REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 398 OF 2005

TECHNOMATIC LIMITED

T/A PROMOPACK COMPANY …… PLAINTIFF

VERSUS

KENYA WINE AGENCIES LIMITED ……..…….....……. DEFENDANT

AND

JASWINDER S. OBHRAI ……..…… PROPOSED INTERESTED PARTY

R U L I N G

1. **Jaswinder S. Obhrai** calling himself a proposed Interested Party lodged a Chamber Summons dated 23rd May 2013 but only filed on 6th June 2013. The Application was brought under the provisions of **sections 3 & 3A** of the *Civil Procedure Act* as well as **Order 1 rules 10 and 14** of the *Civil Procedure Rules, 2010*. The Application sought for Mr. Obhrai to be joined as an interested party to this suit. The Application was predicated upon the following grounds:

> **"1. THAT the Proposed Interested Party is a bona fide holder in due course of a promissory note dated 24th day of November, 2004 for a sum of Kshs. 16,960,828.00 issued by the Respondent Company herein.**
>
> **2. THAT the Proposed Interested Party as such bona fide purchaser, he is likely to be affected by the orders of this Honourable Court that may be made in this suit.**
>
> **3. THAT being such bona fide purchaser, the Proposed Interested Party is deserving of being enjoined in this suit has its input will help the court herein reach a sound decision with respect to the subject matter herein.**
>
> **4. THAT the Proposed Interested Party contends that no determination can be made on the promissory note, which is in issue in the instant suit, without his input as the bona fide purchaser.**
>
> **5. THAT the rights and interests of the Proposed Interested Party will be greatly prejudiced if this suit and the said application is allowed to proceed in his absence.**

6. THAT the Proposed Interested Party is therefore a necessary party to these proceedings to enable the court effectively determine the matters in question".

2. The Application was supported by the Affidavit of Mr. Obhrai sworn on even date therewith and noted that he was the *bona fide* holder in due course of a promissory note (hereinafter "the promissory note") dated 24th November 2004 in the amount of Shs. 16,960,828/- issued by the Defendant company herein. The deponent noted that on 5th December 2007, he had sent a letter to the Defendant demanding for the payment and/or redemption of the promissory note. The Defendant had failed and/or neglected to honour the promissory note. The deponent had been advised by his advocates on record that as a holder in due course, he was entitled to receive payment from the Defendant company upon demand or presentation of the promissory note. As a result, notice having been given to the Defendant Company, it was indebted to Mr. Obhrai in the said sum as above. The deponent went on to say that he had made various attempts at getting the promissory note settled by the Defendant but the same had been futile because the promissory note was in issue in this suit. He had been advised by his advocates on record that it was necessary for him to be enjoined in the suit so that his rights and/or acquired interest over the promissory note may be determined.
3. The Defendant filed a detailed Replying Affidavit through its Company Secretary and Legal Officer one **Doris M. Thangei** sworn and filed on 25th July 2013. The deponent first noted that Mr. Obhrai had filed a Winding-up Cause as against the Defendant being No. 17 of 2010. That Petition was based on the premise that the Defendant had been unable to pay the sum of Shs. 42,675,531.35 inclusive of interest which was the principal amount of Shs.16,960,828/- plus accumulated interest at the rate of 18% per annum, such claim being anchored on the promissory note. Through a Chamber Summons dated 18th August 2010 filed in the Winding-up Cause, the Defendant had sought for the Petition to be dismissed. This was upheld by the Court on 18th July 2012 when the said Petition was struck out with costs. The Defendant had maintained in the said Winding-up Cause that Mr. Obhrai was not a *bona fide* holder of the promissory note in due course. Mrs. Thangei attached to her said Affidavit copies of the pleadings and proceedings in **High Court Petition No.17 of 2010**. The deponent then went on to refer to the list of documents filed by the Plaintiff herein dated 7th September 2007 as well as the Supplementary list dated 23rd April 2013. She had also had occasion to peruse the Witness Statement by one **Navdeep Singh Mehta** dated 20th December 2012. Nowhere in that documentation had the Plaintiff stated that the promissory note issued by the Defendant Company was assigned to Mr. Obhrai. The deponent maintained that it was delusionary of Mr. Obhrai to state that he had purchased the promissory note from the Plaintiff and that he was the *bona fide* owner of the same. As far as the Defendant was concerned, Mr. Obhrai was a busybody who sought to enter these proceedings in order to muddle them and to cloak them without any legal premise. Mrs. Thangei believed that no purpose would be served by Mr. Obrhai being enjoined as an interested party to this suit and that she had been advised, in any event, by her advocates on record, that the *Civil Procedure Rules, 2010* do not hold any position in law as an "Interested Party".
4. In response to the Defendant's Replying Affidavit, Mr. Obhrai swore a Further Affidavit dated 25th October 2013. He noted that he had been advised by his advocates on record that in **High Court Petition No. 17 of 2010**, he had not sought for the winding up of the Defendant company for failing and/or refusing to honour the promissory note. The deponent maintained that the Petition was struck out on 18th July 2012 on a technicality in that the Court found the Petition to be premature. The merits of the Petition were never dealt with. Mr. Obhrai went on to say that the promissory note had been issued by the Defendant herein to the Plaintiff herein and the latter had duly endorsed the same in his favour. As a result of such endorsement, he had been advised by his advocates on record that he was entitled to be enjoined in the proceedings herein. He denied being a busybody or that he was attempting to meddle as regards this suit. The issues raised in his said Application before Court were meritorious and should be canvassed during the hearing of the suit in due course. He concluded by saying that the interests of justice could only be met by the Court granting his said Application, as the Defendant would not be prejudiced in any way if the same was allowed.
5. Mr. Obhrai's Submissions as regards his said Application were filed herein on 14th January 2014. After setting out the details and grounds of the said Application, he detailed the background and

the facts thereof. He emphasised that he was the holder in due course of the promissory note in the sum of Shs. 16,960,828/-. He maintained that the promissory note formed part of the subject matter in the instant suit and was exhibited in the Plaintiff's bundle of documents herein. Mr. Obhrai then pointed to **Order 1 rule 10 (2)** of the Civil *Procedure Rules, 2010* as well as to the case of ***Kimiti v Njogu*** **(2005) eKLR** in which **Okwengu J.** had detailed:

"The answer to this is found in Order 1 rule 9 & 10 of the Civil Procedure Rules which gives the court the discretion to substitute or add parties to proceedings at any stage provided their presence is necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. This provision does not restrict the court to adding only a co-plaintiff or Co Defendant or a 3rd party only as maintained by the Respondents. I therefore overrule their objection in this regard and grant leave to the applicant to be joined as an interested party to this suit as his presence is necessary to enable the court to effectually adjudicate upon all the issues."

6. Mr. Obhrai also referred the Court to the case of **Giro Commercial Bank Ltd v Shreeji Enterprises (K) Ltd & 3 Ors** **(2006) eKLR** in which **Ransley J.** had commented as regards promissory notes:

"In this case the 1st Defendant did not get back the promissory notes it had given to the 2nd Defendant. A Promissory Note is like a financial timebomb in that the maker remains liable on it until such time as he receives back the promissory notes and cancels the same."

Thereafter, Mr. Obhrai noted that the Petition in **Winding-up Cause No. 17 of 2010** had been struck out for being premature and was not, therefore, determined on its merits. He concluded that the Defendant, having disputed that he was a *bona fide* holder in due course of the promissory note in the Petition as above, was not in a position so to do. The law relating to promissory notes precluded the maker thereof from denying to a holder in due course the existence of the payee and the latter's capacity to endorse the same over.

7. The Defendant's submissions in opposition to the enjoinder of Mr. Obhrai to this suit were filed herein on 13th March 2014. The Defendant set out the grounds in support of the Application before Court and submitted that Mr. Obhrai had no legal standing and that the Court had no jurisdiction to entertain the Application leave alone grant the Orders sought. The Defendant submitted that the jurisdictional authority invoked by Mr. Obhrai was **Order 1 rule 10 (2)** of the *Civil Procedure Rules*. **Sections 3 and 3A** of the *Civil Procedure Act* were inapplicable "there being no lacuna for them to fill" and that **Order 1 rule 14** was a procedural section for access to the Court for orders under **Order 1 rule 10**. I must confess that I did not quite appreciate what the Defendant was getting at so far as this submission was concerned. However in order to clarify the point, the Defendant noted that under **Order 1 rule 10 (2)** it was for the Plaintiff or the Defendant to invoke that rule in order to have Mr. Obhrai enjoined as a party hereto. Neither the Plaintiff nor the Defendant had made any such application.
8. The Defendant maintained that Mr. Obhrai was a busybody and had not sought any relief against either the Plaintiff or the Defendant but sought to "stroll into the proceedings and be spectator". Such was a role that could be fulfilled without the applicant being made a party. Mr. Obhrai had not demonstrated to this Court that the ultimate Order or Decree being issued in this suit could not be enforced without his participation in the proceedings. Although he alleged to be a *bona fide* holder in due course of the promissory note, such did not make him a necessary or proper party to be enjoined in the suit. He could be called as a witness but he had no legal basis to be enjoined as an interested party. He had no cause of action against the Defendant and had not pleaded any. The rights (if any) that Mr. Obhrai was claiming (and which the Defendant denied) took place on 5th December 2007, three years after this suit was filed in Court. The Defendant maintained that the submissions filed by Mr. Obhrai were framed on a complete misapprehension of the law and the authorities relied upon were distinguishable. As regards its own authorities, the Defendant referred this Court to ***Njau v Nairobi City Council*** **(1982-88) 1 KAR 242,** ***Samuel Kamau Macharia & Anor. v Kenya Commercial Bank Ltd & 2 Ors*** **Supreme Court Application No. 2 of 2011**

(2012) eKLR, *Kingori v Chege & 3 Ors* (2002) 2KLR 250 and **Commissioner of Income Tax v Westmont Power (K) Ltd (2010) eKLR** citing the case of **City Chemist (Nairobi) & 2 Ors v Oriental Commercial Bank Ltd Civil Application No. NAI 302 of 2008 (unreported)**.

The Defendant concluded its submissions by maintaining that the Application before Court was incurably incompetent and could not be cured by **sections 3 and 3A** of the *Civil Procedure Act*.

9. Of all the authorities cited to court by Mr. Obhrai on the one hand and the Defendant on the other, I found most assistance as regards joinder of parties from the Judgement of **Nambuye J.** in the **Kingori v Chege** case (supra). The learned judge thoroughly reviewed the law and considered the **Code of Civil Procedure** which although not detailed in the text, I must presume was the definitive volume by **Mulla**. The Judge detailed as follows:

"The respondents referred the Court to look on the Code of Civil Procedure page 1006 paragraph 3 it is stated "the Court may at any stage of the proceedings whether upon or without the application of either party and on such terms as may appear to the Court to be just order that the name of any party improperly named whether as plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit be added. Page 1008 paragraph 1 that "the Court must be satisfied before the application is granted that the amendment has become necessary through a bona fide mistake which instance may be of fact or law". Page 1016 paragraph 5 states "parties cannot be added so as to introduce quite a new cause of action". Paragraph 6 states "parties cannot be added so as to alter the nature of the suit". Page 1018 paragraph 10 states that "necessary parties who ought to have been joined that is parties necessary to the constitution of the suit without whom no decree at all can be passed". Page 1019 in the case of a defendant two conditions must be met:

1. **There must be a right to some relief against him respect of the matter involved in the suit.**

2. **That his presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit …….. A proper party was one without whom no decree can be made effectively. A proper party is one in whose absence no effective order can be made but whose presence is necessary for a complete and final decision on the questions involved in the proceedings. Paragraph 4 a proper party is one who has a designed subsisting direct and substantive interest in the issue arising in the litigation. An interest which will be cognizable in the Court of law. That is an interest which the law recognizes and which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. Page 1026 paragraph 11 it states a person may be added as a defendant to a suit though no relief may be claimed against him provided his presence is necessary for a complete and final decision of the questions involved in the suit. Such a person is called a proper party as distinguished from a necessary party".**

Order 1 rule 10 (2) states 'the Court may at any stage of the proceedings either upon or without the application of either party under such terms as may appear to the Court to be just order that the name of any party improperly joined whether as a plaintiff or defendant be struck out and that the name of any person who ought to have been joined whether as a plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit be added'.

When the above principles are applied to the facts of these applications it is clear that the guiding principles when an intending party is to be joined are as follows:

1. **He must be a necessary party.**

2. **He must be a proper party.**

3. **In the case of a defendant there must be a relief flowing from that defendant to the plaintiff.**

4. **The ultimate order or decree cannot be enforced without his presence in the matter.**

5. **His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit".**

10. It must be remembered that Mr. Obhrai applied to be enjoined on his own as a party to the suit. Neither the Plaintiff nor the Defendant made such application and it seems that the Plaintiff is fairly indifferent as to whether Mr. Obhrai is enjoined or not. It is the Defendant who has virulently objected to his being enjoined. What is not clear from the Application before Court is just what Mr. Obhrai is seeking out of this suit by way of remedy as against the Plaintiff or the Defendant. From the pleadings herein the Plaintiff seeks judgement as against the Defendant in the amount of Shs. 25,751,017.55 together with costs and interest. In the body of the Plaint at paragraph 6 there is mention of the promissory note for the payment of Shs. 16,960,828.00 with a due date of 2nd January 2005, which was issued by the Defendant presumably towards part settlement of the amount claimed by the Plaintiff. Paragraph 7 of the Plaintiff details that the promissory note was dishonoured but without saying exactly when that occurred. There is also no mention in the Plaint of the endorsement of the promissory note by the Plaintiff to Mr. Obhrai. However in the witness statement in support of the Plaintiff's claim by the said Mr. Mehta, he details:

"The Plaintiff has subsequent to the filing of this suit sold on the Promissory note in order to keep the company afloat since the defendant's actions have negatively impacted on the cash flow of the Plaintiff, but even that process of selling the promissory note has been sabotaged by the defendant."

What Mr. Mehta does not say is exactly to whom the promissory note was sold although Mr. Obhrai has detailed in his Supporting Affidavit that he purchased the same for value. However, does this give Mr. Obhrai any status to become involved in this suit?

11. The one area in which I am in agreement with the submissions of Mr. Obhrai is as regards the **Winding-up Petition No. 17 of 2010**. I have perused the ruling of **Njagi J.** delivered on 18th July 2012. The learned judge dwelt at length as to the requirement under **section 220** of the *Companies Act* that a formal demand should be made for the sum claimed by a creditor as against the company by the giving of 21 days' notice. The judge found that such notice had not been given by Mr. Obrhai or his advocates, merely a 7 day notice. The judge went on to say:

"For the above reasons, I find that the petition herein was filed prematurely and the Company's inability to pay its debt has not been fully and properly tested. Furthermore, paragraph 6 of the Further Amended Plaint dated 5th October 2006 and filed in court on 6th October, 2006 demonstrates clearly that the amount of money in the promissory note was, prima facie, interwoven with the total sum claimed. In the circumstances, one can understand why the court declined to give summary judgement in this matter for that sum alone."

In my view, the learned judge correctly summarised the position with regard to this suit. I do not really see the relevance of the promissory note in this suit when taking into account the whole sum claimed as against the Defendant by the Plaintiff. The promissory note having been dishonoured as detailed in the Plaint herein, plays no further part in the prayers sought by the Plaintiff. The fact that the promissory note was issued by the Defendant is in my view by the by in relation to the Plaintiff's claim.

12. At this stage, I must necessarily comment upon the submission by the Defendant in relation to the specific wording of **Order 1 rule 10 (2)** of the *Civil Procedure Rules*. I have no hesitation in adopting the finding of **Nambuye J.** in the **Kingori v Chege** case (supra) as follows:

"The operative words in order 1 rule 10 (2) of the Civil Procedure Rules are 'either upon or without the application of either party'. The use of the words 'either party' denotes that the formal move has to be made by a party already participating in the proceedings. There is no addition of use of the words 'or any other party or 3rd party' under that rule. It would seem that an intending party cannot come in on his own and choose which position he wants."

13. To come back to the guiding principles when an intending party is to be joined, I find, so far as Mr. Obhrai is concerned:
    a. That he is not a necessary party
    b. That he is not a proper party
    c. Should he be joined as a defendant I find that there is no relief flowing to him from the Defendant herein under the prayers in the Plaint
    d. The ultimate Order or Decree which emanates from this suit can be enforced without his presence in the matter
    e. I do not consider that Mr. Obhrai's presence is necessary to enable this Court to effectively and completely adjudicate upon and settle the questions involved in this suit.

As a result, I find that the Chamber Summons dated 23rd May 2013 brought by Mr. Obhrai to be without merit and I dismiss the same with costs to the Defendant.

DATED and delivered at Nairobi this 26th day of June, 2014.

J. B. HAVELOCK

JUDGE