



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**ELC SUIT NO 474 OF 2010**

**SAMUEL MUSAI & 33 OTHER ..... PLAINTIFF**

**VERSUS**

**ANDREW MAKAU & 10 OTHERS..... DEFENDANT**

**RULING**

There are two applications for the consideration of this court.

The 1<sup>st</sup> application is the Chamber Summons dated 12<sup>th</sup> March 2013 brought under Order 1 Rule 10, 14 and 25 and Order 8 Rule 3 of the Civil Procedure Rules. They applicants have also invoked Section 3A of the Civil Procedure Act. They are seeking for orders that the following persons be added to this suit as the 35<sup>th</sup> to 48<sup>th</sup> Plaintiffs.

1. *Major Richard Mweemba*
2. *Major Wellington Alubiri*
3. *Fredrick Agesa*
4. *Ernest Wasike*
5. *Sammy Odiara*
6. *Joshua Kioko*
7. *Elizabeth Adembesa*
8. *Beatrice Asienwa*
9. *Phoebe Amiani*
10. *Monica Sakha*
11. *Eliud Murunga*
12. *Isaiah Ngochi*
13. *Nelson Njiru*
14. *Erastus Atetwe*

2. That the plaintiffs /applicants be granted leave to amend the re- amended plaint.
3. Costs in the cause.

The application is premised on the grounds stated on the face of the application and the supporting Affidavit of John Lusimba the 27<sup>th</sup> Plaintiff. He deposed that the subject matter of this suit is the construction of stalls and offices on the parcel of land on which the Salvation Army Nairobi Central Corps Church stands whereby the plaintiffs are challenging the legality of the said construction. They

therefore seek leave to be joined as parties in this suit. He added that the plaintiffs have no objection whatsoever to the addition of the said names since they are members of the Salvation Army Nairobi Corps Council Committee and have a great interest in the subject matter of this suit. He added that the nature of this suit is necessary for this court to effectively adjudicate upon and settle all questions involved in this suit. There is also an affidavit of Major Richard Mweemba deposed on 12<sup>th</sup> March 2013 reiterating the supporting affidavit of John Lusimba.

This application is opposed. The 10<sup>th</sup> Defendant also filed his grounds of objection on 9<sup>th</sup> July 2013 stating that the application as drawn is supported by persons who are not parties to the suit and offend the provisions of Order 1 Rule 6 of the Civil Procedure Rules and that the applicant has no authority from the intended plaintiffs to swear the affidavit on their behalf.

The 11<sup>th</sup> defendant filed its grounds of objection on 24<sup>th</sup> June 2013 and stated that the application dated 12<sup>th</sup> March 2013 was an afterthought as the applicants have not laid any nexus of why they should not be joined in the suit and they have not shown that they have a cause of action against the defendants. He added that if it is true that there has been reconciliation between the parties then the application is superfluous and the applicants should have withdrawn the suit. The 11<sup>th</sup> defendant further stated that some of the applicants had no claim against the defendants therefore the applicants are being frivolous and vexatious.

The parties filed written submissions as regards the joining of the plaintiffs to this suit. The applicant stated that they filed a consent in court on 23<sup>rd</sup> April 2013 to have the 1-8 defendants removed from the this suit and now they want the proposed plaintiffs joined to this suit. They state that they are the new leaders and officials of the salvation Army Church Nairobi Central which church owns the property in dispute. This suit had been brought against former officials of the church who were colluding with the 11<sup>th</sup> defendant to disentitle the members of the church their property. The plaintiffs added that the reconciliation process that Mbogoli J and Ougo J had intimated to them had been done between the plaintiffs and the 1<sup>st</sup> to 9<sup>th</sup> defendants and that the 10<sup>th</sup> and 11<sup>th</sup> defendant have been adamant in the reconciliation process and that was why the suit against them was still in court. That was why the plaintiffs withdrew the claim against the 1<sup>st</sup> to 8<sup>th</sup> defendants in this suit.

The 11<sup>th</sup> defendant filed its submissions on 7<sup>th</sup> October 2013. It stated that the application to join the proposed plaintiffs was unprocedural as the application would have been instituted by the proposed parties. It also stated that there is no evidence that there was change of the church leadership. It also contended that the consent alluded to by the plaintiffs was not served to it.

I have considered the pleadings; the authorities relied upon by the parties and the law. The issue that this court has been called upon to determine is whether the proposed plaintiffs should be joined in this suit. This is a discretionary order and the court must do so putting in mind the circumstances of this case. Order 1, rule 1 states that, "*All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise*". Further order 1 Rule 10 (2) provides for joinder of parties and sets the criteria for who can be joined. Order 1 Rule 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, be added*".

For the court to make a finding on the issue for determination on whether to join the plaintiff it looks at the pleadings and the issues arise only out of the pleadings of the parties and other evidential material as may be presented. In the present case the plaintiff alleges that the proposed plaintiffs are the new officials of the church who have replaced the old officials who had colluded with the 11<sup>th</sup> defendant. They have however not shown this court any evidence that they are indeed the new officials of the church and also

they have not shown the court how their presence before the court will be necessary in enabling the court to effectively and completely adjudicate upon and settle all questions involved in the suit as highlighted in Order 1 Rule 10 (2). Looking at the Amended plaint dated 8<sup>th</sup> October 2010 both the plaintiffs and the defendants are members of and worship in the same church which is the Salvation Army, Nairobi Central Corps. The dispute in this suit is on the construction of an illegal project meant to benefit some members of the church. The plaintiffs have not been included as officials of the church in this particular pleading. They have further not demonstrated to this court that they stand to be affected directly by any decision that the court makes in the suit before the court. Since some plaintiffs are still parties in this suit this court finds that the proposed plaintiffs have not demonstrated and/or established that they are a necessary party whose presence is necessarily to enable the court to make full adjudication of this suit. This court accordingly dismisses the application dated 12<sup>th</sup> March 2013 with costs to the 10<sup>th</sup> and 11<sup>th</sup> defendants.

The second application is the plaintiffs' Notice of Motion dated 5<sup>th</sup> July 2013 brought under Order 40 Rule 3 of the Civil Procedure Rules is seeking for orders that :

- a. *The Funan Construction Company Limited directors be committed to civil jail for a term of six (6) months for disobedience of this courts orders dated 21<sup>st</sup> March 2012.*
- b. *This court do appropriately punish Funan Construction Company Limited and its directors for disobeying the court's orders dated 21<sup>st</sup> March 2012.*
- c. *The contemnor do pay costs of this application.*

This application is premised on the grounds state on the face of the application and the supporting Affidavit of John Lusimba the 27<sup>th</sup> Plaintiff. He stated that he filed a suit seeking to stop construction which was being undertaken by the 11<sup>th</sup> defendant on LR No 209/1951 and on 26<sup>th</sup> January 2011 the court gave an order stopping the construction pending the hearing and determination of this suit. The 11<sup>th</sup> defendant continued to ignore the court order on the allegation that the same was granted before it became a party to this suit. Following the 11<sup>th</sup> defendants allegation that it was not a party to the suit the applicants made an application dated 16<sup>th</sup> November 2011 which they sought and obtained specific orders against the 11<sup>th</sup> defendant from continuing with the construction. Even with the court orders served upon the 11<sup>th</sup> defendant it has continued to construct which is a blatant breach of the of the orders of the court and since orders of court are not in vain the applicants are praying that the application be allowed with costs to the contemnor.

Parties filed their written submissions. The plaintiffs submitted that there were two court orders issued by the court for injunction. The 1<sup>st</sup> order being the one issued by Mbogoli J on 26<sup>th</sup> January 2011 against the 1<sup>st</sup> to 9<sup>th</sup> defendants and the second order was issued on 21<sup>st</sup> March 2012 against the 11<sup>th</sup> Defendant where it was stopped from constructing on the property until the hearing and determination of the suit. They relied on the case of **Mutilika Baharini Farm Ltd (1985) KLR 227** where it was held that "A person who knowing of an injunction or order of stay wilfully does something or causes others to do something to break the injunction or interfere with the stay is liable to be committed for contempt of court as such person has by his conduct obstructed justice" The plaintiffs also relied on the application filed by the 11<sup>th</sup> defendant on 9<sup>th</sup> August 2012 and particularly paragraph 5 of the affidavit sworn by Daniel Gacheru Ndiangui where it showed that the 11<sup>th</sup> defendant knew of the injunction as the application sought to discharge the injunction. This they say was enough to show that the 11<sup>th</sup> defendants disobeyed the court order and should be cited for contempt. They also denied that the court order injunctioning the 11<sup>th</sup> Defendant lapsed on 20<sup>th</sup> March 2013 since they were specific and argued that the law allows the court to give orders extending to conclusion of the suit which is the case with this suit.

The 11<sup>th</sup> defendant in his submissions stated that the 11<sup>th</sup> defendant was specifically restrained from proceeding with the construction of the premises which order it obeyed. It added that this order was conditional and when the conditions were not complied with it prompted the 11<sup>th</sup> defendant to file an

application seeking to discharge the order which the court reminded the plaintiff that the injunction orders would lapse on 20<sup>th</sup> March 2013 and since the order lapsed the 11<sup>th</sup> defendants resumed construction in the month of April 2013.

This court has considered the application and the written submissions and authorities relied on. The Black's Law Dictionary (Ninth Edition) defines contempt of court as, "**Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.**" In the case of **Teachers Service Commission V Kenya National Union of Teachers & 2 others [2013] eKLR** the court observed that, "*The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law.*" The reason why power is vested in the courts to punish for contempt of court is to safeguard the rule of law which is fundamental in the administration of justice. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise.

In the present suit the plaintiffs have complained that the 11<sup>th</sup> defendant has ignored the orders issued by this court and gone ahead with the construction to the detriment of the plaintiffs. The 11<sup>th</sup> defendant on the other hand has defended itself by stating that the ruling delivered by Ougo J on 14<sup>th</sup> December 2012 declined to grant the orders that the 11<sup>th</sup> defendant had sought but went ahead reminded the plaintiffs that the injunction order they had sought against the 11<sup>th</sup> defendant lapse on the 20<sup>th</sup> March 2013. It was after the lapse of the order granted that it resumed construction of the building. It should be noted that Order 40, rule 6 is very clear when it comes to the grant of injunctions and states that, "*Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise.*" It is therefore clear that the 11<sup>th</sup> defendant started construction of the building after the lapse of the injunction and were therefore not in contempt of any court order. The end result is that the application dated 5<sup>th</sup> July 2013 is hereby dismissed with costs to the 10<sup>th</sup> and 11<sup>th</sup> defendants.

It is so ordered.

Dated, signed and delivered this **18<sup>th</sup>** day of **July**, 2014

**L.GACHERU**

**JUDGE**

In the presence of

..... for the Plaintiffs

..... Defendants

Kamau : Court Clerk

**L.GACHERU**

**JUDGE**