendment has not been effected. This is what has prompted the applicant to come to this court, once again this time in a move to bring the entire proceedings to an end.

The respondent has raised the issue of locus standi, on the part of the applicant to seek the reliefs sought, which go to the root of the application which has to be determined first before the merits of the application can be gone into. This has arisen as a result of the fact that the pleadings have not been amended by either party on board to bring in the applicant. The said applicant has not put in a pleading of its own which is on record. This would mean that its application has perched itself on to the defence on record, unprocedurally. Alternatively if it has not perched itself on to the defence on record unprocedurally, it is hanging as it has no base on which to be anchored. This court, has judicial notice of the fact that save in miscellaneous applications in any other case, an interim or interlocutory application

has to be anchored on a pleading which must be already existing in the proceedings filed by the party seeking to benefit from the interim application. In the absence of that, the presenter of the application stands non suited.

Applying the above reasoning to the facts herein, it is clear that in the absence of any substantive pleading, presented to court, by the applicant, the interlocutory application has no base on which to be anchored and as such the same is incompetent. Once ruled incompetent there is no need to go into its merits.

The ruling that the application is incompetent by reason given does not leave the applicant remediless. It is now apparent that the mischief on the part of the parties already on record that this court mentioned in its ruling of 21.09.2007 has manifested itself in the conduct of the plaintiff failing to comply with the court order. No move was made by them to appeal against that decision or seek its review on account of mistake. Their allegation that they have no cause of action against the incoming defendant holds no water as it is a statement from the bar. The plaintiff should have put in a replying affidavit to demonstrate how they have no cause of action against the incoming defendant.

This court, having granted an order to the applicant, it cannot perch itself on the judicial fence and then fold its arms akimbo and mourn. As submitted by the applicant, it has its inherent powers as a tool to prevent it from being abused and also to ensure that orders issued by it are obeyed in obedience and not in breach.

Since in the reliefs, currently presented to court, there is no prayer by the applicant seeking vindication of the orders of 21.09.2007 or seeking the courts intervention to enforce obedience to the same, there is nothing that this court, can do for the applicant save to provide directions on the way forward.

The way forward herein is that as long as the orders of 21.09.2007 stand, the 2<sup>nd</sup> defendant is already a party to these proceedings. What he lacks as a basis to present his own pleadings is an amendment of the pleadings on record to put them formerly on record. No doubt the applicant is handicapped. No doubt the court, saw mischief on the part of the parties on board for their failure to bring on board the second defendant. Now that the mischief has manifested before the court, there is no way this court, is going to make its orders of 21.09.2007 effective and prevent them from being rendered nugatory without providing directions that the applicant has to apply for a variation of the said order to provide for an alternative route whereby the court, can be invited to amend the said pleadings by adding the name of the 2<sup>nd</sup> defendant on its own. Upon such amendment being effected is when the applicant can have locus to present its own defence and counter claim on the basis of which it can anchor the current application.

- (1) For the reason given, the applicants application dated 13.03.2008 and filed the same date is struck out for being incompetent.
- (2) The applicant is at liberty to follow directions given herein above and upon compliance with the same is when he can present a similar application.
- (3) Though the Plaintiff respondent has participated in the proceedings and it is on the basis of its point of law among other reasons, that the applicant's application has been faulted, nonetheless it is denied an order for costs, from the applicant, because it is in breach of this court's orders of 21.09.08 which still stand to date. Each party will therefore bear own costs of this application.

**DATED, READ AND DELIVERED AT NAIROBI THIS 3<sup>rd</sup> DAY OF OCTOBER 2008**

**R. N. NAMBUYE**

**JUDGE**