



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

ELRC NO.E010 OF 2020

(Before D.K.N.Marete)

ASHFORD KIMATHI.....CLAIMANT

VERSUS

REGISTERED TRUSTEES OF NANYUKI SPORTS CLUBRESPONDENT

RULING

This is an application dated 8th March, 2021 and comes out thus;

1. *That this Application be certified as urgent.*
2. *That this Honourable court be pleased to grant leave to the Claimant/Applicant to enjoin trustees of the Nanyuki Sports Club to wit; Mr.Michael Littlewood, Maj. Gen Peter M.Waweru, Dr.Benson Muthiora, Mrs.Harriet Mwirigi, Mr.Sajid Bhat.*
3. *That the draft amended Statement of Claim annexed and marked AK-1 be deemed as duly filed.*
4. *That costs of this Application be provided for.*

It is grounded as follows;

- a) *That the Claimant/Applicant filed a claim on unfair, unlawful and illegal termination against the registered trustees of Nanyuki Sports Club.*
- b) *That the Claimant/Applicant was appointed by the Nanyuki Sports Club as a General Manager/Club Secretary with effect from 10th June, 2019 on a renewable contract for three (3) years.*
- c) *That the trustees of the Nanyuki Sports Club are; Mr.Michael Littlewood, Maj.Gen Peter N.Waweru, Dr.Benson Muthiora, Mrs.Harriet Mwirigi, Mr. Sajid Bhat.*
- d) *That the property of Nanyuki Sports Club is vested in the Trustees as per Rule 4 (a) of the Club's Rules.*
- e) *That the decisions of the Club are made through its trustees hence the need to enjoin them in the suit herein.*
- f) *That the presence of the trustees before this court is necessary in order to enable the court effectually and completely adjudicate upon and settle the questions involved in this suit.*
- g) *That to ensure just and expeditious determination of the suit herein, the Claimant/Applicant ought to be granted leave to enjoin the trustees as parties to the suit.*
- h) *That the non-joinder of the trustees to the claim herein perse does not in itself render this suit fatally defective hence the Honourable Court to grant the Claimant/Applicant leave to enjoin them.*

The Respondent in a Replying Affidavit dated 13th March, 2021 avers that the application lacks merit and ought to be dismissed with costs.

The Claimant/Applicants case is that it is also necessary to enjoin the trustees of the Respondent in this suit as the respondent's property is vested in these trustees as per Rule 4 (a) of the Clubs Rules.

Further, it is the trustees who are vested with the power to issue employment contracts and also termination as per the clubs constitution. It becomes necessary to have them enjoined to enable an effective and total adjudication of the issues in dispute herein.

The Claimant/Applicant's further case is that non joinder does not in itself render the suit fatally defective and therefore the need for this court to effect the prayer for joinder.

The Respondent in a brief Replying Affidavit sworn on 13th March, 2021 opposes the application and avers that;

4. *That the application is misconceived, incompetent, bad in law, a gross abuse of the process of the Court, untenable, frivolous and vexatious.*

Further, the applicant has not placed any material fact before this court to show that the Registered Trustees of Nanyuki Sports Club exist as a legal entity under the trustees (Perpetual Succession) Act, Cap 164, Laws of Kenya or any material to show that Mr. Michael Littlewood, Maj. Gen Peter N. Waweru, Dr. Benson Muthiora, Mrs. Harriet Mwirigi, Mr. Sajid Bhat are registered as such under the said Act. This is expressed as follows;

6. *That there is no certificate of incorporation brought before the Court as evidence of such trust and without one, this Court cannot act on assumptions as he who alleges must prove.*

7. *That this is not a case of joinder or misjoinder but a case of suing a non-existent legal entity and there is no case upon which the persons sought to be joined can be joined.*

8. *That the Law on societies is very clear and the only option open to the Applicant is to withdraw the current suit.*

9. *That the decisions of the club are made by the committee not by the alleged trustees.*

10. *That there is nothing before this court to show that the persons sought to be joined made any decisions regarding the dispute before court or any role that they played and as such are complete strangers.*

11. *That it is the duty of the party seeking the discretion of the court to place sufficient material before the court to enable it exercise its discretion in his favour.*

12. *That the Applicant has failed in his duty and this application lacks merit and should be dismissed with costs.*

The Claimant/Applicant in his written submissions dated 21st April, 2021 seeks to rely on the authority of Order 8 rule 5 (1) of the Civil Procedure Rules, 2010 which provides thus;

"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may enter of its own motion or on the application of any party, order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just"

He further buttresses his case by relying on the authority of **Freight Forwarders Kenya Limited vs. Aya Investments Uganda Limited (2014) eKLR** where the court observed as follows;

"Our courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side. In this regard see East Bakery vs Castelino (1958) E.E. 461. Order 8 Rule 3 grants the court that discretion to permit amendment. The power to amend pleadings is provided in the Rules for the following purpose. "For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may enter of its own motion or on the application of any party, order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just. Order 8 Rule 5(1) of the Civil Procedure Rules." (Emphasis ours).

Again, he submits as follows;

16. *Despite the Properties of the Nanyuki Sports Club being vested on the Trustees as per clause 49(a) of the Club's Constitution, it is essential to amend the pleadings to enjoin the Club as the appointing authority.*

23. *Clause 4(a) of the Nanyuki Sports Club vested the property of the club in five trustees who must be members of the club.*

"The property of the club shall be vested in five Trustees who must be full members of the club, and who shall be elected at the Annual General Meeting for a period of five years provided that in the event of death or retirement of either one of them, or both, such vacancies thus caused shall be filled by an election at a Special General meeting, called by giving a notice of 21 days to Full members. Person(s) so elected shall continue in office for a term of five years subject to death or retirement.

24. *We submit that any order that may be issued by this Honorable Court is only capable of enforcement and/or implementation*

against the trustees of the Nanyuki Sports Club. As such, the trustees ought to be enjoined as parties to the suit herein to ensure the orders of the court shall be enforceable and not a mere academic exercise.

It is the applicant's penultimate submission that the presence of the trustees before this court is therefore necessary in order to enable the court effectually and completely adjudicate upon and settle the questions in this suit. This is crowned in the authority of **Nderitu Wachira Receiver & Receiver & Manager of Bulleys Tanneries Ltd. (under Receivership) & 4 others v Siraji Enterprises Ltd & another (2016) eKLR**, Court of Appeal observed thus;

“Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo motu, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.”

The Respondent in her written submissions dated 10th May, 2021 reiterates her case on the unsuitability and illegality of the proposed trustees for lack of registration. No certificate of incorporation is exhibited. It is her case that the Claimant/Applicant has not demonstrated any legitimacy of bringing the trustees on board as prayed. This is not sustainable in the absence of evidence of their legal standing in the respondent establishment.

The Application tilts in favour of the Applicant. His case of joinder overwhelms that of Respondents. This is because it is in the interest of the parties that all issues in dispute be canvassed and determined in the presence of all interested parties.

The denial and grounds of opposition of joinder on the part of the respondent can be viewed as merely evasive. It is incumbent upon the trustees to take responsibility and avail themselves for a scrutiny of their action(s) in the running of the respondent facility.

The application for joinder comes in to enjoin critical elements and parties to the suit. It does not in any way prejudice the case of the respondents, or at all.

I am therefore inclined to allow the application with orders that each party bears their costs of the application.

DATED AND DELIVERED AT NYERI THIS 30TH DAY OF JUNE, 2021.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Onyony instructed by Onyony & Company Advocates for the Claimant/Applicant.
2. Mr.Wahome Gikonyo instructed by Wahome Gikonyo & Company Advocates for the Respondent.