



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCC. CASE NO. 433 OF 2003**

**ROSE FLORENCE WANJIRU (Suing on her own behalf and on behalf of and representing and for the benefit of all persons interested in and being, past, present and future accounts holders with specified banks/institutions in Kenya and includes all those persons enjoined pursuant to the Honourable Court’s order issued on 27.8.2015).....1<sup>ST</sup> PLAINTIFF**

**And 187 other Plaintiffs as named in the Amended Plaint.....2<sup>nd</sup> to 188<sup>th</sup> PLAINTIFFS**

**VERSUS**

**STANDARD CHARTERED BANK KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**HABIL OLAKA (The Executive Director (Secretary).....2<sup>ND</sup> DEFENDANT**

**Of The KENYA BANKERS ASSOCIATION Being Sued**

**On Behalf of the KENYA BANKER’S ASSOCIATION**

**CENTRAL BANK OF KENYA.....3<sup>RD</sup> DEFENDANT**

**IDB CAPITAL LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Notice of Motion dated 18<sup>th</sup> September 2019 seeks the following orders:-

- 1. S. Gichuki Waigwa & Associates are the advocate on record for all the Plaintiffs set out in the Amended Plaint.**
- 2. The 2<sup>nd</sup> to 186<sup>th</sup> Plaintiffs and their claims be struck out.**
- 3. The Plaintiffs do pay the costs of this Application.**

2. Let me start with the first prayer. The suit before Court was commenced by Rose Florence Wanjiru as a representative action through a Plaint dated 22<sup>nd</sup> July 2007 and filed on the same day. Then, as now, she is represented by the firm of S. Gichuki Waigwa & Associates.

3. Through a Ruling dated 27<sup>th</sup> May 2015, 187 other Plaintiffs were joined into the proceedings as co-plaintiffs to Rose Florence Wanjiru. Some of those co-plaintiffs are represented by other firms and not S. Gichuki Waigwa & Associates. Let me give examples. The firm of Kiptinness and Odhiambo Associates represent the 187<sup>th</sup> Plaintiff. The firm of Munyithya Mutugi Umara & Muzna Company Advocates represents the 183<sup>rd</sup> and 184<sup>th</sup> Plaintiffs. Jennifer Shamalla & Co. Advocates represents the 182<sup>nd</sup> Plaintiff. The 188<sup>th</sup> Plaintiff is represented by P. G. Kaingu & Company Advocates.

4. The question is whether or not the Plaintiffs should be allowed to retain more than one advocate on record. This Court has considered the arguments for and against the first prayer and takes the following view.

5. As argued by Counsel Fraser for the Applicant it is old proposition that “co-plaintiffs must appear by the same counsel, and cannot sever their case” (See Halsbury's Law of England 3<sup>rd</sup> edition). In **Zuber Noor t/a Reflos Enterprises –vs- Mefreight Shipping Ltd [2004] eKLR** Mwera J (as he then was) relied on that proposition when he held that:-

**“...and that co-defendants may be represented by different counsel. But it can be added that counsel appearing for co-plaintiffs may acquire service of a leader and this is not considered separate at all”.**

6. This position needs to be considered against the opposing Plaintiffs’ concerns that that applying that rule would be to delimit their right to representation in a manner that is not acceptable.

7. In resolving this matter I bear in mind that the joinder of the 187 Plaintiffs into this matter followed an application for joinder by the Plaintiff’s themselves. That would be a concession that there is a community of interest between the Plaintiffs. It would be expected that the 187 Plaintiffs, in seeking to join the proceedings, were certain that there was no conflict of interest between their various interests *inter se* and with the main Plaintiff and that none was likely to arise in future.

8. I venture to suggest that a rationale for requiring that co-plaintiffs in a representative action do not each have different advocates on record is that a Defendant should not be required to deal with more than one law firm as this can prove to be inconvenient and oppressive to the Defence. One can only imagine how chaotic it may turn out to be, not just for the parties themselves, but for the Court if each and every one of the 188 Plaintiffs chose to appoint different counsel resulting in 188 law firms on record. The law firms representing the Defendants would be required to serve process on 188 law firms and to deal with 188 different law firms. And during proceedings, the Court itself would have to take representation from, possibly, 188 advocates. This in itself could prove to be detrimental to the right to fair hearing of the Defendants.

9. The rights of the Defendants must therefore be put on a scale *vis a vis* that of the Plaintiff’s freedom to choose own counsel. The scales tip in favour of the Defendants as the 187 Plaintiffs’ right would not be seriously jeopardized because they all have a common interest and on their own volition chose to join the 1<sup>st</sup> Plaintiff. If however, any Plaintiff feels it untenable to continue the suit being represented by the agreed firm on record, then it can opt out of the suit and pursue its own proceedings. Order 1 Rule 2 contemplates such possibility and grants power to the Court to order separate trial, it reads:-

**“Where it appears to the court that any joinder of plaintiffs may embarrass or delay the trial of the suit, the court may either on the application of any party or of its own motion put the plaintiffs to their election or order separate trials or make such other order as may be expedient”.**

10. Further there may be some mitigation to the Plaintiffs’ concerns. A way would be hold that it is only the firm of S. Gichuki Waigwa & Associates representing the initial Plaintiff who shall be on record as appearing for the Plaintiffs and if they so wish, the advocates for the other Plaintiffs will act under the umbrella of the firm of S. Gichuki Waigwa & Associates and on arrangement with that firm but cease to be on record. As a practical issue the Court will from time to time give directions as to whether the other advocates can participate in the proceedings and trial and the extent of such participation.

11. This Court has nevertheless noted that this Application should have been brought more promptly and just as soon joinder was permitted by Court. For that, reason all pleadings and documents so far filed by the exiting advocates shall be considered to have been properly filed.

12. I move to the second limb. This is for a striking order against the 2<sup>nd</sup> to 186<sup>th</sup> Plaintiffs. The order is not against the 1<sup>st</sup>, 187<sup>th</sup> and 188<sup>th</sup> Plaintiffs.

13. It is common ground that on 29<sup>th</sup> March 2019 the Court made the following orders:-

**i The Plaintiff to file and serve their claims and bundle of documents within 45 days.**

**ii The Defendant to file and serve their bundle of documents within 90 days of service.**

Common as well is that of the Plaintiffs facing the adverse order only the 183<sup>rd</sup> and 184<sup>th</sup> Plaintiffs have since filed statements and bundle of documents, albeit out of time.

14. It is of course true that willful failure by a party to abide with any pre-trial directions may attract the sanction of the Court. This is also true in respect to a party who fails to respond to an order to furnish particulars.

15. That said, an order for striking out is definitely a drastic order because it brings to an end the action of the Party against whom the order is made. For that reason, this Court will not grant such an order just yet and will grant the defaulting Plaintiffs one last opportunity to comply. As to where there has been late compliance such as by the 183<sup>rd</sup> and 184<sup>th</sup> Plaintiffs, I allow the late filing to be deemed as duly filed and served.

16. The Court’s answer to the motion of 18<sup>th</sup> September 2019 is as follows:-

16.1 Prayer 1 is allowed.

16.2 The 2<sup>nd</sup> to 186<sup>th</sup> Plaintiffs, save for the 183<sup>rd</sup> and 184<sup>th</sup> Plaintiffs shall comply with the order of Court made on 29<sup>th</sup> March 2019 within 45 days hereof failing which the Plaintiffs shall not be permitted to call any evidence at the main hearing.

16.3 Costs of the Application to the 2<sup>nd</sup> Defendant.

**Dated, Signed and Delivered in Court at Nairobi this 28<sup>th</sup> Day of February, 2020**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Waigwa for Plaintiff

Dar for Oraro for 1<sup>st</sup> and 3<sup>rd</sup> Defendants

Fraser for 2<sup>nd</sup> Defendant

Mugo for 183<sup>rd</sup> and 184<sup>th</sup> Plaintiffs

Miss Kipruto for Maweu for 4<sup>th</sup> Defendant

Gicheha for Odhiambo for 187<sup>th</sup> and 188<sup>th</sup> Plaintiffs

Kainga for 188<sup>th</sup> Plaintiff

Court Assistant: Nixon