REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 664 of 2002

ALFA MOTORS LIMITED……..…...…….. PLAINTIFF

VERSUS

TOYOTA EAST AFRICA LIMITED…….....1ST DEFENDANT

TOYOTA TSUSHO CORPORATION…....2ND DEFENDANT

RULING

On 21st November 2007, Azangalala J allowed the plaintiff's application which primarily sought the leave of the court to enjoin Toyota Tsusho Corporation of Japan (TTC) as the 2nd defendant in the suit. In allowing the application, the learned judge made the following observation:

"*I have found that the plaintiff makes definite claims against TTC. It was in my view entitled to seek leave to join TTC. Indeed if the original plaint had been drawn in the terms of the draft amended plaint without mentioning TTC, the court would be duty bound to direct that TTC be joined as a necessary party for the effectual and complete adjudication of all the questions involved in the suit.*"

The plaintiff duly filed its amended plaint enjoining the said TTC as the 2nd defendant to the suit. The 2nd defendant was duly served with summons to enter appearance. The 2nd defendant filed its defence to the plaintiff's claim. In essence, the thrust of the 2nd defendant's defence was that it was a stranger to the plaintiff's claim and further that the plaintiff's plaint disclosed no reasonable cause of action against it. The 2nd defendant further pleaded that the plaintiff's claim as against it was time barred by virtue of the provisions of the **Limitation of Actions Act**.

On 5th January 2008, the 2nd defendant filed an application pursuant to the provisions of **Order VI Rule 13(1) (a)** of the **Civil Procedure Rules** seeking to strike out the amended plaint dated 29th May 2002 *(in actual fact dated 27th March 2007)* and have the suit against the 2nd defendant dismissed. The grounds in support of the application are stated on the face of the chamber summons. It was contended that the amended plaint contravened the provisions of **Order VIA Rule 7(1)** of the **Civil Procedure Rules** and further that the joinder of the 2nd defendant as a party to the suit was contrary to the provisions of the **Civil Procedure Rules**, the **Limitation of Actions Act** and the **Law**. The 2nd defendant further stated that the plaint did not disclose a reasonable cause of action against it in that the pleading against the said 2nd defendant was contrary to the provisions of the law, and more particularly in regard to issues in

relation to the lifting of the veil of incorporation. The 2nd defendant complained that the plaint contravened the provisions of the **Companies Act** and the **Law** relating to companies.

In response to the application, the plaintiff filed grounds in opposition to the application. The plaintiff stated that the grounds in support of the application were vague, indefinite and confused. The plaintiff stated that the application was misconceived, vexatious and an abuse of the process of the court as the issues raised therein had already been determined by the court. The plaintiff insisted that its suit against the 2nd defendant disclosed a reasonable cause of action and further that the alleged contravention of **Order VIA Rule 7(1)** of the **Civil Procedure Rules** was not a sufficient ground for striking out an amended plaint. The plaintiff reiterated that the joinder of the 2nd defendant as a party to the suit was not contrary to the provisions of the **Civil Procedure Rules** or the **Limitation of Actions Act** as the said joinder was ordered by the court. As regard the issue of lifting of the veil of incorporation, the plaintiff was of the view that the said dispute was an issue for determination at the trial of the suit.

Before the oral hearing of the application, the parties to this application filed written submissions in support respective opposing positions. At the hearing of the application, I heard the rival submissions made by Mr. Oraro for the 2nd defendant and by Mr. Rebelo for the plaintiff. I have carefully considered the rival arguments made by the said parties to this application. I have also considered the authorities cited by learned counsel. It is now settled that a court of law will not strike out any pleading unless the said pleadings obviously fails to disclose a reasonable cause of action and is so hopeless that it cannot be rescued or revived by amendment. As was held by Madan JA in **DT Dobie & Co(Kenya) Ltd vs. Muchina [1982] KLR 1** at page 9:

"*The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court… No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

In the present application, the 2nd defendant seeks to strike out the suit against it essentially on the grounds that the amended plaint was filed in contravention of **Order VIA Rule 7(1)** and **Order VII Rule 1(2)** of the **Civil Procedure Rules**. As regard argument by the 2nd defendant that the amended plaint had been filed in contravention of **Order VIA Rule 7(1)** of the **Civil Procedure Rules** which requires every pleading that is amended to be endorsed with the date of amendment and the number of the rule pursuance to which the amendment is made, the plaintiff conceded to this omission. However, the plaintiff argued that the error was not of such a fundamental nature as to result in the striking out of the amended plaint. Having considered the arguments made in that regard, I am in agreement with the plaintiff that failure by a party endorse the date which the amendment was made is not an omission that can result in the striking out of such pleadings.

I am in complete agreement with the decision of Azangalala J in the case of **Ramji Haribhai Devani Limited vs. Kenya Commercial Bank Limited [2006] eKLR** at page 5 where he stated that:

"*In the light of the above I most respectfully agree with the interpretation given by Ringera J to the use of the word "shall" in a statute or a rule. Being of that persuasion, I am in respectful agreement with the decision of Onyango Otieno J in **Milestone Engineering Ltd & Anor –vs- Cooperative Merchant Bank of Kenya and Anor (supra)** that the omission to endorse the rule under which the amendment was made in this case is a minor omission. In my view the use of the word "shall" in the rule is merely directory and not mandatory. I am fortified in this view by the fact that the omission has not occasioned any grave prejudice to the defendant. The defendant has indeed responded to the amended plaint and proceedings have continued on the basis of the amended plaint. To hold otherwise would lead to the unjust result of striking out the amended plaint with the consequence that the plaintiff's suit would stand struck out. That consequence in my view was not envisaged or even contemplated when the rule was made."*

I therefore hold the 2nd defendant did not suffer any prejudice by the said omission that is of the nature that can result in this court striking out the amended plaint. As regard whether there is a requirement that an amended plaint be accompanied by an affidavit verifying the amended plaint as provided under **Order VII Rule 1(2)** of the **Civil Procedure Rules**, I hold that there is no such legal requirement. The filing of a verifying affidavit is only required when a plaint is being filed and not when a plaint which is already filed has been amended.

As regard to the 2nd defendant's complaint that it has been prevented from raising its defence of limitation by virtue of its joinder to the suit, I hold that the 2nd defendant can still raise the said defence during the hearing of the suit. Having carefully perused the amended plaint, and the response thereto by the 2nd defendant, it was apparent to this court that the basis upon which the 2nd defendant seeks to strike out the suit has not been clearly presented to the court. It was not clear to this court when the 2nd defendant alleges that the cause of action against it was time barred by the **Limitation of Actions Act**. I find no merit with this ground.

The 2nd defendant further argued that the plaintiff had no reasonable cause of action against it on the ground that the plaintiff was purporting to sue it on the basis that it was the majority shareholder of the 1st defendant. I empathize with the 2nd defendant when it argues that the thrust of the plaintiff's claim appear to be against the 1st defendant and not against the 2nd defendant. Like Azangalala J, I am of the view that the plaintiff's claim against the 1st defendant would be incomplete if the 2nd defendant was not enjoined in suit. This is because the plaintiff made specific averments against the 2nd defendant in regard to its alleged conduct in dissuading its other distributors from dealing with the plaintiff. I am of the view that during the hearing of the case, the 2nd defendant will have the opportunity to disprove the allegations of commercial impropriety made against it by the plaintiff. This court cannot at this stage reach a definitive determination, without encroaching on the jurisdiction of the judge who will hear the case, that indeed the plaintiff does not have a reasonable claim against the 2nd defendant.

Taking into account the totality of the facts placed before this court during the hearing of the application, it was clear to this court that the 2nd defendant was essentially seeking this court's opinion in regard to the decision rendered by a court of concurrent jurisdiction which made the decision to enjoin the 2nd defendant as a party to this suit. I am of the opinion that if the 2nd defendant was aggrieved by the said decision which enjoined it to these proceedings, the proper course of action that ought to have been taken was for the 2nd defendant to appeal against the said decision to the appellate court. This court lacks jurisdiction to entertain an issue which has been heard by a court of competent and concurrent jurisdiction which has rendered a decision. In the premises therefore, I hold that the 2nd defendant failed to establish an appropriate case for striking out the amended plaint herein. The 2nd defendant's application lacks merit and is hereby dismissed with costs to the plaintiff.

DATED at **NAIROBI** this **27TH** day of **APRIL, 2009.**

L. KIMARU

JUDGE