



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC SUIT NO. 840 OF 2016

UNITED STATES INTERNATIONAL UNIVERSITY..... PLAINTIFF

VERSUS

MAESTRO CONNECTIONS HEALTH SYSTEMS LTD.....1ST DEFENDANT

H. E. DANIEL TOROITICH ARAP MOI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....5TH DEFENDANT

NDUNG’U NJOROGE & KWACH ADVOCATES.....6TH DEFENDANT

PAUL NDIRITU NDUNG’U.....7TH DEFENDANT

RULING

On 18th January, 2017, the Plaintiff made an oral application for leave to further amend its Amended Plaintiff dated 29th July, 2016. The application was not opposed by any of the parties to these proceedings. Pursuant to that leave, the Plaintiff filed a Further Amended Plaintiff dated 30th January, 2017. In its Further Amended Plaintiff, the Plaintiff added ICEA Lion Life Assurance Company Ltd., Ndungu Njoroge & Kwach Advocates and Paul Nderitu Ndungu to the suit as 5th, 6th and 7th Defendants respectively. Upon being served with Summons to Enter Appearance, the 6th and 7th Defendants filed an application by way of Notice of Motion dated 14th February, 2017 seeking an order that the suit as against them be struck out with costs. The 6th and 7th Defendants application was opposed by the 1st and 2nd Defendants.

On 26th April, 2017 the 6th and 7th Defendants and the Plaintiff filed in court a consent dated 25th April, 2017 which provided in material part as follows:-

“By Consent:-

1. Ndungu, Njoroge & Kwach Advocates, the 6th Defendant, and Paul Nderitu Ndungu, the 7th Defendant are hereby removed respectively as Defendants from Further Amended Plaintiff.

2. Paul Nderitu Ndungu will give evidence as a witness for the Plaintiff, United States International University, on the lines of the hereto annexed Witness Statement.

3. There is no order as to costs pertaining to this Notice of Motion and these consent orders.

For the avoidance of doubt, these consent orders shall not be a bar to proceedings or causes of action United States University might have against the 6th and 7th Defendants.

DATED AT NAIROBI this 25th day of April, 2017.

NDUNGU, NJOROGE & KWACH ADVOCATES

FOR THE 6TH AND 7TH DEFENDANTS.

NYACHAE & ASHITIVA

ADVOCATES FOR THE PLAINTIFF”

When the 6th and 7th Defendants’ Notice of Motion application dated 14th February, 2017 came up for hearing on 26th April, 2017, the advocates for the 6th and 7th Defendants and the advocates for the Plaintiff asked the court to adopt the consent mentioned above as an order of the court. This request was opposed strenuously by the 1st and 2nd Defendants. The 1st Defendant argued that after the 6th and 7th Defendants were joined to the suit, the 1st Defendant filed pleadings which touched on the 6th and 7th Defendants and as such if the said parties are struck out of the suit which is what is intended to be achieved by the consent between the 6th and 7th Defendants and the Plaintiff, the 1st Defendant would be put into trouble of amending the said pleadings. The 1st Defendant argued further that, whereas it is the prerogative of a Plaintiff to decide who to join in a suit, once a party is joined to a suit, its dis-joinder or removal from the suit is at the discretion of the court. The 1st Defendant submitted that looking at the pleadings on record as a whole, it would be seen that the 6th and 7th Defendants are necessary parties to these proceedings and that their presence in the suit would enable the court to effectually and completely determine all the issues arising in this suit.

On his part, the 2nd Defendant argued that the Plaintiff having sought and obtained leave of the court to join the 6th and 7th Defendants to the suit, it was not open to it to unilaterally purport to withdraw the suit as against the said Defendants. The 2nd Defendant argued that once the Plaintiff amended the plaint and added the 6th and 7th Defendants to the suit, the other Defendants acted by aligning some of their pleadings to the Further Amended Plaint. The 2nd Defendant averred that following the said amendment, the 2nd Defendant filed a counterclaim in which he mentioned and made allegations against the 6th and 7th Defendants. The 2nd Defendant cited the case of Central Kenya Ltd. Vs. Trust Bank Ltd (2002) 2 E. A 365 (CAK) and submitted that once a person has been adversely mentioned in a suit, it is necessary for that person to be made a party to the suit otherwise it would be impossible for the court to determine the veracity of the allegations against him. The 2nd Defendant argued that if the court proceeds and make a determination adverse to such a person without him being made a party, the court would be accused of condemning the person unheard. The 2nd Defendant urged the court not to adopt the consent between the 6th and 7th Defendants and the Plaintiff. The 2nd Defendant also asked the court for time to consider whether to seek the joinder of the 6th and 7th Defendants to the suit before the consent between the 6th and 7th Defendants and the Plaintiff is adopted. The 3rd, 4th and 5th Defendants did not oppose the application.

In response to the submissions by the 1st and 2nd Defendants, the Plaintiff argued that the fact that a person is named in a defence does not make him a necessary party to a suit since a defence is not a foundation of a suit. The Plaintiff submitted that if the 1st and 2nd Defendants wished to have the 6th and

7th Defendants joined in the suit, they were at liberty to seek such joinder. The Plaintiff submitted that it had made a well considered decision to remove the 6th and 7th Defendants from the suit so that the 7th Defendant can be its witness. The Plaintiff submitted that the 1st and 2nd Defendants had no business dictating to the Plaintiff how to conduct its case.

On their part, the 6th and 7th Defendants submitted that the 1st Defendant was not sincere in its opposition to the removal of the 6th and 7th Defendants from the suit. The 6th and 7th Defendants submitted that the 1st Defendant had itself joined the 6th and 7th Defendants in its suit namely, ELC No. 721 of 2016 which is consolidated with this suit and had agreed to their removal from that suit by consent after the 6th and 7th Defendant filed an application to be struck out from the suit like in the present case. The 6th and 7th Defendants argued that the 1st Defendant is bound by the said earlier consent and has no basis for opposing a similar consent between the 6th and 7th Defendants and the Plaintiff herein. The 6th and 7th Defendants argued that the 2nd Defendant has not raised any claim against the 6th and 7th Defendants in their defence and counter-claim in these proceedings which could form a basis for their insistence that the 6th and 7th Defendants are necessary parties to the suit. The 6th and 7th Defendants submitted that the 2nd Defendant was at liberty to make a formal application for the joinder of the 6th and 7th Defendants if they wished to have them as parties to the suit. The 6th and 7th Defendants submitted that the 1st and 2nd Defendants had no valid grounds for opposing the consent which the 6th and 7th Defendants and the Plaintiff wished to record. The 6th and 7th Defendants submitted that it is not necessary for the 6th and 7th Defendants to be joined as parties to the suit and that perusal of the pleadings as a whole would reveal that the 6th and 7th Defendants can do well as witnesses rather than parties to the suit. The 6th and 7th Defendants submitted that it was not the intention of order 1 Rule 10 of the Civil Procedure Rules that witnesses be joined in the suit as parties. The 6th and 7th Defendants argued that what is in dispute between the parties is the ownership of parcel of land and that it has not been suggested in any of the pleadings on record that the 6th and 7th Defendants have an interest in the said parcel of land to justify their joinder in the suit. The 6th and 7th Defendants dismissed the case of Central Kenya Ltd. Vs. Trust Bank Ltd (supra) that was cited by the 2nd defendant as irrelevant. The 6th and 7th Defendants urged the court to adopt the consent in question as an order of the court.

I have considered the submissions by the parties and the authorities which were cited in support thereof. The only issue that this court has been called upon to determine is whether the court should approve and adopt as an order of the court the consent dated 25th April, 2017 between the Plaintiff and the 6th and 7th Defendants. There is no dispute that this court has power to enter judgment or make orders by consent or agreement of the parties. A consent or agreement by the parties reduced into writing, signed by the parties and filed in court is not binding upon the parties until it is approved by the court and made an order or judgment of the court.

A consent order or judgment is an agreement of the parties with respect to the issues in dispute in the case between them that has been approved by the court and made an order or judgment of the court. It is trite law that the court does not approve or make agreements by the parties orders of the court as a matter of course. The court has discretion in the matter. Like any other discretion exercised by the court, the same must be exercised judiciously. A consent being an agreement, the court has to ensure that the contractual elements are present and that the same is fair, lawful, reasonable and binding before it can be adopted as an order of the court. I have subjected the consent between the Plaintiff and the 6th and 7th Defendants to the tests I have set out above. The consent by the Plaintiff and the 6th and 7th Defendants has four limbs. The first limb which is the one objected to by the 1st and 2nd Defendants seeks essentially to withdraw the Plaintiff's suit as against the 6th and 7th Defendants. Under order 25 rules 1 and 2 of the Civil Procedure Rules, the Plaintiff has a right to discontinue or withdraw its suit as against all or any of the Defendants. The first limb of the consent is in the circumstances lawful. As to whether it is reasonable and fair in the circumstances of this case, I am not persuaded by the submissions by the 1st and 2nd Defendants that they would suffer any prejudice, irreparable harm, or injustice if the Plaintiff withdraws its suit as against the 6th and 7th Defendants. This court cannot force the Plaintiff to continue with the claim they had brought

against the 6th and 7th Defendants if they have been advised by their advocates whose advice they have accepted that the claim has no basis and that the 6th and 7th Defendants would be more useful as witnesses. I am in agreement with the submissions by the Plaintiff and the 6th and 7th Defendants that nothing stops the 1st and 2nd Defendants from seeking leave to join the 6th and 7th Defendants to the suit in case they feel that the 6th and 7th Defendants are necessary parties. The advocates for the 1st and 2nd Defendants argued at length to persuade the court that the 6th and 7th Defendants are necessary parties to these proceedings and that their presence before the court would assist the court to effectually and completely adjudicate upon and settle all questions involved in this suit. Order 1 rule 10(2) and the case of Central Kenya Ltd. vs. Trust Bank Ltd. (supra) were cited in support of the said submissions. I wish to state that I am not considering an application under order 1 rule 10 of the Civil Procedure Rules. The little I say on it the better as I do not wish to prejudice any application that may be brought under that order which I will consider on its own merit. The much I would wish to say is that if I allow the Plaintiff to withdraw its claim against the 6th and 7th Defendants, I would in no way be saying that this court on its own motion or on an application by a party cannot order that the 6th and 7th Defendants be added once again to the suit. In allowing the withdrawal of the suit as against the 6th and 7th Defendants, the court would only be respecting the Plaintiff's right under Order 1 rule 3 and Order 25 rules 1 and 2 of the Civil Procedure Rules aforesaid. It should be noted that this court had already made an order in ELC No. 771 of 2016 on 13th December 2016 allowing the 1st Defendant to withdraw its claim as against the 6th and 7th Defendants herein. There was a consent between the 1st Defendant and the 6th and 7th Defendants herein on the issue. When I made the order, some of the arguments which were put forward in opposition to the present consent were raised and considered by the court before the order was made. This court is not bound by its own decisions. No good grounds have however been put forward to persuade me to depart from the said order of 13th December, 2016. I have said enough to show that the first limb of the consent between the Plaintiff and the 6th and 7th Defendants is lawful and proper.

The disposal of the objections to the first limb of consent takes me to the 2nd limb which provides that the 7th Defendant, Paul Nderitu Ndungu will give evidence "*as a witness for the Plaintiff, United States International University, on the lines of the hereto annexed Witness Statement.*" Although no objection was raised by any of the parties to this limb of the consent, this court has a problem with the same. Our judicial system is adversarial in nature. The parties are supposed to present their respective claims, defences and the evidence in proof thereof. Save for its power to summon witnesses, the court cannot and has no business making an order that a particular person shall give evidence as a witness of a particular party to the proceedings pending before it or directing on the nature of the evidence that such a person should give. If the court was to do that, the court would be descending to the arena of the dispute which is not proper. It follows that, the second limb of the consent between the Plaintiff and the 6th and 7th Defendants cannot be made an order of this court. Let it remain an agreement between them but for which they cannot get court sanction. I have not found anything wrong or untoward with regard to the third and fourth limbs of the consent which deals with the issue of costs and the rights of the Plaintiff to bring fresh proceedings against the 6th and 7th Defendants.

In view of the foregoing analysis, this court hereby adopts the consent dated 25th April, 2017 save for the second limb thereof as an order of the court. The costs of the objection to the consent shall be in the cause.

Delivered and Signed at Nairobi this 2nd day of June, 2017

S. OKONG'O

JUDGE

In the presence of

Mr. Sifuma for the Plaintiff

Mr. Okatch & Mr. Ouma for the 1st Defendant

Ms. Nyasah for the 2nd Defendant

Mr. Kamau for the 3rd and 4th Defendants

Mr. Frazer SC for the 5th Defendant

Ms. Thuku for the 6th and 7th Defendants

Ms. Nyokabi Court Assistant