



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.356 OF 2016

KANURI LIMITED & 34 OTHERS.....PLAINTIFFS

VERSUS

UBER KENYA LIMITED.....DEFENDANT

RULING

1. This suit pits 34 Plaintiffs against Uber Kenya Limited (hereafter Uber Kenya). In the Amended Plaintiff dated 26th October 2016 and filed on 28th October 2016, the Defendant is sued as trading as and/or for and on behalf of Uber B.V, Uber International Holding B.V and Uber International B.V.

2. Together with the presentation of the claim, the Plaintiffs filed an Application for Injunction which was amended by an Amended Notice of Motion dated 26th October 2016. It seeks the following Prayers:-

2. THAT pending the hearing and determination of this application inter-parties and the main suit, an order of temporary injunction be issued restraining the defendants/respondents by themselves, their agents, employees, representatives, servants, proxies, assigns or anyone acting on their behalf from further implementing/imposing upon the Applicants, the 35% fare reduction or the minimum fare rate to Kshs.200/= or by any other percentage/margin different from the initial rate of Kshs.60 per kilometer and minimum fare of Kshs.300.

3. That Motion and the Plaintiff's entire action has been confronted by a Notice of Motion and Notice of Preliminary Objection by the Defendant, both dated and filed on 8th November, 2016. The Motion seeks the following Prayers:-

1. The Amended Plaintiff filed on 28th October 2016 by the 2nd to 34th Plaintiffs be struck out and the suit be dismissed.

2. The Honourable Court do give any other and/or further directions as it may deem fit and just.

3. The costs of this application and of the suit be granted to the Defendant.

The Preliminary Objection is on the following four issues:

1. The 2nd Plaintiff, the Digital Taxi Association of Kenya, is not a legal person and consequently does not have the capacity to sue in its own right.

2. Save for the 6th Plaintiff, Peter Mbugua, the 3rd to the 34th Plaintiffs are non-suited and cannot bring a claim on behalf of the 2nd Plaintiff, the Digital Taxi Association of Kenya.

3. The citation of parties other than the Defendant in the style and manner adopted by the Plaintiffs in the Amended Plaintiff is a nullity in law and has no grounding whether under the Civil Procedure Rules nor under any substantive law. Accordingly, the application and the suit itself are not legally sustainable as against the Defendant.

4. The Amended Notice of Motion is incompetent and was amended unprocedurally rendering it liable to striking out *in limine*.

4. The 1st Plaintiff is described as a Limited Liability Company and is said to carry out Public Transport Business with a fleet of 17 passenger service vehicles. The 2nd Defendant is Digital Taxi Association of Kenya. This is an Association registered under The Societies Act (Cap 108 Laws of Kenya) and claims to be part of the suit on behalf of over 800 members who are said to be Taxi owners, drivers and operators carrying out Public Transport with a cumulative fleet of over 4000 service vehicles. As to the 3rd to 34th Plaintiffs they aver that they are Taxi owners, drivers and operators carrying out Public Transport Business within the city of Nairobi.

5. The entry of Uber services has fundamentally altered the Taxi Sector of Public Transport Business in Nairobi. This action, however, is evidence that its entry into the Kenyan Market has not been without difficulty. Perhaps the teething problems of any business at its infancy!

6. The Plaintiffs allege that, on diverse dates, the Defendant induced the Plaintiffs to deal with it in a Commercial engagement in which the Plaintiffs were lured by Defendant into entering an online agreement, contract and/or arrangement with Uber B.V. The role the Defendant being the clearance/approving agent of Uber B.V.

7. The nature of the online arrangement is that the Plaintiffs would acquire/procure either through purchase, financing or hire, vehicles and commit them for Uber services.

8. The Plaintiffs would have to comply with certain requirements as a prerequisite to being allowed to do business with the Defendant. Those requirements are set out in paragraph 6 of the Amended Plaintiff. I needed not rehash them but suffice it to say that each of the requirements had a financial implication and it is averred that, together with the cost of a vehicle, the Plaintiffs incurred an average cost of Kshs.1,300,000/= on each vehicle.

9. It is further averred that having met the requirements, the Plaintiffs entered an online contract on the understanding, guarantee and assurance by the Defendant that the fee/tariffs to be charged to Uber Clients seeking transport would not be less than Kshs.60 per kilometer with a minimum fare of Kshs.300 per trip. And although the Plaintiffs had the right to charge less than this recommended amount, the primary purpose of the pre-arranged fare was that it was the default amount in the event the Plaintiffs did not opt to negotiate different fares.

10. Agreed as well was that the Defendant would be entitled to 25% of the fare from the proceeds of each trip made.

11. From the contents of the Amended Plaintiff, that arrangement seemed to work well and most of the Plaintiffs acquired more vehicles and committed them to the arrangement. But that may have been short-lived!

12. It is alleged that on or about the 28th day of July 2016, the Defendant, in breach of the contract and in utter contempt and mockery of the Plaintiffs investments and expectations and in total disregard of operational costs and other local market factors, drastically, arbitrarily and without consultation or agreement of the Plaintiffs or any of its partners, dropped the fares to Kshs.35 per kilometer and the

minimum fare to Ksh. 200 per trip.

13. A complaint by the Plaintiffs is that the new fares are not financially sustainable. The Plaintiffs state that the Defendant's unilateral action is actuated by malice and in furtherance of a conspiracy to exploit the Plaintiffs and dominate the Taxi Business.

14. The contents of paragraph 17 of the Amended Complaint would seem critical to the Plaintiff's case against the Defendant as it sets out what the Plaintiff's perceive as the role of the Defendant in this arrangement. It is alleged that the Defendant's operations and dealings are clandestine in nature and executed through proxies. That as currently constituted in Kenya, the Defendant is a Shell Company incorporated and used as an agent by a mysterious, elusive, intangible and indescribable foreign principal. That the Defendant is a facade and a vehicle of fraud and exploitation. The Plaintiffs crave that the corporate veil over the Defendant be lifted.

15. In the end, the Plaintiffs seek the following final orders:-

a. A declaration that the Defendant's actions or reducing the fare rates by 35% to KES 35 per Kilometer and minimum fare to KES 200 were illegal, unsustainable and in disregard of local market factors thus unfair, draconian and is in breach of the contract, the local laws and terms of engagement.

b. An order compelling the Defendant to restore the fare rates to the original amount of KES 60/- per kilometer and minimum fare to KES 300/= with immediate effect.

c. An injunction restraining the Defendant from varying fare rates unless with the consultation and express agreement of the Plaintiffs and a guarantee to that effect.

d. Damages for loss of earnings from the period the fare rates were dropped to KES 35 per Kilometer to the date of restoration of said fare rates to the original rates of KES 60 per Kilometer which amount is to be calculated based on the number of trips done by each Plaintiff during the period of the reduced fare rates.

e. General damages for breach of contract.

f. The costs of this case, interests and any other relief this Honorable deems just and fit to grant.

16. I now turn to consider the issues raised in the Motion and Objection.

17. It is argued that the 2nd Plaintiff, Digital Tax Association is not a legal person and consequently does not have the capacity to sue in its own right. In the Amended Complaint, the 2nd Plaintiff is described as an Association registered under The Societies Act (Cap 108 Laws of Kenya). The gist of the Objection is that the 2nd Defendant being an unincorporated society cannot bring a suit in its own name.

18. There is no controversy that The Societies Act (Cap 108) does not provide the manner in which suits by or against unincorporated Societies can be presented. And it seems settled that suits by or against those Societies must be brought in the names of or against all members of the body or bodies. And where there are numerous members the suit may be instituted by a few members in a representative capacity under the Provisions of Order 1 Rule 8 (**see John Ollenyo Amwayi & others vs. George Abura & others Hccc No. 6339 of 1990, Kenya Federation Vs. Kenya Premier League Ltd & 4 others [2015] eKLR.**)

19. The Plaintiffs counter that Objection by positing that, although unincorporated, the 2nd Plaintiff is a person under the provisions of Article 260 of The Constitution and can sue in its own name and that in any event the Society is properly represented by the 3rd to 34th Plaintiffs who are its members.

20. Article 260 of The Constitution 2010 defines person to include;

‘a company, association or other body of persons incorporated or unincorporated’.

But my understanding is that the definition given therein is for purposes of construing the Constitution. It is not to be applied generally and was never intended to clothe unincorporated societies with legal capacity to sue or be sued in their own name in ordinary litigation.

21. As to whether the 3rd – 34th Defendants represent the 2nd Plaintiff, the answer lies in the Plaintiffs own pleadings. In paragraph 1b, the 3rd to 34th Plaintiffs are unequivocal that they bring the suit in their individual capacities.

22. I fear that the 2nd Plaintiff has no answer to the Preliminary Objection and its name shall ultimately be struck out from these proceedings.

23. It is then asserted that save for the 6th Plaintiff, Peter Mbugua, the 3rd to 34th Plaintiffs are non-suited and cannot bring a claim on behalf of the 2nd Plaintiff, the Digital Taxi Association of Kenya. But in my view this assertion may not go far given that in the Amended Plaint (paragraph 1(b)), the 3rd to 34th Plaintiffs state that they bring their actions in their individual capacities and on the basis of contracts entered individually.

24. As to whether the 1st and 3rd – 34th Plaintiffs can properly consolidate their Causes of Action against the Defendant, is settled by the provisions of Order 1 Rule 1 of The Civil Procedure Rules:-

“1. All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise”.

The Plaintiffs Causes of Action, though separate, are based on individual but similar contracts with the Defendant or its principal and the nature of complaint therefrom is similar. While some of the reliefs sought may differ in quantum (e.g damages sought), most reliefs are of like nature. Their Causes of Action raise common questions of Law and fact and it would be prudent use of judicial time and energy that their grievances be heard and determined together.

25. The 3rd Preliminary Objection is worded very widely as follows:-

3. The citation of parties other than the Defendant in the style and manner adopted by the Plaintiffs in the Amended Plaint is a nullity in law and has no grounding whether under the Civil Procedure Rules nor under any substantive law. Accordingly, the application and the suit itself are not legally sustainable as against the Defendant.

However, in the submissions made to Court the Defendant narrows this Objection to an argument on the Doctrine of Privity of Contract.

26. The Defendant argues that the very foundation of the suit before Court is an alleged Contract entered between the Plaintiffs and Uber B.V and that the Defendant, Uber Kenya Limited, was not privy to that Contract. The Plaintiffs own documents reveal this factual position.

27. Generally, the Doctrine of Privity of Contract postulates that a Contract cannot confer rights or impose obligations on any person other than those who are party to the Contract. Yet what I hear the Plaintiffs to be saying is that the Defendant, Uber Kenya, presented itself as the party to whom the Plaintiff contracted with. That, in so far as Kenya is concerned, it is Uber Kenya who has been enforcing the terms of the Contract. Importantly, the Plaintiffs allege that the Uber Kenya is the vehicle used by its Principals to breach the Contract and to engage in Restrictive and Abusive trade practices and other illegalities. The Plaintiffs allege that the Principals are mysterious, elusive, intangible and indescribable! I understand the Plaintiffs to be saying that the violations of fraud, scheme of secrecy and conspiracy and

abuse of dominant position and restrictive trade practices are directly attributed to both Defendant and its Principals.

28. From the evidence presented to Court alongside the Plaintiff's Amended Motion of 26th October 2016, it is noted that the Uber Taxi Drivers and Owners entered into an online agreement with Uber B.V which is described as a Private Limited Liability Company established in the Netherlands and having its offices in Amsterdam, The Netherlands. On the other hand Uber Kenya Limited has two shareholders namely Uber International Holdings B.V (900 shares), and Uber International B.V (100 shares). From information in a search obtained from the Registrar of Companies these two entities share an address (Vizelstraat 68 1017 HL Amsterdam) with Uber B.V. The Court takes the view that it would be too early to take out the name of Uber Kenya Ltd without a further interrogation as to the exact and nature of relationship it has with Uber B.V and, further, its role in Kenya in the implementation of the Contract entered between Uber B.V and the Plaintiffs. It would be haste to dismiss the Plaintiff's claim against Uber Kenya Limited without further scrutiny as to whether Uber Kenya bears separate civil culpability (from Uber B.V) in the manner in which the contract has been implemented in Kenya. The Court would dismiss that objection.

29. But having said that, it should be easily evident that the Plaintiffs claim as currently brought may run into headwinds. Even if it is accepted that Uber Kenya Ltd is a Vehicle for deceit and fraud on behalf of Uber B.V or that it in the face of Uber B.V in Kenya, the Plaintiffs will be faced with a daunting task to prove their claim without enjoining Uber B.V which is the primal party to the contracts that form the foundation of the action herein. In respect to certain grievances, the Plaintiffs may not be able to sustain those allegations without enjoining the disclosed principle (see **Victor Mabachi & Anor Vs. Nuturn Bates Ltd**[2013] eKLR).

30. The Amended Notice of Motion of 26th October 2016 amended the earlier Notice of Motion of 31st August 2016. But this was done without leave of the Court and that is what the Defendant sees as a fatal infraction of procedure.

31. It is settled, and common ground, that just like a pleading, an application (be it a Notice of Motion or Chamber Summons) can be amended (see **Fredrick Mwangi Nyage vs. Garam Investments & Another** [2013] eKLR where Havelock J. paid homage to the Court of Appeal's decision in (**Echaria vs. Echaria**). What is in issue is whether there would be occasion when there can be an amendment to an application without leave of Court.

32. The stance of the Defendant is that, not being a pleading, amendment to an Application cannot be dealt with under the Provisions of Order 8 Rule 1 of the Civil Procedure Rules and falls to be dealt with under Section 100 of The Civil Procedure Act. Section 100 provides:

“100. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

33. The Plaintiff's answer is that the above Provision of substantive Law does not concern procedure for Amendment. It merely confers powers to Court to amend any defect or error in any proceedings. And I must add to make or allow all necessary amendments for the purpose of determining the real question or issues raised in the proceedings.

34. There being no specific procedure provided, the Plaintiffs argue that the provisions of Order 8 Rule 1 applies. This reads:-

1. (1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed,

35. The Courts power to amend is generally granted by primary legislation in Section 100 of the Civil Procedure Act. In respect to Pleadings, Procedure for the exercise of that right or power is set out in

Order 8 of The Civil Procedure Rules. But there is no corresponding procedure in respect to the amendment of Application. And where there is need to move the Court for Leave to amend a Notice of Motion, the Application for Leave would have to be brought under the Provisions of Order 51 Rule 1 of The Civil Procedure Rules:-

“1. All applications to the court shall be by motion and shall be heard in open court unless the court directs the hearing to be conducted in chambers or unless the rules expressly provide”.

36. That said, the question to be answered is whether there is occasion when an amendment to a Notice of Motion can be effected without Leave of Court.

37. The straightforward answer to this seems to be that, because of lack of Provisions similar to Order 8 Rule 1 which expressly permits the amendment of Pleadings without leave, the sanction of the Court must always be sought through an application brought under the auspices of Order 51 Rule 1 of The Civil Procedure Rules.

38. Given that answer, must the Amended Notice of Motion of 26th October 2016 suffer an immediate and abrupt end?

39. Whilst, as a General Rule, because of lack of similar provisions to Order 8 Rule 1, all amendments to Applications must be made with Leave of Court, a Court should be slow to strike down an amendment brought without Leave if it is done before the Respondent has filed an answer or response to the original application unless it can be shown that the amendment prejudices or causes an injustice to the opposite side. This test of prejudice or injustice is important because procedural law is a handmaiden of substantive justice and it should not be allowed to obstruct it.

40. And I would think that the prejudice test is one of the motivations for the Provisions of Order 8 rule 1 (1) which allows a party to amend his pleadings once at any time before pleadings are closed without requiring the Leave or sanction of the Court. In that instance the amendment is brought early in the proceedings and the Defendant has good opportunity to confront the pleadings in their amended form. In that way the amendment may not prejudice the other side.

41. Here, the Amended Application was filed about two months after the original Motion. Not much time had passed in between. And critically, it was filed before the Defendant had filed any response to it. In addition it was the first amendment to the Motion.

42. Against this is an argument made by the Defendant that the amendment is prejudicial because the Motion as amended now seeks prayers against a party who has nothing to do with the Plaintiff's grievances. My short observation to this argument is that the substantive joinder of the Defendant to this action in place of Uber B.V was through the Amendment to the Plaint and not the Notice of Motion, the Plaint itself having been amended without Leave on the same day as the Amended Notice of Motion. And there is no objection to the manner in which the Plaint was amended. What the amended Notice of Motion does is to align it with the cause of action as set out in the Amended Plaint. The real prejudice, if any, would therefore have been in the Pleadings.

43. In any event, the Defendant has opportunity to file a response or answer to the Amended Motion and to demonstrate that it is not the proper Defendant. For now the Court excuses any blemish on the amendment to the Notice of Motion.

44. In the end the Notice of Motion and Preliminary Objection (both of 8th November 2016) succeed only to the extent that the 2nd Plaintiff's name is struck out from the suit with costs to the Defendant. The Notice of Motion and Preliminary Objection otherwise fail.

45. Because of the partial success and substantial failure, the Plaintiffs shall have 2/3 costs on the Notice of Motion and Preliminary Objection of 8th November 2016.

Dated, Signed and Delivered in Court at Nairobi this 30th day of March,2017.

F. TUIYOTT

JUDGE

PRESENT;

Ekuru & Mutuma for Plaintiff

Njogu & Siyakei for Defendant

Alex - Court Clerk