



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 64 OF 2019

(Before Hon. Justice Hellen S. Wasilwa on 27th October, 2020)

O'BRIAN BOLEI KIPSOWE.....1ST APPELLANT

LAWRENCE KARANJA.....2ND APPELLANT

SHEIKH YAQUB.....3RD APPELLANT

VERSUS

SIMBA CAETANO FORMULA LIMITED.....1ST RESPONDENT

CAETANO FORMULA EAST AFRICA SA.....2ND RESPONDENT

AND

GROUPE RENAULT SA.....PROPOSED INTERESTED PARTY

(Being an Appeal from the Ruling and Order of the Chief Magistrates Court at Nairobi, Milimani Law Courts delivered by Hon. D.A. Ocharo (PM) on 28th November 2019, in CMELRC No. 1436A of 2019)

RULING

1. Before this Court is the Appellant's application dated 11/5/2020 seeking the following reliefs:-

a. THAT this Application be certified urgent and be heard in the first instance and service thereof be dispensed with on a priority basis.

b. THAT this Honourable Court do issue orders to enjoin Groupe Renault SA as an Interested Party/3rd Respondent for purposes of this Application.

c. THAT this Honourable Court do issue orders and/or direction for service of all the Pleadings herein and the orders issued on 6th December 2019 and confirmed on 28th January 2020 upon Groupe Renault SA whose 13/15 quai Alphonse Le Gallo – 92100 Boulogne Billancourt cedex – France by way of email correspondence through their official email address denis.levot@renault.com and/or as this Honourable Court may otherwise direct for purposes of notifying Groupe Renault SA of the said pleadings and/or orders as well as requiring their due compliance thereof.

d. THAT this Honourable Court do issue any other or further orders that it may deem just and fit to give effect to the Orders issued on 6th December 2019, and confirmed on 28th January 2020.

e. THAT the costs of this Application be in the appeal.

2. The Application is supported by the grounds set out therein and the Supporting Affidavit of Sheikh Yaqub sworn on 11/5/2020. The 1st Respondent supported the Application vide the Replying Affidavit of Ameet Shroff sworn on 18/6/2020. The Application has been opposed by the Intended Interested Party's Grounds of Opposition dated 10/7/2020 and the Replying Affidavit of Sofia Idehn sworn on 9/7/2020. The 2nd Respondent has also opposed the Application vide the Grounds of Objection dated 27/5/2020.

The Applicant's Case

3. The Applicants' case is that on 6/12/2019, this Court issued interim injunctive orders restraining the Respondents from implementing and/or taking any action which would terminate their employment by either closing down or transferring business to any other person, pending the hearing and determination of their application. However, on 28/1/2020 this Court directed that the interim orders would remain in force pending the hearing and determination of the Appeal.

4. The Applicants aver that the 2nd Respondent disobeyed the orders and opened a new showroom to market and sell Renault motor vehicles, spare parts, accessories and related products. They also advertised that any company other than the 1st Respondent would be the official dealer and distributor of Renault products.

5. It is averred that the Intended Interested Party is the manufacturer and supplier of the Renault merchandise sold in the 2nd Respondent's new showroom. It is further averred that the 2nd Respondent continues to disobey the injunctive interim orders with support from the Intended Interested Party.

6. The Applicants aver that the Intended Interested Party is aware that the 1st Respondent is the authorized official dealer of Renault merchandise in Kenya hence any supply and distribution of Renault products from the Intended Interested Party to the 2nd Respondent to deal with other companies is a deliberate disregard of the orders.

7. Nevertheless, the Intended Interested Party still supplies products to the 2nd Respondent despite having knowledge the 2nd Respondent's failure to distribute the products to the 1st Respondent amounts to violation of court orders. As such, the Intended Interested Party should be enjoined to the proceedings to enable this Court effectively adjudicate the issue of contempt as raised in their contempt application of 5/3/2020.

The 1st Respondent's Case

8. The 1st Respondent avers that it filed the Notice of Motion Application dated 2/4/2020 requesting this Court's intervention to ensure that the orders of 6/12/2019 are not disobeyed, in light of the 2nd Respondent's demand letter of 20/3/2020 cautioning them to cease and desist using the 2nd Respondent's Renault trademarks, trade names and references because the 1st Respondent was no longer the authorized distributor of Renault merchandise.

9. It is the 1st Respondent's case that complying with the said demands would cause it to close down its business operations which would lead to termination of the Appellants' employment thereby exposing the 1st Respondent to citation for contempt of Court.

10. The 1st Respondent avers that it received another demand letter of 12/6/2020 from the Intended Interested Party demanding that they stop using the domain name <renaultkenya.co.ke>, transfer the same to Intended Interested Party and undertake not to use the trademark RENAULT under any form. Consequently, the 1st Respondent's domain name and website was suspended and another domain was put up replacing the 1st Respondent as the official dealer with Premium Mobility Solutions.

11. It is therefore the 1st Respondent's case that these actions amount to a deliberate and contumelious disregard of the Orders of 6/12/2019. As such, it is necessary to join the Intended Interested Party to this suit.

The Intended Interested Party's Case

12. The Intended Interested Party's case is that it is a French multinational automobile manufacturer and manufactures a myriad of products including the Renault brand. However, it does not have a place of business in Kenya hence its products are imported, distributed and sold in Kenya through a distribution agent.

13. The Intended Interested Party avers that there is no existing contractual or other relationship between them, the 1st Respondent or the Appellants.

14. It is averred that no order has been issued restraining the Intended Interested Party from supplying the 2nd Respondent with products under Renault brand or entering into a distribution agreement with another entity. That no order has been issued restraining the performance of the importation and distribution agreement of 26/11/2013. Further, no order has been issued requiring the Intended Interested Party and the 2nd Respondent to supply the 1st Respondent with products under Renault brand or requiring them to get involved in the 1st Respondent's business operations and employment relationship with the Appellants.

15. The Intended Interested Party avers that the relationship between the Respondents was governed by a formal distribution agreement whose result was that the 1st Respondent became a sub-distributor of products under the Renault brand in Kenya. However, the agreement lapsed on 30/6/2019 resulting in various disputes being: **High Court Civil Case E049 of 2019; Simba Corporation Limited vs. Caetano Formula East Africa SA** and **Court of Appeal Civil Application 234 of 2019; Simba Corporation Limited vs. Caetano Formula East Africa SA** where it was confirmed that the formal distribution agreement had expired on 30/6/2019.

16. The Intended Interested Party avers that the application lacks merit and should be dismissed with costs because it makes no allegation of contempt of Court, there is no link between the Intended Interested Party and the Appellants or the 1st Respondent neither has a remedy been sought against it in the appeal.

17. It is contended that pursuant to Article 162 (2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, this Court lacks the jurisdiction to hear and determine any dispute between the Intended Interested Party and any other parties to the appeal. Further, that they are not a necessary or proper party to the proceedings in the subordinate Court which are still pending and where they have not been joined as an Interested Party.

18. Finally, it is contended that the application is misconceived and an abuse of the Court process as it does not contain comprehensible allegations of fact against the Intended Interested Party.

The 2nd Respondent's Case

19. The 2nd Respondent contends that the application is incompetent, misconceived and amounts to an abuse of the court process as it is not founded on any provisions of the law and is intended to convolute the issues before this court so as to achieve other ulterior motives. Further, the Appellants have not provided any justification on why the Intended Interested Party was not joined at the trial stage, hence, a joinder to prosecute a contempt of court application regarding orders issued in the absence of the Intended Interested Party will greatly prejudice them. It is the 2nd Respondent's position that the proposed joinder will not assist this court in determining the claims by the Applicants as employees.

20. It is contended that the Applicants have not demonstrated the existence of an employment relationship between them and the Intended Interested Party, and how its action will lead to the termination of their employment. As such, the Intended Interested Party has no direct stake in these proceedings thus not a necessary party as anticipated by the Supreme Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others; Supreme Court Petition 12 of 2013 [2014] eKLR.**

21. The 2nd Respondent avers that the allegations that it aided the Intended Interested Party in disobeying court orders or that 1st Respondent is the authorized dealer of Renault products, are completely misconceived and not related to the purpose and intent of the Orders issued on 6/12/2012 for the following reasons:-

a. There is no contractual relationship between the 1st Respondent as the Applicants' employer and the Intended Interested Party.

b. As the manufacturer of Renault products, the Intended Interested Party only has a contractual relationship with the 2nd Respondent and not the 1st Respondent.

c. The Intended Interested Party was not privy to distributorship agreement between the Respondents and only the 2nd Respondent had the mandate to appoint a distributor.

d. The distributorship agreement was non-exclusive hence the 2nd Respondent was at liberty to appoint another distributor.

e. No contempt of Court can arise as the distributorship agreement lapsed on 30/6/2019 as was held by the High Court and Court of Appeal when it was faced with the matter; and was never renewed. As such, the application as presented was res judicata.

22. The 2nd Respondent urged this Court to dismiss the application with costs.

The 1st Respondent's Rejoinder

23. The 1st Respondent filed a Further Replying Affidavit in response to the Intended Interested Party's Grounds of Opposition and Replying Affidavit. The 1st Respondent contends that the Intended Interested Party demanded that they cease from using the Renault trademarks, trade names, domain name <renaultkenya.co.ke> and other references; because they were no longer the distributor of Renault motor vehicles, spare parts and accessories, in Kenya.

24. Subsequently, the 1st Respondent's domain name and website were suspended and another domain name created for Premium Mobility Solutions Limited. According to the 1st Respondent, this amounted to closing down its business operations which in turn resulted in termination of the Applicants' employment.

25. The 1st Respondent contends that the Intended Interested Party is the developer of an online parts ordering, service and maintenance system of after sale service to Renault customers. It is averred that the Intended Interested Party together with the 2nd Respondent issue the 1st Respondent with tokens to access the online portal which was denied from July 2020 thus inhibiting their business operations. Efforts to be granted access have proved futile.

26. The 1st Respondent avers that vide the letter of 2/9/2020, the 2nd Respondent asked them to stop providing after sales and warranty services to customers and instead refer the customers to the company set to take over.

27. Finally, the 1st Respondent contends that the issue of whether it is the official authorized dealer of Renault products in Kenya is pending before the High Court in EO49 2019 and is also the subject of arbitration.

28. The Application was disposed of by way of written submissions with all the parties filing their submissions.

Submissions in Support of the Application

29. The Applicants' submissions are that the Intended Interested Party has not denied the existence of a court order barring the distribution of the said product by any entity other than the 1st Respondent neither has it denied making supplies to Premium Mobility Solutions thereby rendering the Appellants jobless.

30. The Applicants submit that this Court has jurisdiction to order the joinder of Interested Parties to these proceedings. To buttress this position, they have placed reliance upon Order 1 rule 10 (2) of the Civil Procedure Rules, Sankar's Code of Civil Procedure (11th Ed. Reprint, 2011, Vol. 1 P 887), the case of **Central Kenya Limited vs. Trust Bank & 4 Others; CA No. 222 of 1998** and the case of **JMK vs. MWM & Another [2015] eKLR**.

31. It is the Appellants' submissions that the Intended Interest Party is crucial to these proceedings hence should be joined. This is because the injunctive orders are at the core of these proceedings but which have been violated by the 2nd Respondent with the aid of the Intended Interested Party through making supplies to the latter for distribution to Premium Mobility Solutions.

32. Lastly, the Applicants submit that the 2nd Respondent has no authority to dictate to them whom to sue. As such, the objection is untenable and should be overruled.

33. On their part, the 1st Respondent submits that the application is meritorious since the orders in place affect the Intended Interested Party's interests who distributes, sells and markets Renault products. To reinforce this position, they rely on the cases of **Pravin Bowry vs. John Ward & Another [2015] eKLR**, **Civicon Limited vs. Kivuwatt Limited & 2 Others [2015] eKLR** and the Supreme Court case of **Francis Kariuki Muruatetu & Another vs. Republic & 4 Others [2016] eKLR**.

34. Further, it is submitted that the Intended Interested Party has assisted in perpetuating the 2nd Respondent's contempt of court orders. It is contended that joining the Intended Interested Party to this suit will inhibit multiplicity of suits as the Intended Interested Party will be bound by the orders issued in this Court.

35. The 1st Respondent submits that the Intended Interested Party's stake depends on whether the 2nd Respondent shall be found to be in contempt of court. It is their position that the Intended Interested Party's argument that they are not a party to the proceedings in the lower court do not hold water as they will be affected by this Court's orders.

36. It is submitted that the Intended Interested Party has not demonstrated the prejudice it or the parties in this suit stand to suffer by its joinder.

37. Both parties urged this Court to allow the application as it was meritorious.

Submissions in Opposition to the Application

38. The Intended Interested Party submits that the only issue before this Court is whether it should be joined to these proceedings. They submit that a Court can only join a party who will enable it to effectually and completely adjudicate upon and settle all questions involved in a suit.

39. It is the Intended Interested Party's submissions that the Appellants have failed to demonstrate the necessity of the joinder and contends that they have no stake in the matter. To fortify this position, the Intended Interested Party relied on a myriad of cases which outline the circumstances that a Court should consider before allowing an application for joinder of parties. They are: **Attorney General vs. Kenya Bureau of Standards & Another [2018] eKLR**, **Lucy Nungari Ngigi & 128 Others vs. National Bank of Kenya & Another [2015] eKLR** and **Bellevue Development Company vs. Vinayak Builders Limited & Another [2014] eKLR** and **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others [2014] eKLR**.

40. The Intended Interested Party submits that in the instant case, there is no existing employment or contractual relationship between them and the Appellants, that it is not privy to the employment relationship between the 1st Respondent and the Appellants, that it has no stake in the appeal and that no discernible prejudice is likely to be suffered if the Intended Interested Party is not joined to these proceedings. Further, no application has been made in the magistrates' court to have the Proposed Interested Party joined to those proceedings.

41. It is their position that the proposed joinder is solely intended to vex the parties, convolute the proceedings and re-litigate a commercial matter which had already been determined by the High Court and the Court of Appeal. In their view, this was propounded by the fact that the Intended Interested Party had not been cited for contempt of court and that the application made was not one of contempt of Court.

42. The Intended Interested Party submits that no order has been issued restraining it from supplying the 2nd Respondent with products under Renault brand or entering into a distribution agreement with another entity. Further, that no order has been issued requiring it or the 2nd Respondent to supply the 1st Respondent with products under the Renault brand.

43. As such, the Intended Interested Party submits that the issues raised in the Application do not relate to any employment relationship or threatened employment relationship between the Appellants and the 1st Respondent on the one part, and the 2nd Respondent and the Proposed Interested Party on the other part.

44. It is the Intended Interested Party's reiterates that the relationship between the Respondents was governed by a formal distribution

agreement which resulted in the 1st Respondent becoming a sub-distributor of products under the Renault brand in Kenya. The agreement lapsed on 30/6/2019 resulting in various disputes where the High Court and Court of Appeal confirmed that the formal distribution agreement had lapsed on 30/6/2019.

45. The Intended Interested Party submits that pursuant to Article 162 (2) of the Constitution and Section 12 of the Employment and Labour Relations Court Act, this Court lacks the jurisdiction to hear and determine matters relating to the distribution of products under the Renault brand in Kenya.

46. It is the Intended Interested Party's submissions that the orders issued by this Court contradicts those issued by the High Court and Court of Appeal. This is because the order of 6/12/2019 may imply that the 2nd Respondent is prevented from entering into a sub-distribution agreement with a third party for products under the Renault brand pending the determination of the Appeal. On the other hand, the High Court and Court of Appeal found that the formal distribution agreement between the Respondents had expired, implying that the 2nd Respondent was free to enter into a sub-distribution agreement with any other entity.

47. The Intended Interested Party urges this Court to vacate the orders of 6/12/2019 because of the Applicants' failure to disclose all the pertinent facts of the case.

48. As regards the 1st Respondent's Further Replying Affidavit of 15/9/2020, the Intended Interested Party contends that the issues surrounding the domain name are unrelated to the Appellant's employment with the 1st Respondent and the orders of 6/12/2019. They further submit that the issue of domain name is within the jurisdiction of Kenya Network Information Centre and not this Court.

49. On its part, the 2nd Respondent submits that the Appellants have not demonstrated the recognizable stake the Intended Interested Party has in these proceedings or how it will be affected by the Court's decision if the application is denied. To fortify this position, the 2nd Respondent relied on the case of **Shirvling Supermarket Limited vs. Jimmy Ondicho Nyabuti & 2 Others [2018] eKLR**.

50. It is submitted that the Appellants have not demonstrated by way of evidence, the nexus between their employment relationship and the Intended Interested Party. It is their position that any action that risks terminating their employment lies with the 1st Respondent who is their employer because the Intended Interested Party is incapable of taking actions that would likely terminate their employment contracts.

51. The 2nd Respondent submits that as at December 2019 when the orders were issued in the matter, the distribution agreement between the Respondents had long lapsed and not even the orders of 6/12/2019 could revive it. It is further submitted that the Intended Interested Party was not privy to the distribution agreement between the Respondents hence incapable of influencing or appointing a new distributor in place of the 1st Respondent following the lapse of the agreement.

52. It is the 2nd Respondent's submissions that the distributorship agreement was non-exclusive hence the 2nd Respondent was at liberty to appoint another distributor. As such, the allegation that the 1st Respondent is the sole distributor of Renault vehicles and parts is false.

53. It is submitted that the Appellants and the 1st Respondent have annexed materials that relate to a commercial dispute between the Respondents which are not relevant to this dispute. For instance, photographs showing that the 2nd Respondent had engaged the services of a new distributor and letters issued to the 1st Respondent by the 2nd Respondent directing it to stop using the Renault trademark or trade name. According to the 2nd Respondent, this amount to an attempt to have this Court make a determination regarding the commercial dispute which is beyond its jurisdiction.

54. Both parties urged this Court to dismiss the Application with costs.

55. I have examined the averments of the Parties herein. The application before me relates to joinder of an Interested Party Group Renault SA whom the Applicant avers is a necessary Party for preservation of this Court's orders of 6/12/2019 that barred the Respondent's from taking any action that would operate to terminate the Appellants' employment.

56. The Appellants aver that the 1st Respondent has been transferring its business to the Proposed Interested Party who is therefore a necessary Party to the Appeal.

57. The Intended Interested Party is opposing the application for joinder, averred that there is no relationship between them, the 1st Respondent and the Appellants and should therefore not be enjoined in this Appeal.

58. 1st Respondent averred that the issue of the distribution of Renault products in Kenya is pending before the High Court in E049 of 2019 and is also the subject of arbitration.

59. In determining issue of joinder, I am guided by the fact that there are interim orders pending before this Court which barred the Respondents from taking any action that would operate to terminate the Appellant's employment. The order as per the submission herein is being flouted by the Intended Interested Party who is not a Party to this suit hence the need to enjoin the Intended Interested Party.

60. The Court of Appeal in **JMK vs MWM & Another [2015] eKLR (supra)** indicated as follows:-

“In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our Civil Procedure Rules, in TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448, stated that the power of the court

to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.

61. Indeed joinder of a Party as from the holding of the Court of Appeal can be done at any stage of the proceedings even at the appeal stage.
62. The Intended Interested Party has submitted that the orders of the Court contradict other orders of the High Court and of the Court of Appeal without exhibiting the said orders.
63. In that view and if the Intended Interested Party is enjoined in these proceedings, the true facts of this case will be explicit.
64. It is also necessary that the intended Interested Parties be enjoined to these proceedings in order to preserve the substratum of the Appeal and be part and parcel of the Court's proceedings to prevent any miscarriage of justice even to the Intended Interested Party.
65. I therefore allow the application for joinder of the Intended Interested Party Group Renault SA as prayed.
66. Costs in the Appeal.

Dated and delivered in open Court this 27th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kago for 1st Respondent – Present

Weru for 2nd Respondent – Present

Kuyo for Proposed Interested Party

Appellants – Absent