



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1719 OF 1996

BI-MACH ENGINEERING COMPANY LIMITED.....PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LIMITED.....DEFENDANT

AND

SAMUEL MWANGI MACHARIA.....INTERESTED PARTY/APPLICANT

RULING

On 18th October, 2010, Samuel Mwangi Macharia, the applicant herein filed an application seeking to be joined in this suit as an interested party. The application was brought on several grounds. The application was opposed by the plaintiff and the same was heard and dismissed by Muchelule J. in a ruling that was delivered on 31st May, 2011. In the ruling Muchelule J. stated as follows:

“On the evidence, I find the Applicant was aware of the suit all along. The suit has been on since 1996 and is almost concluded. He cannot be allowed now to, as it were, stall it. There is no evidence that the authority of the Board of Directors or that of the shareholders in a General Meeting was not obtained in instituting the suit. I find that his interest and those of the company will be well taken care of in the suit as it is.”

After the applicant’s application was dismissed as aforesaid, he filed a separate suit namely, ELC No. 702 of 2011 against the plaintiff, the defendant herein, and one, James Mbera Macharia in respect of the same subject matter. The applicant thereafter filed an application for stay of this suit pending the hearing and determination of ELC No. 702 of 2011. The application for stay of this suit was heard and dismissed by Nyamweya J. on 12th September, 2013. Instead of staying this suit, Nyamweya J. stayed ELC No. 702 of 2011 pending the hearing and determination of this suit or further orders by the court.

What is now before me is the applicant’s application brought by way of Notice of Motion dated 9th December, 2015 seeking review and setting aside of the orders that were made by Muchelule J. on 31st May, 2011 dismissing his application to be joined in this suit as interested party, and for leave to be joined in the suit as interested party. The application was brought on the grounds that new developments have taken place in this case since the earlier application for joinder was dismissed on 31st May, 2011. The applicant has contended that his earlier application was dismissed on the ground that this suit which was part-heard had progressed to near conclusion and that an order has since been made for the hearing of the case to start *de novo*. The applicant has also contended that the suit that he had filed namely ELC No. 702 of 2011 was stayed pending the hearing of this suit. The applicant has averred that in the ruling staying the suit, the judge had indicated that the issue of the ownership of the suit property could be determined during the hearing of this suit or thereafter and that the ideal situation would have been to consolidate this suit with ELC No. 702 of 2012 so that the two (2) suits are heard together. The applicant has averred that the court did not make an order for consolidation because this suit had been heard substantially.

The application was opposed by the plaintiff on several grounds, the main ground being that the application does not meet the threshold for review set out in section 80 of the Civil Procedure Act, Chapter 21 Laws of Kenya and Order 45 of the Civil Procedure Rules. The application was argued by way of written submission. The applicant filed his submissions on 24th August, 2017 while the plaintiff/respondent filed its submissions in reply on 26th September, 2017.

I have considered the application and the opposition that was mounted against it by the plaintiff. I have also considered the submissions of counsel and the authorities that were cited in support thereof. I am satisfied that the applicant has met the conditions for review. I am in agreement with the applicant that the order that was made on 31st May, 2011 dismissing his application to be joined to the suit was influenced more by the fact that this suit was part heard and that his joinder to the suit at that stage would have stalled the proceedings which had progressed very much. The situation has now changed. Following the order that was made on 6th October, 2015, the hearing of this suit shall now start afresh. I see no prejudice that would be occasioned to the plaintiff if the applicant is joined in the suit. The applicant has a claim against the plaintiff, the defendant and one, James Mbera Macharia. The applicant has filed a suit against them which suit has been

stayed pending the hearing of this suit. I am of the view that if the applicant is given a hearing in this suit, it may not be necessary to hear ELC No. 702 of 2011. Time and costs would be saved for the parties and the court. I am satisfied that the applicant has given sufficient reasons to warrant the review of the orders that were made herein on 31st May, 2011. I am however of the view that the applicant should be joined in the suit not as an interested party but as a defendant so that he may be heard substantially on whatever claim he may have against the parties herein. He would also be in a position to file a counter-claim if he wishes to do so, so that all the issues in dispute between the parties are heard and finally determined.

I have considered whether I should consolidate this suit with ELC No. 702 of 2011 instead of adding the applicant as a defendant to the suit but I have decided against it. I am of the view that consolidation would make the proceedings herein unnecessarily convoluted. That suit shall remain stayed pending the hearing and determination of this suit.

In conclusion, I find merit in the Notice of Motion dated 9th December, 2015. The application is allowed on the following terms:

1. The orders made herein on 31st May, 2011 are reviewed and set aside;
2. The applicant, Samuel Mwangi Macharia is joined in this suit as the 2nd defendant;
3. The plaintiff shall amend the plaint further within 14 days from the date hereof to effect the joinder of the applicant to the suit;
4. The applicant shall file his defence, bundle of documents and witness statements within 14 days from the date of service of the amended plaint;
5. The costs of the application shall be in the cause.

Dated and delivered at Nairobi this 28th day of June 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Wambui for the Plaintiff

Mr. Kimani for the Defendant

No appearance for the Applicant

Catherine Court Assistant