



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 567 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

NEHEMIAH KIPROP KIPLAGAT.....1ST CLAIMANT
ELISHA DONALD KOLI.....2ND CLAIMANT
HUDSON LIHANDA.....3RD CLAIMANT
STANLEY OIRERE MOSOMI..... 4TH CLAIMANT
GERALD KINGORIKARIUKI.....5TH CLAIMANT
ENOCK MON ARI.....6TH CLAIMANT
MUNGA EDWIN ODHIAMBO..... 7TH CLAIMANT
BERNARD OWITI.....8TH CLAIMANT
EDWIN ONGERI BOSIRE..... 9TH CLAIMANT
MICHAEL MUTAHL.....10TH CLAIMANT
ASAPH JUMA KIVITE.....11TH CLAIMANT
VICTOR KIPKOGEL.....12TH CLAIMANT
MUNYAO ERICSON MUTUKU.....13TH CLAIMANT
SAMMY KIRWA KITUR.....14TH CLAIMANT
CLIVE OMARI RUOTI..... 15TH CLAIMANT
JACQUILENE MORAA.....16TH CLAIMANT
EUNICE WAIRIMU WAITUIRI.....17TH CLAIMANT
CHARLES KIAGE MAKORI..... 18TH CLAIMANT
WARUTERE DAVID MAINA.....19TH CLAIMANT

VERSUS

RADIO FREQUENCY SYSTEMS LIMITED.....1ST RESPONDENT

MICHAEL JOHN MW AURA.....2ND RESPONDENT/CONTEMNOR

EQUITY BANK KENYA LIMITED.....3RD RESPONDENT/CONTEMNOR

GEOFFREY NG'ANG'A TAMBARA.....INTENDED INTERESTED PARTY/APPLICANT

RULING

The Intended Interested Party filed a Chamber Summons application on 27th January, 2020 seeking the following orders:

1. Spent.
2. That the Applicant herein, Geoffrey Ng'ang'a Tambara be joined in this suit as an Interested Party forthwith before the inter partes hearing of the Claimant's application dated 1st November, 2019 and which hearing is fixed for Wednesday, 29th January 2020.
3. THAT this application be heard ex-parte in the first instance on the ground that the Applicants presence before the Court is necessary at the inter partes hearing of the Claimant's application dated 1st November, 2019 in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit.
4. That costs of this application be provided for.

The application is based on the following grounds:

1. The Applicant was employed by the 1st Respondent as a General Manager on permanent basis vide an employment contract dated 11th January 2018. The Applicant's employment was constructively and unfairly terminated and his salaries for the period between February 2018 and August 2019 unfairly withheld by the 1st Respondent.
2. The Applicant has consequently filed a suit for recovery of salary and damages for unlawful termination being ELRC Cause No. 737 of 2019. The suit is against the 1st and 2nd Respondents herein together with one director of the 1st Respondent, Simon Horner.
3. On 19th December, 2019 the Applicant filed a Notice of Motion seeking orders that the Court freeze account number 01xxxxxxxxxx held by the 1st Respondent at Equity Bank and that the Court restrain its directors and agents from dealing or transferring with the proceed held in the account.
4. The suits in Cause No. 567 of 2019 and Cause No. 737 of 2019 emanate from the same set of facts, are against the same parties, the prayers sought are near similar and the subject matter of the application dated 1st November, 2019 in Cause No. 567 of 2019 is the same as the matter pending in Cause No. 737 of 2019.
5. It is only justiciable that the Applicant be enjoined in the suit as an Interested Party before the hearing of the Claimant's application dated 1st November, 2019 in order to enable the Applicant respond to the application and to enable the Court effectually and completely adjudicate upon and settle all questions involved in the application.

The application is supported by the affidavit of George Ng'ang'a Tambara sworn on 27th January, 2019 in which he reiterates the grounds set out in the application. He further deposes that any orders issued in the instant suit shall have a bearing and effect on his claim and application against the Respondents.

Claimant's Case

The Claimants filed a Replying Affidavit sworn by Omwanza Nyamweya, an Advocate of the High Court of Kenya, on 4th February, 2020. He deposes that accounts 07xxxxxxxxxx and 07xxxxxxxxxx, held by the Claimant's advocates and where a sum of Kshs.20,238,324.27 was transferred, are distinct.

He deposes that in no way is the order in ELRC Cause No. 737 of 2019 going to affect the current suit as the suits are totally unrelated. He deposes that there is no demonstrable interest in the suit by the 2nd Intended Interested Party and once the funds were moved, the property in the monies effectively moved to the Claimants herein being held for their interest under the care of the Claimants advocates awaiting delivery of the same.

He avers that the Intended Interested Party has filed ELRC Cause No. 737 of 2019 to claim the amount owed to him and it is imperative that he raises the issues he could wish to canvass in the instant suit in his suit.

He avers that the issues the Intended Interested Party wishes to raise can only be couched in a different substantive suit and cannot in anyway involve the instant Claimants as the suit between the Claimants and the 1st Respondent is *res judicata*.

He further avers that the application will only delay and embarrass this Court from determining the substantive issue of contempt of Court between the parties in the suit. He further avers it will be against the laid down principles and rules of the court for the Court to re-interrogate and entertain the enjoyment of the Intended Interested Party as the Court is *functus officio*.

The 1st and 2nd Respondent's Case

They filed Grounds of Opposition dated 6th February, 2020 stating that:

1. The application is misconceived and bad in law as the intended Interested Party/Applicant seeks to join the proceedings too late in the day when the Court has exercised its authority over the matter and has completely determined the real issues in controversy and what remains for determination is the issue of contempt proceedings which are incidental to or a natural consequence of the final decision of the court.
2. The Interested Party is stranger to these proceedings whose presence and participation is not necessary or relevant for the determination of the issue of contempt of court.
3. Joinder at these stage of the proceedings offends the principle of finality of litigation and will delay the hearing and determination of the alleged issue of contempt of court,
4. The Intended Interested Party's case is yet to be heard and determined and he has no rights that have crystallised against any of the parties in the matter.

The 1st Respondent also filed a Replying Affidavit sworn by Simon Wallington Horner, its majority shareholder/director and Chief Executive Officer, on 2nd April, 2020. He deposes that the Intended Interested Party has no relevance to the proceedings and that he has not informed the Court when he learned of the matter. He deposes that he wants the Court to believe that he has all of a sudden developed some interest in the proceedings.

He deposes that the Intended Interested Party incorrectly wants the Court to believe that by the mere mention of the fact that he seeks to freeze account 01xxxxxxxxxxx in ELRC Case No. 734 of 2019 he has an identifiable interest.

He avers that the Intended Interested Party is the 2nd Respondent's proxy used by him for his unending fraudulent machinations to defraud the 1st Respondent of its assets. He avers that the Intended Interested Party is only interested in participating in the Claimant's pending Notice of Motion for contempt dated 1st November, 2019 and has not demonstrated what he intends to do in the main suit.

He avers Intended Interested Party has also not demonstrated what prejudice he stands to suffer if the application is not allowed.

Intended Interested Party's submissions

The Intended Interested Party submitted that the constitution of Kenya (Protection of Rights and Fundamental Freedoms Practice and Procedure Rules, 2012) defines an interested party as a person or entity that has an identifiable stake or legal interest in the proceedings before the Court but is not a party to the proceedings or may not be directly involved in the litigation.

He submitted that he has an identifiable stake in the matter as he has inter alia proven that he was employed by the 1st Respondent, was constructively dismissed; there exists an application being ELRC Cause 737 of 2019 seeking to freeze the bank account subject of the current contempt proceedings; there are applications against the same parties; and that both suits arise from the same set of facts and seek the same reliefs.

He submitted that based on the facts above, he has an inalienable right in the subject matter of this suit and the subject matter of the contempt application. He relied on the case of **Carol Silcock v Kassim Sharrif Mohamed [2013] eKLR** where the Court held:

“In **Caltex Oil Limited Vs Evanso Wanjihia; Civil Application No. Nairobi 190 of 2009**, the Court of Appeal held that the O2 principle had given the courts greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.

The Intended Interested Party's submission that this court cannot entertain the present Applications because it became functus officio upon the delivery of the Judgement, in the circumstances of this case, is one of the “past technicalities” that the Court of Appeal had in mind in the Caltex Oil case.”

He further relied on the decision in **Elisha Kare Busienei & 3 others v Japhet Kipyego Chepkwony (Suing as the Administrator of The Estate Of Elizabeth J. Sirma & 2 others Nicholas Gituh Karira (Applicant/Interested Party) & 3 others [2020] eKLR** that the applicants had passed the test for joinder after judgment was delivered.

He argued that he has demonstrated peculiar circumstances of this case and considering the disputes between the 1st Respondents and its directors; the freezing order sought in Cause No. 737 of 2019 would affect the Orders issued in this matter, it is important that he be allowed to join the suit and shed light on various issues. In conclusion, he submitted that his application is meritorious and ought to be allowed.

Claimant's Submissions

The Claimants also cited the definition of an Interested party in the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** and the **Blacks Law** dictionary. They submitted that the Employment and Labour Relations Court Act and the Rules are silent to on the position of an interested party save for Rule 18(1) which provides that the court may serve or order service of a pleadings to a party whom it is satisfied may be interested in the matter.

They relied on the Supreme Court decision in **Communications Commission of Kenya & 5 Others v Royal Media Limited & 5 Others [2014] eKLR** on when a party can be enjoined in a matter as an interested party. They further relied on the case of **Catherine Nyambura v Director of Public Prosecutions & 3 Others [2018] eKLR** and **Moses Wachira v Niels Bruel & 2 Others [2016] eKLR**.

They argued that the contempt of court application does not in any way involve the intended interested party as no right has accrued against him pursuant to the consent judgment of 2nd October, 2019. They further submitted that the intended interested party cannot appeal the judgment as he was not a party to the suit and that he has never applied for review of the judgment.

They argued that the intended interested party has only one singular way to approach the Court which is as an objector to the Judgment or Ruling of this Court. They further submitted that the applicant has not in any way shown or indicated any equitable or legal right accruing to him in the amounts withdrawn from the firm of Omwanza & Areba Associates which belong to them.

They submitted that since they have incurred extra costs in dealing with the application, they relied on the case of **Little Kenya Limited v Andrew Mwiti Jason [2014] eKLR** that costs follow the event. They further relied on the case of **British Columbia (Minister of Forests) v Okanagan Indian Band [2003] 3 S.C.R 371, 2003 SCC 71** on the four standard characteristics of a regular award of costs.

In conclusion, they submitted that the intended interested party has not met the threshold to be enjoined as an interested party and that he is claiming a right that has not yet crystallised. They further argued that he has not convinced the Court on what he intends to advance and how it will be helpful to the Court in the resolution of the question of contempt of court.

1st Respondent's submissions

It cited **Rule 18(1)** of the **ELRC (Procedure) Rules, 2016** and submitted that the Intended Interested Party is not a necessary party to the proceedings. It submitted that the Intended Interested Party has not satisfied the guiding principles for joinder of Interested Parties set out in the case of **Joseph Njau Kingori v Robert Maina Chege & 3 Others [2002] eKLR** which include that one must be a necessary party, a property party and one's presence is necessary to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit.

It submitted that joinder of the intended interested party will not add value to the proceedings and that he is not crucial to the determination of the matter at hand. It argued that the real intention of the application is to frustrate the pending contempt application against the contemnors and is a collusion between the contemnors and the intended Interested Party.

It submitted that the Intended Interested Party has not demonstrated its position on the Claimant's pending application dated 1st November, 2019 and that all he says is that he has an interest in the 1st respondent's bank account held at Equity Bank Limited.

It argued that it would be extremely prejudicial to the 1st Respondent if a wrong party is to be joined to these proceedings and the suit is liable to be struck out for joinder of a wrong party. It referred to the Supreme Court's decision in **Trusted Society of Human Rights Alliance v Mumo Matemo & 5 Others [2014] eKLR** that a suit can be struck out of a wrong party is enjoined in it.

It submitted that there is no prayer in the main suit that will directly affect the Intended Interested Party and that he does not intend to bring a claim in these proceedings against the 1st Respondent. It submitted that joining the Intended Interested Party in the proceedings will not only be lacking in legal basis but it would cause delay and embarrass the proceedings.

It submitted that the application is suspect coming at a time when the contemnors were faced with contempt proceedings. It urged the Court to dismiss the application with costs.

Analysis and Determination

The issue for determination is whether the Applicant/Intended Interested party has demonstrated that he ought to be enjoined as an Interested Party to these proceedings.

The Intended Interested Party avers that both **ELRC Cause No. 7373 of 2019**, his suit, and the instant suit are near similar and that he has a pending application which seeks to restrain the directors of the 1st Respondent from dealing with the proceeds or deposits held in 1st Respondents' account.

The Supreme Court in **Communications Commission of Kenya & 4 others v Royal Media Services Limited & 7 others [2014] eKLR** held:

“In determining whether the applicant should be admitted into these proceedings as an Interested Party we are guided by this Court's Ruling in the **Mumo Matemo case** where the Court (at paragraphs 14 and 18) held:

“[An] interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she

is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause...”

Similarly, in the case of **Meme v. Republic, [2004] 1 EA 124**, the High Court observed that a party could be enjoined in a matter for the reasons that:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. joinder to prevent a likely course of proliferated litigation.”

[24] We ask ourselves the following questions: (a) what is the intended interested party’s stake and relevance in the proceedings? and (b) will the intended interested party suffer any prejudice if denied joinder?”

As stated by the Claimant and Respondents, the suit herein was determined by consent of the parties adopted by the Court on 2nd September, 2019 which provided that Kshs.20,238,324 be transferred from the 1st Respondent’s account to the Claimants’ advocates accounts being the salary arrears and terminal dues. The only issue pending before the court is the Claimant’s application for contempt of Court. I do not find any aspect set out in the Intended Interested Party’s application that would assist the Court in determining the contempt of court application.

Additionally, the similarity in the suits does not give rise to the intended Interested Party’s relevance in these proceedings. The Orders sought in his Notice of Motion against the 1st Respondent are issues that can adequately be determined in **ELRC Cause No. 737 of 2019** without the Intended Interested Party’s involvement in the instant suit.

I further find that the Intended Interested Party will not be prejudiced if he is not joined as an Interested Party since the outcome of the contempt of court application will not in any way affect him and his interests will primarily be determined in **ELRC Cause No. 737 of 2019**.

The **Carol Silcock case** cited by the Intended Interested Party can be distinguished from the instant application. In that case the Judgment and Decree delivered by the Court bound the Intended Interested Party and the Plaintiff was not required to file a fresh suit for an order cancelling the transfer of the suit to the interested party. Further, in the **Elijah Kare Busienei case** the Court established that the intended interested parties had an interest in the land.

In the instant case, neither the proceedings nor the consent judgment of the Court have any bearing or effect upon the Intended Interested Party.

I therefore find that the application for joinder by the Applicant as an Interested Party has no merit and dismiss it with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 13TH DAY OF NOVEMBER 2020

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE