REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION AT MILIMANI LAW COURTS

CIVIL CASE NO 433 OF 2003

ROSE FLORENCE WANJIRU

(Suing on her own behalf and on behalf of and representing all persons interested in and being past and present accountholders with specified banks in Kenya) ..... PLAINTIFF

Versus

STANDARD CHARTERED BANK OF KENYA LIMITED.....1ST DEFENDANT

J.K. WANYELA, EXECUTIVE DIRECTOR KENYA BANKERS ASSOCIATION.....2ND DEFENDANT

CENTRAL BANK OF KENYA.....3RD DEFENDANT

RULING

Representative suit

[1] This suit is a representative suit commenced under Order 1 Rule 8 of the Civil Procedure Rules (hereafter the CPR). It involves numerous people who share a community of interest in the subject matter of the suit, which Order 1 Rule 8 of the CPR was intended to serve to prevent a multiplicity of suits by such huge number of interested persons. Although it is alleged that 20 Million customers are targeted, there is not statistics or data presented to the court in support of the specific number of persons targeted.

The Issue

[2] The issue that emerges for determination is: what is the core or essential content of a notice by public advertisement under Order 1 rule 8(2) of the CPR. That is discernible from the Chamber Summons dated 2nd August, 2003, the addendum provided as the sample notice and the arguments of the learned counsels of the parties.

[3] Order 1 Rule 8 of the CPR provides as follows:

> **Rule 8**
>
> **(1) Where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.**
>
> **(2) The parties shall in such case give notice 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.**
>
> **(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the court to be made a party to such suit.**

[4] Rule 8 above ordains in mandatory terms that notice of the suit must be given to all persons on whose behalf or for whose benefit a suit is instituted or defended, and such notice shall be given 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. There is not a dispute this suit is a perfect candidate for Notice to be given by Public Advertisement because of the huge number of persons on whose behalf or for whose benefit the suit is instituted. The only quarrels by Mr Frazer and Mr Oraro is on the contents of the proposed public advertisement and have objected to some items in the addendum which was submitted to court. Whereas I admit that Rule 8 of Order 1 of the CPR has received a sufficient treatment by the courts, the points being raised by Mr Frazer and Mr Oraro are quite nascent and calls for as thorough legal scrutiny. The objections which the court is called upon to decide are discussed below.

Submissions by the Applicant

[5] The Applicant, through her legal counsel Mr Waigwa, defended the content of the Addendum which contains the proposed public advertisement under Order 1 rule 8(2) of the CPR. Counsel also defended the Applicant's intention to advertise the order which allowed the notice of suit to be given by public advertisement. Mr Waigwa submitted that the notice as represented by the Addendum fully complies with the law. First, the proposed Public Advertisement has simply given a simple explanation of the suit and asked the persons on whose behalf or for whose benefit the suit is instituted to either join the suit through an advocate of choice or the current advocate for the Plaintiff. Counsel argued that such persons are entitled to legal counsel and there is nothing wrong with stating the obvious. All that information in the Addendum is necessary for the benefit of over 20 Million customers the suit is targeting. They have the right to as much information as possible and any restriction of the amount of information will be an inhibition to the number of persons targeted. The court should not, therefore, restrict the information from reaching the identified class of suitors herein. Mr Waigwa cited **Mulla*, The Code of Civil Procedure ACT V OF 1908*; Sixteenth Edition** on the nature of the notice to be given under rule 8 of Order 1 of CPR.

[6] Mr Wagwa did not stop there. He argued further that the size of the advertisement and the content in so far as it relates to useful information should not be restricted; in any event it is the Applicant who will bear the cost of the advertisement. Borrowing from the practice of substituted service, Mr Waigwa urged that there is no particular format that is prescribed for advertisement, and, therefore, the proposed format in the Addendum is appropriate and sufficient. He took issue with the proposal by the Respondents that there should be time limitation as to when the persons on whose behalf the suit is instituted should apply to be joined. According to him, Order 1 rule 10 of the CPR, permits parties to apply at any stage of the proceeding to be joined in a suit. In any case, he submitted, there is no prejudice that will be caused to the Respondent by having the information in the sample advertisement.

Submissions by the Respondents

[7] Mr Frazer did not object to items 1 and 2 of the addendum which he stated are appropriate. Item 1 relates to the description of the party who has filed the representative suit and that the suit is representative. Item 2 gives a brief summary of the suit. He objected to items 3, 5, 6 & 8 of the Addendum for the reason that those items are not necessary under Order 1 rule 8(2) of CPR. Mr Frazer was of the view that the advertisement is to give notice of the suit and should not be attended to by unnecessary information such as the right to appoint counsel of choice or to instruct the one on record. To him, explanation of the suit is not permitted in law. Under rule 8(2) of Order 1 of the CPR, the Public Advertisement may only give a brief summary of the suit. He raised yet another point; that the court should place a limitation as to when such persons who are the subject of the advertisement should apply to be joined. According to him, the larger the number of prospective parties, the more the necessity to place a limitation to apply to be joined lest we should find ourselves with litigation without end. He urged that rule 8 is the instructive provision and so rule 10 of Order 1 of CPR will not apply in this application. For those reasons, he urged the court to reject the items objected to.

[8] Mr Oraro was present during the first session of the proceedings but he was absent at the hearing of the application as had been scheduled by the Court. Albeit belatedly, he sent another counsel, Mr Ochieng to inform the court that he was before another judge and would be pleased if the court could wait for him so that he makes his submissions. The said counsel alerted the court of that position after the other counsels had already completed their submissions and the court was giving its directions on the ruling date. The court appreciated the courtesy shown by Mr Oraro but decried that counsel should have been keen to wait on the court rather than the vice versa. The court also noted that the proceedings had already closed and the application was made too late in the day. The court noted further, that Mr Oraro had earlier indicated to the court that he fully associated himself with the submissions by Mr Frazer. With that comfort, the court proceeded to reserve the ruling on the substantive issues to be delivered on Notice.

COURT'S RENDITION

Objections to Content: Legal Basis

[9] I find the argument by Mr Waigwa challenging the legal basis for the objections herein to be of preliminary importance and I propose to determine it *in limine*. Contrary to the counsel's submission, objections as to the contents of the proposed public advertisement under rule 8 of Order 1 of the CPR are in the nature of the mandatory directions which the court must give under the rule; nature and manner of giving the notice. Secondly, the objections are not a mere technicality which can be diminished by Article 159 of the Constitution as urged by the counsel for the Applicant; the objections raise a substantial question on the core or essential content of a notice under rule 8 of Order 1 of the CPR; an attack on compliance of the notice with rule 8 which is not by any stretch a matter of mere form. Therefore, the objections on content of the notice are substantive and properly grounded in law; they provide practical and legal effect to the essential core requirements in rule 8. I am persuaded by what Kiryabwire J said on the subject herein in the Ugandan Case of **IBRAHIM BUWEMBO, EMMANUEL SSERUNJOGI, ZUBAIRI MUWANIKA FOR AND ON BEHALF OF 800 OTHERS v UTODA LTD HCCS NO. 664 OF 2003** on the provisions of the Civil Procedure Code of Uganda similar to those in Order 1 Rule 8 of the Civil Procedure Code, 2010 for Kenya. The learned judge had the following to say:-

> **"It would appear to me that the wording of O1 r8 (1) with regard to notice either by personal service or by public advertisement as the court may in each case direct is mandatory. Furthermore, the requirement to give a proper notice cannot be regarded a mere technicality or direction that can be dispensed with''.**

[11] Needless to say that, the scrutiny by the court of the content of the notice by public advertisement serves important purposes, namely; 1) to safeguard the rights of all the persons suing or being sued; and 2) the sanctity of process of the court. This is understood well when you fathom that a public advertisement under Order 1 rule 8(2) of the CPR brings the suit to the attention of and informs the persons interested of their right to apply to be made parties in the suit. It is thus the enabler of access to justice and gets them impleaded in the suit, either to support the case or to defend against it. It also gives

the persons interested the opportunity to know the person who has been selected to represent them. Therefore, to bind parties with a community of interest in one suit, a proper notice must be given. See the case of **J.J. CAMPOS & ANOTHER v A.C. DESOUZA & 5 OTHERS (1933) KLR 86** and **Mulla on the Code of Civil Procedure** on the subject**.** For the sake of jurisprudence around the subject of this case, I should emphasize that a Notice by public advertisement should not be seen or used as: 1) an opportunity to pass on adverse information or litigate the case through the notice so as to injure the other party, and the course of justice; or 2) an avenue to amend pleadings or depart from the original suit. Such is perverted practice which if it were to prevail, would turn the notice into a subsequent pleading to which, I doubt, the Respondent will have any opportunity to put a rejoinder or have the Applicant recant the offending material; except, perhaps to fall back to the law on subjudice, contempt of court or defamation which may not really offer any or sufficient remedy to the injured party. I have laid down the legal dimensions on the subject matter; I now turn to determine the substantive points.

Nature of notice under O 1 RR 8(2) of CPR

[12] The real issue in this case is the nature of the notice by public advertisement under rule 8(2) of Order 1 of the CPR. Or put in other words, what should the notice under rule 8 of Order 1 of the CPR contain or not contain? And on the appropriate test in law, does the Addendum herein pass for a notice by public advertisement under rule 8 of Order 1 of the CPR? I am content to cite the following passage in **Mulla on *Code of Civil Procedure*** which is quite apt in resolving the issues before me, that:

> ‘’**…the courts, where called upon to deal with an application under Order 1 rule 8, should bear in mind that the provisions contained therein are mandatory and not merely directory, and are essential preconditions for trial of the case as a representative suit. They must see that if they direct that the notice should be by public advertisement, the notice must disclose the nature of the suit as well as the reliefs claimed therein, in order to enable the persons interested to get themselves impleaded as parties to the suit, either to support the case or to defend against it. Further, the notice must mention the names of the persons who have been permitted to represent them, so that the persons interested may have an opportunity of knowing who has been selected to represent them’’.**

[13] Yet another work which is as instructive is found in the words of Kiryabwire J in the Ugandan Case of **IBRAHIM BUWEMBO (supra)** that:-

> ‘’...**The notice by public advertisement must disclose the nature of the suit as well as the reliefs claimed so that the interested parties can go on record in the suit either to support the claim or to defend against it”**

[14] The above literally and judicial work by Mulla and Kiryabwire J enables the court to enter into a more interrogating judicial discussion on this case. The way I understand Order 1 rule 8(2) of the CPR, the notice to be given to all person interested, is that of the suit. No difficulties would arise where personal service of the notice is adopted; the notice will be a short one and accompanied by the actual pleadings filed in court. More trouble is found when the notice of the suit is to be given by a public advertisement, and the court is not surprised at the objections which have been raised in this case. **Mulla on the *Code of Civil Procedure*** also recognizes special attention should be paid to the content of notice by public advertisement. And I am glad these objections provide occasion for the court to determine on the core or essential content of the notice by public advertisement under rule 8(2) of Order 1 of the CPR.

Order allowing public advertisement

[15] I am not being monotonous by stating the obvious; I am forced to by the arguments of counsels herein. First and foremost, the notice by advertisement should declare on the face that it is being advertised pursuant to the order of the court, the date of the order and the judicial officer who issued it too be indicated appropriately. However, there is no legal or any practical significance in advertising the full rendition of the order which authorized the advertisement as the Plaintiff proposes to do. The Plaintiff is accordingly directed on that issue. I move to other more complex arguments.

Scope of notice

[16] Without doubt, the phrase ‘’notice of the suit’’ used in Order 1 rule 8(2) of the CPR refers to the nature of the suit as well as the reliefs claimed therein**.** But, that scope does not include explaining the suit through the notice as that would very nearly amount to litigating the case through the notice. It bears repeating, that any contrary view would be problematic and will attract serious constitutional objections on the basis that;

1) it will afford the Plaintiff unfair advantage;

2) it will become a source of prejudice to the Defendants; and

3) a smack on the administration of justice which may in a way border the wider concept of *subjudice.*

[17] The nature of the case consists in a brief summary of the cause of action and the reliefs sought without providing evidence or elaborated facts. The brief summary should be couched in words or phrases which are as nearly as possible drawn upon and used in the plaint or other primary pleading filed by the party issuing the notice. In that case, the preferred style and model of the public advertisement is a sort of a modified précis-writing of the suit, which many of us did in our elementary education: make a clear presentation of the salient cause of action and relief sought in the suit by, as far as possible, lifting terms and phrases from the original pleadings and leaving no room for adornments. That approach will avoid prejudice to the Defendants and the administration of justice in general. It is worth of note that the advertisement merely gives notice of the suit and it is not to be seen as a subsequent pleading in the sense of the laws governing civil proceedings. Therefore, it should not contain any substantive information which is not in the pleadings, adverse or otherwise, as that leaves the Defendants with no opportunity to reply or join issue as would be with other formal pleadings. In light thereof, any innuendo in a public advertisement tinctures compliance with the prescriptions of the law and should never be allowed to be part of the notice given under Order 1 rule 8(2) of the CPR. Accordingly, a court of law has a mandatory obligation of ensuring the notice of the suit which is given to all persons on whose behalf or for whose benefit a suit is instituted or defended, is a proper notice and in accordance with Order 1 rule 8(2) of the CPR. The said obligation invariably carries the duty of the court to scrutinize and approve only notices which conform to the prescriptions of Order 1 rule 8(2) of the CPR, and the duty is more onerous on a notice by public advertisement. See the case of **COMPOS v De SOUZA [1933] EA 93.**

Need to avoid adornment

[18] Using the above test, item 2 of the Addendum is sufficient description of the nature of the suit and should be retained as drafted. It is as clear as it should and devoid of embellishments or unnecessary information. But item 3 of the Addendum is an obvious embellishment of the notice; it is unnecessary and should be excluded completely. It is so ordered. That is not all. Similarly, Items 5 and 6 of the Addendum are adornments to the notice and offend the law, because, although a litigant has right to counsel, the notice should not contain information that persons interested may apply to be joined as parties either through advocates of choice or the advocate on record for the Plaintiff. It does not need high wit to discern that, one or more of the persons interested may want to act in person. Equally, the notice must recognize the need to allow the persons interested to exercise free will in engaging an advocate of own choice. I even doubt the invitation for the persons interested to engage the advocate for the Plaintiff will pass the test provided in the Advocates Act on Marketing & Advertising by advocates which are strict and encourage only “objective true and dignified” advertising. From the foregoing, I do not think Order 1 Rule 8(2) of the CPR was intended to be a medium of advertising by advocates for business. On that basis, Item 5 and 6 in the Addendum should be deleted, except disclosure of the name and particulars of the advocate who is acting for the Plaintiff is necessary element and inextricable part of the description of the person who has been selected to institute the representative suit under Order 1 of the CPR. I, therefore, direct that item 1 of the Addendum which gives the name and description of the Plaintiff should also include particulars of **M/S S. GICHUKI WAIGWA & ASSOCCIATES** as her advocates. Similar disclosures of the particulars of the advocate for the Plaintiff should appear at the signature section and

the part showing the person drawing the notice. I repeat, the description of the advocate should not be accompanied by any invitation to the persons interested to engage the said firm of advocates.

Object of Notice

[19] Although it is not objected to, but for completeness, I must add that a public advertisement under Order 1 rule 8(2) of the CPR should convey the contents of rule 8(3) of Order 1 of the CPR that the persons interested may apply to the court to be made a party to the suit. That is the essence of the notice; to inform all persons on whose behalf or for whose benefit the suit is instituted to be impleaded in the suit as a way of facilitation of an expeditious, proportionate and affordable resolution of the question in which a large body of persons share a community of interest without resorting to individual suits which would not only clog the issue in controversy by also breed unnecessary multiplicity of suits. Item 4 is, therefore, in order. See the case of **PURMA CHANDRA PANIGRAHI v BAIDYA JANI (1972) 74 Cut LT 309.** Item 7 of the Addendum is also necessary and should remain as is. It is simply informing the persons interested where they should obtain copies of the pleadings.

Listing banks which may be affected

[20] Mr Frazer also objected to item 8 of the Addendum but he did not cite any specific reason. But my own view on the matter is, given the nature of this suit and that Order 1 rule 8(3) of the CPR also talks of all persons on whose behalf or for whose benefit a suit is defended, allows room to argue that the notice should mention the names of all the banks as they are considered to be persons interested in the outcome of the suit. Like the Court of Appeal in the ruling dated 8th October, 2013 in **ROSE FLORENCE WANJIRU v STANDARD CHARTERED BANK LTD C.A. NO 216 OF 2004** regarding this case, given the way the pleadings in this case have been crafted, it is impractical to determine the amount of money each customer is owed by the banks mentioned. Also, even if the court were to find that the defendant bank had charged illegal interest and ATM withdrawal fees, each individual claimant will still have to file a specific claim against the particular bank and prove it as such. I am also acutely aware that other defences such as limitation of action will, where applicable, also kick in against the particular claim lodged. And all these things will be predicated on each specific case filed. In the premises, I allow item 8 to remain as is.

Limiting time to apply

[21] Order 1 rule 8(3) of the CPR does not place any limitation of time as to when the persons on whose behalf or for whose benefit a suit is instituted or defended should apply to be made parties in the suit. The general purport of joinder of parties is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit, which explains why the law allows joinder of necessary parties at any stage of the proceedings. However, I should think that the notice under Order 1 rule 8(2) of the CPR should be seen within the nature of a representative suit and take into account the numerous numbers of persons being targeted. The guiding principle would be the greater the number of persons on whose behalf or for whose benefit the suit is instituted or defended, the more desirable it becomes that the court should fix a reasonable time for such parties to apply to be made a party in the suit. Provided, the time which is prescribed in the notice for applying should not prevent any person from being joined as a party at any time as long as he is a person having a community of interest in the determination of any substantial question of law or fact in the particular proceedings. That makes practical sense and it does not infringe any law. Indeed, setting of reasonable time frames in litigation is part of case management and aider of the overriding objective to attain an expeditious, just, proportionate and affordable resolution of disputes. Protracted litigation offends justice: offends Article 159 of the Constitution; offends administration of justice. Accordingly, I direct that the notice shall require the persons interested to apply to be made parties in the suit within 45 days of the notice. See the cases of **CAHIL v NANDHRA [2006] 1 EA 35** and **KENYA AIRWAYS CORRPORATION v AUMA & 5 OTHERS [2007] 2 KLR 24.**

CONCLUSION

[22] The foregoing analysis of the purport, core or essential content of a notice by public advertisement

under Order 1 rule 8(2) of the CPR brings me to the point where I make these conclusions: That the notice brings the suit to the attention of persons interested and informs them of their right to apply to be made parties in the suit. It is thus the enabler of access to justice and getting them impleaded in the suit, either to support the case or to defend against it. It also gives the persons interested the opportunity to know the person who has been selected to represent them. Strict scrutiny by the court of the core or essential content of the notice by public advertisement, therefore, is mandatory and serves to; 1) safeguard the rights of all the persons suing or being sued; and 2) sanctify the process of the court. Any notice by public advertisement which does not comply with the prescriptions of the law must be refused by the court and if necessary be struck down. Thence, public advertisements under Order 1 rule 8(2) of the CPR:

1) Must clearly disclose the nature of the suit as well as the reliefs claimed therein as far as possible drawing upon the pleadings and leaving no room for adornment or explanations;

2) Must mention the names of the persons who have filed the representative or defending the suit together with the particulars of the advocate representing them;

3) Must contain information that the persons interested may apply to be made a party in the suit; and may prescribe time within which the persons interested may so apply;

4) Must declare it has been issued pursuant to the order of the court citing the date and the judicial officer who issued it for better grounding;

5) Must not contain unnecessary information or embellishments or other innuendos.

ORDERS

[23] Accordingly, I make the following orders:

1) The Plaintiff shall, within Seven (7) days, submit to the court for approval a notice by public advertisement which is drawn in accordance with this ruling and Order 1 rule 8(2) of the Civil Procedure Rules.

2) The Addendum provided by the Applicant in the application dated 2nd August, 2003 will abide by this ruling.

3) Costs shall be in the cause.

Dated, signed and delivered at Nairobi this 24th day of June 2014

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F. GIKONYO

JUDGE