



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2081 OF 2014

SAMUEL ALOYS MOTURI.....CLAIMANT

-VERSUS-

E.A.N KENYA LIMITED.....1ST RESPONDENT

GSI KENYA LIMITED.....2ND RESPONDENT

RULING

1. The application before me is the Notice of Motion by the 2nd Respondent dated 11.2.2019. It is brought under order 1 Rule 10(2) of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and it seeks to have the second respondent struck out from the suit.

2. The Application is supported by affidavits sworn by Mr. Peter Otieno on 11.2.2019 and 18.4.2019. The grounds upon which the application is brought are:-

- (a) Suit does not disclose any sustainable cause of action against the 2nd Respondent.
- (b) There is no evidence of any nexus between the 1st and 2nd Respondents in the suit as they are two distinct entities.
- (c) The Directors for the two companies are different
- (d) There is no evidence that the 2nd Respondent acquired the assets or majority shares of the 1st Respondent.
- (e) There is no memorandum or agreement conferring the responsibilities of the claimant's claim.
- (f) The order for joinder of the 2nd Respondent was given contrary to the Rules of Natural Justice because she was not accorded prior hearing.
- (g) The joinder of the 2nd Respondent was done after an unusual delay considering that the suit was filed in 2004.
- (h) The joinder will delay trial and is otherwise an abuse of the process of the court.

3. The 1st respondent did not oppose the application but the claimant opposed the application by his affidavits sworn on 18.3.2019 and 30.5.2019. In brief, the claimant contended that the application has no merits and should be dismissed with costs. He contended that the joinder of the 2nd Respondent was lawfully done and there is evidence to link the respondents herein and as such there is a reasonable cause.

4. He contended that the Special Report published by the special Committee of the 2nd Respondent confirms that the 1st respondent's assets transferred to the 2nd Respondent. He further contended that the report is properly recorded because the applicant has the original copy in his custody and power. In his view, the 2nd Respondent is a necessary party in these proceedings in order for the court to properly and effectively adjudicate and settle all the questions involved in the suit.

5. The main issues arising for determination are:

- (a) Whether the suit discloses a reasonable case against the 2nd Respondent.

(b) Whether the 2nd Respondent is a necessary party to the suit.

(a) Reasonable cause of action

6. The basis upon which the claimant enjoined the 2nd Respondent to the suit was the Special Report filed as part of the exhibits to be adduced during the trial and which has also been annexed to the Replying Affidavit. The existence of the original report is a fact that has been admitted by the 2nd Respondent in paragraph 12 of the written submissions filed on 24.4.2019 but she contends that it is inadmissible. Paragraph 12 states that:-

“The Special Report was in possession and power of the applicant. The same is therefore secondary evidence governed under section 68 of the Evidence Act. The procedure for the adducing of such evidence is governed as under section 69 of the Evidence Act as reproduced hereunder...”

7. The claimant has however urged that the said Report is properly produced and is admissible by dint of section 68(1) and 69 of the Evidence Act as Secondary evidence. Section 68(1) provides that:-

“(1) Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:-

(a) When the original is shown or appears to be in the possession or power of

(i) The person against whom the document is sought to be proved.”

8. On the other hand section 69 of the Act provides the procedure to be followed for producing secondary evidence, thus:-

“Secondary evidence of the contents of the documents referred to in section 68(1) (a) of this Act shall not be given unless the party proposing to give such secondary evidence has previously given the party in whose possession or power the document is, or to his advocate, such a notice to produce it as is required by law or such notice as the court considers reasonable in the circumstances of the case. Provided that such shall not be required in order to render secondary evidence admissible in any of the following cases:-

(i) ...

(ii) When the nature of the case, the adverse party must know that he will be required to produce it.”

9. The application before me appears to be like the placing of a cart before the horse. The applicant seems to be evading the process of trial, which starts from filing of pleadings and ends with a judgment. The parties in this case are yet to do discoveries and undertake pre-trial hearing. I therefore find that the application has come too early before the claimant can even serve notice to the 2nd Respondent to produce under section 69 of the Evidence Act. He cannot therefore complain that the statutory procedure has not been complied with when discoveries and pre-trial has not been concluded.

10. Article 50(4) of the Constitution provides that evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair or would otherwise be detrimental to the administration of justice. I have already stated above that the issue of admissibility of the said Special Report is being raised prematurely and it should await the pre-trial procedure to be done.

11. The position taken by the court is that the contents of the said Report, and especially the Background Information, prima facie, discloses a reasonable case against the 2nd Respondent. The last paragraph on page 10 of the Report and the first paragraph on page 11 of the Report states that:-

“In the year 2005 EAN changed to GSI Global. All organization were to change accordingly. EAN Kenya had gotten itself entangled in many legal cases and the company could not change its name officially through an Annual General Meeting (AGM).

On April, 8, 2008 the company was incorporated afresh as GSI Kenya Ltd. EAN Kenya was abandoned and left to die naturally. The prefix 616, assets, members, staff, goodwill and Directors were transferred to GSI Kenya seamlessly. This was a landmark move that transferred EAN Kenya to the current GSI Kenya.”

(b) Necessary Party

12. In view of the foregoing finding that the suit discloses a reasonable cause of action against the 2nd Respondent, and in view of the foregoing except from the Special Report intended to be produced during the trial, I find that the applicant is a necessary party in these proceedings in order for the court to settle all the questions raised in the suit including whose assets should be attached to settle any decree of the court which may be passed by the court after the trial in favour of the claimant.

13. In the end, I dismiss the application with costs but for avoidance of doubt, the issue of admissibility is still open to be raised either during the pre-trial hearing or during the trial itself.

Dated, Signed and Delivered in Open Court at Nairobi this 20th day of December, 2019

ONESMUS N. MAKAU

JUDGE