**Kearsley (Kenya) Ltd v Anyumba and others**

**Division:** High Court of Kenya at Nairobi

**Date of judgment:** 15 January 1974

**Case Number:** 1026/1972 (44/74)

**Before:** Harris J

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*[1] Civil Practice and Procedure – Service of summons – Unincorporated association – Summons must*

*be served personally on named defendants – Civil Procedure* (*Revised*) *Rules* 1948, *O.* 1, *r.* 8 (*K.*)*.*

*[2] Civil Practice and Procedure – Notice – To members of unincorporated association – Solely to*

*allow members to apply to be joined – Civil Procedure* (*Revised*) *Rules* 1948, *O.* 1, *r.* 8 (*K.*)*.*

**JUDGMENT**

**Harris J:** This is a motion by the plaintiff seeking, first, an order striking out the joint defence filed by two of the defendants and, secondly, the entering of judgment for the plaintiff as prayed in the plaint. Although notice of the application has been given only to the two defendants who have filed their defence counsel for the plaintiff has indicated that the judgment which he seeks is one against all the defendants. The proceedings began with a plaint filed on 21 June 1972 claiming as against the Gor Mahia Football Club, which is stated to be a society registered under the Societies Act, a sum of Shs. 52,628/75 alleged to be due for air tickets sold by the plaintiff to the club during the year 1969. On 3 July 1972 the plaintiff applied by chamber summons for, and was granted, an order to the following effect: “1. Liberty to plaintiff to join as defendants the nine persons whose names are set out in that behalf in the summons; 2. L iberty to plaintiff to cause to be inserted in one daily newspaper circulating in Kenya notification to all members of the defendant club of the institution of the suit in accordance with O. 1, r. 8, such notification to afford not less than one month to each such member to apply to be added as a defendant to the suit prior to the taking by the plaintiff of any further step in the suit without leave of the court.” An unexplained delay of nearly twelve months occurred in the joinder of the nine new defendants, the amended plaint giving effect to this not being filed until 14 June 1973. Before this step had been taken, however, a notice dated 28 August 1972 and signed by the advocates for the plaintiff appeared in a local newspaper in Nairobi on the 31st of that month containing the following terms:

“NOTICE

To,

1. C hairman – Peter Anyumba.

2. V ice Chairman – Zachariah Mbori.

3. S ecretary – Mahallon Dange.

4. D eputy – Romances Onyango.

5. A ssistant – Albert Ojuka.

6. T reasurer – Polycarp Ochola.

7. A ssistant – Obare Asiko.

8. T eam Manager – Samuel Oleba.

9. A ssistant – John Myamwaya.

AND

To all other the members of the aforesaid Defendant Society.

Take Notice that the Plaintiff in this suit has brought and commenced proceedings against you for the

recovery of Shs. 52,628/75 being the balance of the purchase price of air tickets sold by the Plaintiff at your request during the year 1969 the full particulars whereof are well known to you. The Plaintiff further claims costs and interest. And Take Notice that by an order made in this cause on 3rd day of July 1972, the above-named office bearers of your society are ordered to defend this suit on their own behalf and on behalf of all other the members of the Defendant Society. The said order provides further for the notice of the institution of this suit to be given by the publication hereof. You are required to enter an appearance herein in accordance with the procedure of this court *within* 30 *days of the publication of this notice*. In default the Plaintiff may proceed *ex parte* and Judgment be entered against you, your absence not withstanding.” As will be observed this notice contains two major errors. In the first place it states quite inaccurately that in the order of 3 July 1972 the office bearers named in the notice were ordered to defend the suit on their own behalf and on behalf of all other members of the club. Secondly it purports to require the persons to whom it is addressed to enter an appearance in the suit in accordance with the procedure of this court within thirty days, in default of which the plaintiff might proceed to judgment *ex parte*. Notification of such a requirement can be issued only by the court itself and not by a plaintiff or his advocate. Subsequently to the publication of this notice one Mahallon Danga (possibly the same person as the Mr. Mahallon Dange therein mentioned) entered an appearance in the suit, describing himself as honorary secretary of the club. This was followed on 10 October 1972 by the filing of a defence on behalf of two other persons, namely, Obare Osiko and Alelo Ojuka, neither of whom had entered an appearance but who may be among the defendants named in the amended plaint. Neither of these persons claims to be representing any of the other members of the club. This is the defence which the plaintiff now seeks to have struck out. No defence has been filed by Mahallon Danga (or Dange). On 14 June 1973, as already stated, the plaintiff filed the amended plaint bringing in as representing the club the nine persons named in the notice. The present application nevertheless names the club as the sole defendant, omitting all reference to those nine persons. In support of this application counsel for the plaintiff contends that the terms of the order of 3 July 1972 have been obeyed, that the remaining defendants, notwithstanding that they have been notified through the newspaper advertisement, have taken no action and are therefore in default. He relies on O. 6, r. 9 of the Civil Procedure (Revised) Rules 1948. It is clear that a misunderstanding exists in regard to the purpose of O. 1, r. 8 and the effect of an order made thereunder. The rule is in the following terms: “8. (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested. The court shall in such case direct the plaintiff to give notice of the institution 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. ( 2) A ny 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.” In implementing a direction by the court under this rule to give notice by public advertisement to all persons interested of the institution of a suit a plaintiff is not empowered, nor can the court so empower him, either to order any person to defend the suit or to require such person to enter an appearance, and the terms of the present advertisement which purport to do these things are of no effect. The sole purpose of such an advertisement is to bring to the notice of such persons (in this case the members of the club) the existence of the suit so that any one or more of them who may wish to do so and who is not already a party may apply to the court to be added as a party. Such an advertisement does not take the place of a summons to appear issued under the seal of the court by virtue of O. 4, r. 3 of the Civil Procedure Rules nor does it relieve the plaintiff of the obligation to secure the issue by the Registry and the service of such a summons accompanied by a copy of the plaint. In the present case no such summons seems yet to have been issued and in these circumstances it would be quite incorrect either to hold that the defendants or any other members of the club are in default in not entering an appearance or to give judgment against them in the terms of a plaint with which they have not been served. With respect to so much of the application as seeks to have the defence already filed struck out, I am not satisfied that the third paragraph can be said necessarily to be incapable of affording a good defence to the suit. It is in the following terms: “3. The defendants admit that they have been members and officers of defendant football club but assert that the alleged liability to the plaintiff was not incurred during their membership of the club and nor with their authority and they have no knowledge thereof.” Counsel contends, as I understand him, that membership commencing and terminating at any time, whether before or after the incurring of the debt in the year 1969, would render the members liable for such debt, but this is clearly not the case. For the reasons which I have given the plaintiff’s motion must fail. As there was no appearance by any other party there will be no order for costs.

*Order accordingly.*

For the plaintiff:

*D Cassidy* (instructed by *Shapley Barret & Co*, Nairobi)

No appearance for the defendants