REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 59 OF 2009

HAVI & CO ADVOCATES…….....…….…….PLAINTIFF

VERSUS

J.M. NJAGA & CO. ADVOCATES….....……..…… DEFENDANT

RULING

By a Sale Agreement dated 1st July, 2008, **RAFIKI ENTERPRISES LTD ("RAFIKI")** agreed to sell to **BERKSHIRE HOLDINGS LIMITED ("BERKSHIRE")** a property known as LR No. 7879/9 for a sum of Kshs. 50,000,000/-

According to the terms of the Agreement, the balance of the purchase price in the sum of Kshs.45,000,000/- was to be secured by a professional undertaking from the Advocates for Berkshire to Rafiki's Advocates. Rafiki's Advocates were the Plaintiff herein whilst Berkshire was represented by the Defendant. The said Agreement was duly executed under seal by Rafiki and Berkshire. Their respective Advocates only certified the signatures of the directors of the respective Companies who had witnessed the sealing of the Agreement.

Pursuant to the said Agreement, by a letter dated 8th October, 2008, the Defendant wrote to the Plaintiff and stated: inter alia: -

"We hereby give you our professional undertaking to pay you the balance of the purchase price in the sum of Kshs. 45,000,000/- within seven (7) days of successful registration of the conveyance in favour of the purchaser or within thirty (30) days upon release of the completion documents whichever is the earlier." (underlining mine)

The said sale of LR No. 7879/9 seems to have taken long to complete and the Plaintiff, having released the completion documents to the Defendant on 15th January, 2009, on 27th January, 2009 took out an Originating Summons against the Defendants to enforce the professional undertaking given on 8th October, 2008 as aforesaid. In addition to enforcing the said professional undertaking, the Plaintiff sought orders for release of Kshs. 5 million, being the 10% that was in a joint account with NIC Bank. The Plaintiff also prayed for interest of 15.5% from 1st and 8th October, 2008 until payment in full.

On 6th March, 2009, the Respondent filed a lengthy Replying Affidavit detailing why she was unable to release the balance of the purchase price to the Plaintiff.

On 18th May, 2010, the Plaintiff filed a Notice of Motion under order XXIV and order XXXV of the former Civil Procedure Rules seeking summary judgment. That application is still pending although parties have filed their respective submissions in respect of the same. Before parties could highlight on

their submissions on the Plaintiff's application for summary judgment, the Plaintiff filed a Chamber Summons application dated 22nd June, 2011 seeking to join Rafiki Enterprises Ltd and Berkshire Holdings Ltd as parties to the suit. That is the application that was argued before me on 26/10/11. In the said summons, the Plaintiff seeks an Order that:-

1)Rafiki Enterprises Ltd and Berkshire Holdings Ltd be joined as 2nd Plaintiff and 2nd Defendant, respectively.

2)The originating Summons dated the 27th February 2009 be amended to incorporate the addition of the 2nd Plaintiff and 2nd Defendant

Relying on the Supporting Affidavit of Nelson Havi sworn on 22/6/11, Mrs. S. Keya Learned Counsel for the Applicant submitted that the addition of the proposed parties will put all issues for determination before court, it will save courts time and costs, that it will not prejudice the Defendant in any way, that costs could compensate the Defendant and that it was necessary because the professional undertaking the subject of the Originating Summons before court was given in respect of the Sale Agreement between the said proposed parties, Rafiki and Berkshire.

Mr. Onyango, Learned Counsel for the Defendant opposed the application relying on the grounds of opposition dated 22nd July, 2011. Counsel submitted that Rafiki and Berkshire were clients of the Plaintiff and the Defendants respectively in the aforesaid Sale Agreement of 1st July, 2008, that the suit herein is predicated upon a professional undertaking by an Advocate which cannot be enforced against a client; that order 52 (7) on the basis of which the originating Summons is predicated upon applies only to Advocates who in this case are the Plaintiff and the Defendant, that the said provision do not apply to parties who are not Advocates in terms of Sections 2, 9 and 10 of the Advocates Act, Cap 16 laws of Kenya. Counsel referred the court to the case of **Kenya Re-insurance Corporation –vs- Muriu EA LR (1995 – 1998) I E A 107** to buttress his argument that an Advocate cannot lodge a claim on behalf of his client who is not a party to a suit, he also relied on the case of **H.K. Advocates –vs- Muciimi Mbaka NAIROBI HCCC No. 485 of 2004** that an undertaking by an Advocate is a separate and distinct contract from the Sale Agreement between the said Rafiki and Berkshire, that the amount being sought under the undertaking vide the Summary Judgment application which is still pending has been fully paid and what is pending is the issue of interest, that the Plaintiff intends to join the proposed parties so as to save his claim for interest. He urged the court to dismiss the application.

Those were the rival submissions of the respective parties.

I have perused the Originating Summons dated 27th January, 2009. In it, the Plaintiff has pleaded thus:-

"Let Jane Muthoni Njaga T/a J.M. Njaga & Co. Advocates ……..enter an appearance to this Summons which is issued on the application of Nelson Andayi Havi T/a Havi & Company Advocates who claims from the Defendant payment of Kshs.45,000,000/- and release of Kshs.5,000,000/- held in a call deposit account …….. under the professional undertaking given by the Defendant to the Plaintiff on 8th October, 2008……"

As it can be clearly seen this was a suit by an Advocate against another seeking to enforce a professional undertaking. Such suits are provided for under Special provisions of our laws.

Order 52 of the Civil Procedure Rules makes provision relating to the Advocates Act. Rule 7 thereof provides:-

"1) An application for an Order <u>for the enforcement of an undertaking given by an Advocate</u> shall be made ……

a) …….

b)In any other case, by Originating Summons in the High Court."

This MUST have been the provision under which the Plaintiff brought his suit dated 27th January, 2009. The Plaintiff now seeks leave to join two other parties and amend the Originating Summons accordingly.

Applications for amendment of course should be liberally allowed and the principles are well known. In **EASTERN BAKERY –VS- CASTELLANO (1958) EA 461 and 462** the Court of Appeal for Eastern Africa held:-

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: Tildesley v. Harper 91) (1878), 10 Ch. D. 893; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The Court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment the subject matter of the suit: Ma Shwe Mya v. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal.832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; Raleigh v. Goschen (5), (1898) 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment. E.g. by depriving him of a defence of limitation accrued since t he issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), (1946) K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitaley P. 1313

In the matter before me, however, the Principal prayer is joinder not necessarily amendment of the Originating Summons. Amendment is ancillary to the proposed joinder.

My understanding is that it is in the discretion of the Plaintiff who to join as a Defendant in his suit. That discretion can only be fettered where there is good and sound reason to do so.

Order 1 Rule 10 of the Civil Procedure Rules provides:

"1) Where 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 bona fide 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 effectually and completely to adjudicate upon and settle all questions involved in the suit be added***."

Rule 14 provides:-

"Any application to add or strike out or substitute a Plaintiff or Defendant may be made to the Court at any time before trial by chamber summons or at the trial of the suit in a summary manner."

My understanding of the law is that like amendments, the court will liberally allow the addition or substitution of parties

a) Where the suit has been filed by mistake and a wrong party has been joined or left out;

b)Where it is necessary for the determination of the real matter in dispute,

c) Where the presence in court of the party to be added may be necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in a suit.

I may also add that the court will not allow substitution or addition where such addition will cause an injustice to a party who is already in the proceedings or where such a joinder will breach provisions of the law.

Before me is a suit between Advocates whose cause of action arose by their very nature of being Advocates. As it is pleaded and as set out above, it is brought under Order 52 Rule 7 of the Civil Procedure Rules. To my mind, the dispute between the Plaintiff and the Defendant is the issue of the undertaking given by the Defendant to the Plaintiff on 8th October, 2008. That to me was a complete and distinct contract between the two which can be dealt with without any reference to 3rd parties. Indeed the wording of the undertaking is individual and personal i.e. ***"we hereby give <u>you</u> …. To pay <u>you</u>",*** from the Defendant to the Plaintiff. How can 3rd Parties be dragged into it?

My understanding of Order 52 Rule 7 is that the suits thereof are to be brought against Advocate Qua Advocate. It is to enforce an undertaking given by an Advocate and not on behalf of his client or otherwise. I am in agreement with Emukule J in **NRB HCCC No. 485 of 2004 H.K. Advocates –vs- Muciimi M. Mbaka** wherein he held at pg.6 that:-

" His (Advocates) undertaking stand as a separate contract between the advocates, and is not contingent upon any terms of contract between his client and any other party."

To my mind therefore, it will be unnecessary as far as the issue of enforcement of the undertaking between the Plaintiff and the Defendant is concerned, to bring in 3rd parties who are not Advocates and who were not parties to the contract between the Plaintiff and the Defendant.

In **<u>PETER & CO. LTD –VS- MANGALJI & OTHERS (1969) EA</u>** Sheridan J held that a party will be joined to a suit where there is a common question of law or fact involved.

In my view, there will be no common question of law and fact to be tried in a claim by the Plaintiff against the Defendant on the undertaking of 8th October, 2008 as will be between Rafiki and Berkshire on the Agreement of 1st July 2008. Further, adding Berkshire as a Defendant will be an attempt to join a non Advocate in a proceeding for enforcement of an undertaking given by an Advocate contrary to Order 52 Rule 7. Obviously, if it is the issue of interest for late payment of the purchase price, that is an issue between the said Rafiki and Berkshire and the Defendant has nothing to do with it. Joining those parties to these proceedings in my view therefore will be prejudicial to the Defendant and will occasion her an injustice.

The upshot of the matter is that I have come to the conclusion that the application has no merit and I dismiss the same with costs.

It is so ordered.

Dated and delivered at NAIROBI this 11th day of November, 2011.

JUSTICE A. MABEYA