



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, KARANJA & MARAGA, JJ.A.)

CIVIL APPLICATION NO.NAI. 291 OF 2011 (UR 192/2011)

BETWEEN

LAWRENCE NDUTU & 6000 OTHERS.....APPLICANTS

AND

KENYA BREWERIES LIMITED.....1ST RESPONDENT

JOHN HARRISON KINYANJUI T/A

J. HARRISON KINYANJUI & CO. ADVOCATES2ND RESPONDENT

(Being an application for injunction and stay of execution as against the Ruling and Orders of the High Court of Kenya (Ang'awa, J.) given on the 16th December 2011

in

H.C.C.C. NO. 279 OF 2003)

RULING OF THE COURT

The notice of motion dated 23rd December 2011 was filed by the law firm of ***O. P. Ngoge & Associates Advocates*** on behalf of about six thousand former employees of Kenya Breweries Limited, the first respondent herein whose contracts of employment were terminated pursuant to the 1st respondent's restructuring process.

The said applicants are the plaintiffs in ***Nairobi H.C.C.C No. 279 of 2000***. Due to their large number and the fact that there existed a community of interest in their suit, and also for purposes of expediency and practicability, the High court (Hon. Waweru J.) ordered that the matter proceeds as a representative suit under ***Order 1 Rule 8*** of the ***Civil Procedure Rules***. Pursuant to that order, four plaintiffs were appointed to prosecute the suit on behalf of all the others. As at that time, all the plaintiffs were represented by the firm of ***Ngoge & Associates Advocates***.

Notice to all the interested parties was issued pursuant to ***Order 1 Rule 8(2)*** of the ***Civil Procedure Rules***. It was in response to that notice, that some persons who had an interest in the matter sought to be joined as plaintiffs. Some of them appointed ***M/s J. H. Kinyanjui & Co. Advocates*** to represent them in the

representative suit. In doing so, we believe they were exercising their right to be represented by counsel of their own choice. Others filed notices to appear in person.

This development did not go down well with *Mr. Ngoge* who was representing the rest of the plaintiffs and so he raised an objection against *Mr. Kinyanjui's* appearance in the matter. The High court (Hon. Justice Ang'awa) heard the said objection and in a reasoned ruling held thus:

“M/s J. H. Kinyanjui & Co. Advocates are not to file a separate suit because representative action avoids the filing of multiplicity of suits but instead requires one suit to deal with the issue in question for determination.”

The Hon. Judge further held:-

“I would therefore conclude and state that M/s J. H. Kinyanjui & Co. Advocates are correctly before this Court..... I accordingly allow the advocate J. H. Kinyanjui to appear in this matter.”

It is that ruling that provoked the applicants to come to this Court for orders of injunction and stay of execution of the said orders pending appeal. An application for such orders to this Court is provided for under **Rule 5(2)(b)** of the **Court of Appeal Rules** which stipulates that the Court may:

“In any civil proceedings, where a notice of appeal has been lodged in accordance with Rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the court may think just.”

The court's jurisdiction under that Rule is original and very restricted indeed and we shall strictly confine ourselves to the same. Doing so will inevitably lock out most of the prayers sought herein which in our considered view are completely outside the ambit or purview of **Rule 5(2)(b)** of the **Court of Appeal Rules**.

The notice of motion is supported by the affidavit of one **Mohammed Omar Musa** which is to say the least couched in uncivil and very unsavoury language. There was no replying affidavit from the firm of *J. H. Kinyanjui advocates* but the 1st respondent through its in-house legal counsel filed a replying affidavit dated 17th January 2012 and opposed the notice of motion. **Mr. P.M. Gachuhi** learned counsel for the 1st respondent urged that, if the orders sought are granted, some of the plaintiffs might proceed with the suit to the exclusion of the others who opt for different representation. He submitted, and rightly so, that the right to legal representation cuts both ways, and just as *Mr. Ngoge's* clients may not wish to be represented by *Mr. Kinyanjui's* firm, *Mr. Kinyanjui's* clients may not want to be represented by *Mr. Ngoge* either. We are being asked to stay the proceedings before the High court so that this issue of representation can be determined in the appeal.

We have considered the notice of motion before us along with the contents of the rival affidavits and submissions of both counsel herein.

We have also considered the law applicable in this matter. This Court has severally restated the principles that an applicant needs to satisfy in order for a motion under **Rule 5 2 (b)** to succeed. He must show firstly that his appeal or intended appeal is arguable or put another way that it is not frivolous. Secondly and in addition the applicant must show that unless he is granted a stay, or injunction as the case may be, the success of his appeal or intended appeal will be rendered nugatory. (See **Republic vs Kenya Anti-Corruption Commission & 2 Others [2009] KLR31, and Reliance Bank Ltd vs Norlake Investment Ltd [2002] 1EA 227**).

We have considered these principles within the context of the notice of motion before us. We note that in this country, we do not have specific legislation that applies to class or representative suits. All we have is **Order 1 Rule 8** of the **Civil Procedure Rules** which reads as follows:-

Order 1 Rule 8

1. ***“Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.***
2. ***The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.***
3. ***Any person on whose behalf or for whose benefit a suit is instituted or defended under sub-rule (1) may apply to the court to be made a party to such suit.”***

The purposes of a representative suit are clear and we need not get into a detailed synopsis of the same for purposes of this ruling. It is nonetheless important to note that the main intention is to avoid a multiplicity of suits by several parties whose respective claims arise out of the same cause of action. Under **Order 1 Rule 8(2)** the parties shall give notice for purposes of bringing to the attention of other parties with similar interests to either opt to join the representative suit or take any other action. **Order 1 Rule 8(1)** talks of the parties representing *“all except one or more of them.”*

This, therefore, clearly shows that a party who is otherwise affected by the representative suit has a choice as to whether to apply to join the suit or not. Where a person wants to be joined as a party, no problem should arise. There would nonetheless be a situation where after notice being served an interested person feels that though sharing a commonality of interest with the other parties to the suit, he/she does not wish to proceed under the umbrella of that suit for one reason or another. Is such a person necessarily locked out of the dispute? Should such a person be denied recourse? Can *Mr. Kinyanjui’s* clients file their own separate pleadings? These clearly are arguable points. An applicant need not show more than one arguable point in order to succeed in his application.

Order 8 is not very explicit on the issue. Prima facie, one can only deduce that if one has an option to join the suit, then one should have an equal right to opt out of the suit without forfeiting his/her right to seek recourse separately. This would be so because every person has an inherent right to be heard; a right of access to justice and also a right to an effective remedy from the judicial system.

In this case, however, we have not been told whether *Mr. Kinyanjui’s* clients would like to opt out and reserve their right to file a separate suit. If however, they wish to remain in the suit, they may not file their own pleadings. They do definitely have a right to be represented by counsel of their own choice. That is one of the tenets of a fair trial. *Mr. Ngoge* on the other hand has a problem with sharing his pleadings with *Mr. Kinyanjui*.

We are satisfied that the issue of the legal representation of the parties herein is a pertinent one and the same ought to be canvassed on appeal. It is regrettable that splitting this matter would defeat the very purpose of a just and expeditious determination of the suit in a manner that will not breed a multiplicity of suits arising from the same cause of action. In our view however, and given the strong sentiments expressed by counsel, it will not be practically possible for the suit before the High Court to proceed before the issue of representation in this matter is sorted out. So if we do not grant the stay prayed for, there is the risk of the suit in the High Court being concluded without proper representation of some of the parties who have already come on record.

The upshot of all this is that it is important that the issue of the legal representation be sorted out before the main suit proceeds to hearing.

An order of stay of the ruling and orders of the Hon. Lady Justice Mary Ang’awa given on 16th December, 2011 in ***Nairobi H.C.C.C No. 279 of 2003*** is hereby granted pending the hearing and determination of the appeal. The notice of motion succeeds only to that extent.

Costs of this motion will be in the appeal.

Dated and delivered at Nairobi this 20th day of April 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. K. MARAGA

.....

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR