



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 128 OF 2009**

**A.S. SHEIKH TRANSPORTERS  
LIMITED.....PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA  
LIMITED.....DEFENDANT**

**RULING**

Before me is an application dated 23<sup>rd</sup> November, 2010 by the plaintiff. It is expressed to be brought under the provisions of Order 1 Rule 10(1) and Order VIA Rules 3 and 8 of the Civil Procedure Rules. By the application, the plaintiff mainly seeks leave of the court to amend his plaint and Chamber Summons by adding one **Abdi Said Sheikh Ali** as the 2<sup>nd</sup> plaintiff. The application is made on two grounds namely that the name of the said proposed 2<sup>nd</sup> plaintiff was not included in the suit through a bonafide mistake and that it is necessary for the determination of the read issues in controversy to have his name included.

The application is supported by an affidavit sworn by **Abdi Said Sheikh Ali**, the plaintiff's Managing Director who is also the proposed 2<sup>nd</sup> plaintiff. It is deponed in the said affidavit, *inter alia*,

that the deponent is the registered owner of IR34239 otherwise known as LR NO 209/8343/55 which was used as security for an overdraft facility granted to the plaintiff by the defendants; that in the premises the deponent should have been one of the plaintiffs in the suit but for a mistake committed by counsel; that it is necessary for the determination of the real matter in dispute for the plaintiff to be allowed to amend the plaint otherwise the proposed plaintiff stands to suffer irreparable loss and damage.

The application is opposed on the basis of a replying affidavit sworn by one **Nereah A. Okanga**, a legal Counsel Business Support and Corporate Recoveries of the defendant. It is deponed in the said affidavit, *inter alia*, and on advice of counsel that the plaintiff is not only a negligent pleader but also aims to defeat a defence which has already been raised; that the plaintiff is undeserving of the order sought as there are no peculiar or exceptional circumstances and that the application has not been made in good faith.

When the application came up before me for hearing on 19<sup>th</sup> January, 2011, counsel agreed to file written submissions which were duly filed by 30<sup>th</sup> March, 2011. The submissions are an elaboration of the grounds of the application and the affidavits filed.

I have considered the application, the affidavits filed, the pleadings and the submissions of counsel. I have also given due consideration to the authorities cited. Having done so, I take the following view of the matter. Substitution and additional of parties is governed by Order 1 Rule 10 of the Civil Procedure Rules. Sub-Rules 10(1) and (2) read as follows:-

***“10 (1) When a suit has been instituted in the name of the wrong persons as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff the court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.***

***(2) The court may at any stage of the proceedings either 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 joined, 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 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.”***

Under the two sub-rules the decision to allow substitution and/or addition of parties is discretionary. Under Sub-Rule (1) the discretion seems to be fettered as leave to substitute and/or add a plaintiff may be ordered where the suit has been instituted through a bonafide mistake. There is however no such fetter in sub-rule 2 of the same rule and the court has power to order the name of any party improperly joined be struck out and the name of any person who ought to have been joined to be added. It can exercise that power on application or on its own motion - the only consideration being the interest of justice.

Order VIA deals with other amendments to pleadings. The applicant has invoked sub-rule 3 of that order which donates the power to amend pleadings with leave. Under the Rule the court has a wide discretion to grant leave to amend-the primary consideration being to do justice to the parties. In the case at hand, the gist of the plaintiff's application is that it is necessary for the determination of the real issue in dispute to have the name of the proposed 2<sup>nd</sup> plaintiff included mainly because he is the registered proprietor of the land charged to the defendant for an overdraft facility granted to the plaintiff. That fact is not disputed by the defendant. The gist of the opposition is two fold namely that the proposed amendment will deprive the defendant of a defence already raised and further that the application is not made in good faith given that the proposed plaintiff is the Managing Director of the plaintiff and has filed several affidavits on behalf of the plaintiff. He cannot therefore, in the premises, purport not to have included himself as a plaintiff through a bonafide mistake.

The defendant's complaints are not altogether without basis. The proposed plaintiff swore the affidavit which verified the plaint herein. He also swore the affidavit in support of the application for injunction. He therefore in fact participated in originating these proceedings. He even knew that his said piece of land was held by the defendant as security for a loan facility granted to the plaintiff.

The record also shows that the defendant, from the outset, challenged the plaintiff's *locus standi* to sue in respect of the suit property. That position would appear to have triggered the filing of this application.

But are those reasons sufficient to deny the plaintiff the leave to amend as sought? The defendant has invoked several decisions of this court and of the court of Appeal to demonstrate that the plaintiff is not deserving of the said order. Those decisions, with respect, applied to the special facts and circumstances in the cases which circumstances do not obtain herein. In **James Ochieng Oduol T/a Ochieng & Company Advocates -Vs- Richard Kuloba (2008) e KLR**, the Court of Appeal overruled Visram J's (as he then was) decision allowing leave to amend. The court nevertheless stated as follows:-

***“It is common ground that the power of the court to order amendment is discretionary the discretion though wide is circumscribed by the rule itself and by the general principles on amendments. The power may be exercised to substitute a party, to correct the names of parties or to allow the capacity of suing (see rule 3). The relevant rule merely sets out the general power donated to the court to order an amendment to the pleadings.”***

The court even cited with approval previous decisions in which leave to amend had been granted to allow amendments of a plaint disclosing no cause of action (**see Motokur -VS- Auto Garage Ltd and Another (1971) E.A 353**) and notwithstanding that the effect would be to defeat a defence of limitation (**See Barclays Bank DCO -VS- Sham Sudin (1973) EA 451**). The Court of Appeal observed that such amendments can only be allowed where peculiar circumstances are present which were lacking in the **Ochieng Oduol -VS- Kuloba Case**. The court did not describe what circumstances would be peculiar or exceptional. Speaking for myself, I would find that this case presents peculiar and exceptional circumstances. The plaintiff filed this suit on 15<sup>th</sup> July, 2009. This application was lodged on 23<sup>rd</sup> November, 2010. The delay involved is of about 1 ¼ years. This suit is at its nascent stage. Even the pre-trial formalities are yet to be completed. I therefore do not find that the application has been lodged late in the day.

There is no dispute that the proposed 2<sup>nd</sup> plaintiff is the registered proprietor of the suit property. There can be no gainsaying that the proposed plaintiff ought to have been joined as plaintiff and the court has power to join him as such. I dare say even if the plaintiff had not applied to join him, the court would have, of its own motion, joined him as a necessary party.

The defendant may be deprived of an accrued defence but in my judgment it can be compensated by costs. The general principle is that amendments will be allowed if they can be made without injustice to the other side which cannot be compensated by costs (**See Eastern Bakery -VS- Castelino (1958) EA 46**). I detect no such injustice herein.

Before concluding this ruling I am impelled to make a few comments on the case of **Dominic Aloise George Omenye T/a Omenye & Associates -VS- Kenya Commercial Bank Ltd (2010) KLR** which is my decision on an application for leave to amend. The facts of that case are clearly distinguishable from the facts herein. There, an application for leave to amend was made in a part-heard case on the basis of grounds upon which I had made a conclusive determination thereon in an earlier application. I also found that the proposed amendments in that case would contradict the applicant's existing pleadings and his own testimony. The application was also made 13 years late. Those were peculiar and exceptional circumstances which are clearly distinguishable from the facts herein.

In the end I allow the application dated 23<sup>rd</sup> November, 2010 in terms of prayers (b) (c) and (d) therefore. The plaintiffs shall pay the defendant's costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 18<sup>TH</sup> DAY OF MAY 2011**

**F. AZANGLALA**

**JUDGE**

Read in the absence of:-

The parties and their advocates the date having been taken in court.

**F. AZANGLALA**

**JUDGE**

**18<sup>TH</sup> MAY, 2011**