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

Civil Case 252 of 2008

STEPHEN KIPKEBUT T/A RIVERSIDE LODGE AND ROOMS ……PLAINTIFF

VERSUS

NAFTALI OGOLA ……DEFENDANT

RULING

The plaintiff herein in the first instance moved to this court, by way of a plaint dated 27th day of May 2008 and filed the same 27th May 2008. Filed simultaneously with the said plaint is an interim application also dated and filed the same date of 27th day of May 2008. The verifying affidavit was also sworn and filed the same date.

Apparently from the record the interim application was canvassed inter partes on 12/06/2008 and a ruling to that effect was given by Ang'awa J on the 18th day of June 2008. The plaintiff/applicant became aggrieved with that decision and then filed a notice of appeal dated 19th June 2008 and filed the same date, expressing a wish to appeal to the court, of appeal against that decision.

Summons to enter appearance whose copy is traced on the record reveals that the same were issued by the court on 11th day of September 2008. That not withstanding, it is observed that Memorandum of appearance is dated the 15th day of July 2008, and filed on the 17th day of July 2008. The defence and counterclaim is dated the same 15th day of July 2008 and filed the same 17th day of July 2008.

There is an amended plaint dated 27th day of May 2008 and Amended at Nairobi on 4th day of September 2008 and filed on 4th September 2008.

The amended plaint was simultaneously accompanied by an interim application presented by way of notice of motion dated 4th day of September 2008 and filed the same 4th September 2008, seeking an order compelling the defendant, his servant, agents and tenants to give immediate vacant possession of all that piece of land situated in the city of Nairobi area along Jogoo Road otherwise known as LR NO. 209/14318 to the 2nd plaintiff/Applicant, a mandatory injunction to be granted to the 2nd plaintiff/applicant forthwith and directed at the defendant his workers, servants, agents and tenants compelling them to give vacant possession of that piece of land situated in the city of Nairobi known as LR No. 209/14318 forthwith in favour of the 2nd plaintiff/applicant, a mandatory injunction be granted to the 2nd plaintiff/applicant directed at the defendant his workers, servants, tenants and agents to restrain them from occupying , letting, assigning, wasting, in any manner dealing with the 2nd plaintiff property known as LR No. 209/14318 situated along Jogoo Road, within the city of Nairobi, forthwith, that the OCS Jogoo Road Police Station be ordered and directed to enforce the mandatory orders, of this

Honorable court, issued in favour of the 2nd plaintiff and to ensure immediate compliance without breach of peace and that the costs of the application be borne by the defendant herein.

The defendant filed a replying affidavit sworn by one Naftali Ogola on the 18th day of September 2008, and filed the same date. This was followed by a second entry of appearance and defence and counterclaim both dated 29th day of September 2008 and filed on 30th day of September 2008. The reply to the 2nd defendants' defence and defence to counterclaim is dated 6th day of October 2008 and filed on the 7th day of October 2008.

Against the a fore set out background information, and during the pendence of the disposal of the interim application filed simultaneously with the amended plaint by the plaintiff, the defendant presented the application subject of this ruling dated 10th March 2009, and filed the same date. It is by way of chamber summons brought under section 3A of the CPA and all other enabling provisions of the law. It seeks 2 prayers namely:-

1. "That the amended plaint dated 27th day of May 2008 and filed on 4th day of September 2008 be struck out.

2. That the costs of this application be provided for."

The grounds in support are set out in the body of the application, supporting affidavit, and oral high lights in court, and case law. The major ones are as follows:-

1. The initial plaint filed herein dated 27th May 2008 and filed the same date had only one plaintiff namely Stephen Kipkebut T/A Riverside lodge and rooms.

2. The plaint was subsequently amended on the 4th day of September 2008 introducing and or adding of a second plaintiff namely AMU Investment Company Limited.

3. They contend that leave of the court, was necessary before adding the second plaintiff. For this reason the application should be allowed and the amended plaint should be struck out.

4. They rely on order 1 rule 10, 13 which specifically provides that leave of the court, was required.

5. Leave of the court, can only be dispensed with where amendments are done before the close of proceedings.

In response, counsel, for the plaintiff, raised the following points although no replying affidavit or grounds of opposition filed by them have been traced on the file.

- They were entitled to amend their pleadings, once before pleadings are closed. Herein pleadings had not closed, as the same was effected before summons were issued and served.

- The defendants' objection cannot be sustained as the same has been made outside the stipulated time namely, 14 days from the date the offending amendments is brought to the attention of the objecting party.

- There has been no demonstration on how the amendment has prejudiced the defendant, more so when the 2nd defendant says that he is the owner of the land and has filed issues and documents towards the disposal of the proceedings.

- The court, is invited to apply the provisions of order VIA of rule 9 which stipulates that no suit can be defeated by reason of misjoinder and no technical objection to the pleading by reason of want of form can be raised.

- The court, is invited to hold that the striking out of a pleading is draconian, exercisable with caution.

- The authorities relied upon are distinguishable because:-

(a) In one the application was brought under order IXA rule 10 CPR, where a 3rd defendant was introduced without an amendment. Whereas herein they amended before service of the summons to enter appearance.

(b) In another, it is judgement which was being sought to be set aside which is not the case herein.

(c) In one, the 3rd defendant was added without a consent, where as herein the 2nd plaintiff has consented to be joined as a party.

(d) The decisions are only of persuasive value and not binding on this court, and as such they should be ignored.

(e) There are triable issues raised.

(f) 2 defences and 2 counterclaims have been filed, and nothing has been said of this, by the defence, which is proof of abuse of the due process of the court.

(g) Contend that the defendant has not come to court, with clean hands.

In response counsel for the defendant/applicant concede that the right to amend exists, but it is imperative that the same be exercised within the law.

- Agrees that indeed there are two defences and counterclaims, but the first one holds no water as it was filed before summons to enter appearance were served.

- The test to be applied when a complaint is raised about joinder and or addition of parties, is not what prejudice the opposite party stands to suffer, if joinder and or addition of a party is effected, but whether the same is being effected and or undertaken within the law.

On case law the court, was referred to the case of **LESCHES TOR SQUARE INVESTIMENT LIMITED VERSUS JACOB OYEKO , MR. OMINDO AND GEOFREY WACHIRA WANJOYA NAIROBI HCCC NUMBER 808 OF 2004,** decided by Kariuki J, on the second day of February 2007. A perusal of the same reveals that at pages 3, 4, and 5 of the ruling, the learned judge construed the circumstances or situations under which the provision of order 6A rule 1(1), 3 (1) on amendment of pleadings without leave of court, before the closure of the pleadings, and the provision of order 1 rule 1, 9 and 10 on additions and subtraction of parties to proceeding are applicable.

At page 5 of the ruling, the learned judge concluded at line 1 from the top that:-

" *It is plain beyond argument, upon a careful reading of these provisions, that leave of the court, was required before the plaint could be amended to add the third defendant as a defendant in this suit'*

The case of **ABUBAKAR ZAIN AHMED VERSUS PREMIER SAVINGS AND 4 OTHERS, MOMBASA, CA NO. 109 OF 2004** decided by the CA on the 29th day of June 2007. At page 6 of the judgement, 3rd paragraph from the top observation is made that the appeal had a risen from an application filed by the 1st, 2nd, 3rd and 4th respondents, seeking to stricke out the plaint, and dismiss the suit, on the grounds that the plaint is scandalous, frivolous or vexatious and an abuse of the process of the court, as the applicants' action was time barred, under the provisions of the limitation of Actions, Act, cap 22 ,of the laws of Kenya.

At page 9 line 13 from the bottom, the law lords of the CA made the following observations:-

" *It is trite law, that the power to strike out any pleading or any part of a pleading under order 6 rule 13 is not mandatory but permissive, and confer a discretionary jurisdiction to be exercised having regard to the quality and all circumstances relating to the offending pleadings. See the speech of* Madan JA (as he then was) in **D.T. DOBIE AND COMPANY (K) LIMITED VERSUS MUCHINA (1982) KLR** page 1 quoting from sellers **C.J. IN WENLOCK VERSUS HALONLY AND OTHERS (1965) WLR 1238** at page 12.42. And as per Halisburys laws of England, 4th Edition volume 37, paragraph 430, the discretion will be exercised by applying two fundamental, although complementation principles. The first principle is that the parties will not lightly be driven from the seat of judgement, and for this reason the court, will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may often be required by the very essence of justice, to be done so as to prevent the parties being harassed and put to expense by frivolous, vexatious or hopeless litigation.

These principles have been incorporated in our jurisprudence and likewise our own courts', have expressed similar sentiments in **NITIN PROPERTIES VERSUS JA GIR, SINGH KAISI NAIROBI CA NO. 132/89** (In reported) This court said:-

" *Striking out is a drastic remedy, and it has been held time and again that striking out procedure, can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution"*

In **SAMMUEL KANYI GITONGA VERSUS PETER MUGWERU NAIROBI HCCC NO. 3356/89 (UR)** Bosire J (as he then was) referred to striking out as "*a draconian measure*" and held that it must and can only be done in the clearest cases, where is it clear that the defence or plaint as the case may be is beyond resuscitation by amendment. In **TRADE BANK LIMITED VERSUS KERSAN NAIROBI HCCC NO. 6662/91** on reported, Pall J (as he then was) also held that "*the exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleadings in question is on the face of it unsustainable"*.

In **D.T. DOBIE AND COMPANY LIMITED VERSUS JOSEPH MUCHINA** (1 bid) it was further stated:-

"*No suit ought to be summarily dismissed unless it appear 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 a 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"*

At page 12 line 2 from the bottom the CA went on to add:-

"*The courts, will generally give leave to amend a defective pleading where there is reason to suppose that the case can be improved or saved (served) by legitimate amendments."*

On the courts', assessment on the facts herein, there is no dispute that the under listed sequence of events form common grounds and are not indispute:-

(i). That there is an original plaint in place.

(ii). That there is a defence and a counterclaim filed before summons to enter appearance were taken out and served. There is no dispute that in law, such papers are considered to be invalid, of no consequence and cannot be acted upon by either party to the proceeding.

(iii). It is on record that the original plaint had only one plaintiff, and the amendment which was introduced and effected before the summons to enter appearance were taken out, and served introduced a second plaintiff in the heading of the plaint and corresponding averments to the introduced plaintiff in the body of the plaint.

(iv). it is after the filing of the amended plaint that the summons to enter appearance were taken out and served.

(v). Upon such service of the summons to enter appearance, the defendant duly filed a replicated defence and counterclaim.

(vi). Upon filing and service of the defence and counterclaim, the plaintiff duly filed a reply to defence and defence to counterclaim.

Applying the above undisputed sequence of events to the rival arguments herein, it is clear that all that the defendant is saying, is that, the plaintiff needed leave, of court, to add and or introduce the second plaintiff in the heading of the amended plaint, as well as the corresponding averments in respect of the said introduced plaintiff in the body of the amended plaint. It is also common ground that the said amendment was effected without leave of the court.

The stand of the plaintiff, on the other hand, is that since the amendment was effected before the close of the pleadings as the same was filed even before summons to enter appearance were taken out and served, the amendment was done within the rules, and leave of the court, was unnecessary. Secondly that even if it can be taken that leave of the court, was necessary, the defendant was expected to raise the complaint within 14 days after the amendment was effected. However since the amendment was effected before the service of the summons to enter appearance, 14 days would be expected to run from the date of gaining of locus standi in the matter namely, entry of appearance and filing of the defence and the counter claim.

Due consideration has been made of the above rival arguments by this court, and the court, is of the opinion that the simple task of this court, is to determine whether the amendment falls into the category that requires leave of court, or those that do not require leave of court.

Amendment that do not require leave of court are those that fall under the provisions of order VIA. Rule 1(1) thereof which Read:-

"*Order VIA Rule 1(1). A party may without leave of the court, amend any pleading of his once at any time before the pleadings are closed."* Herein since it is on record that the amendment was effected even before summons to enter appearance were taken out unless the contrary is shown, these appear to have been within the law. It is on record that the objection of the defence relates to the addition of a party.

Turning to an amendment with leave, this is donated by the provision of order VIA rule 3 CPR. A reading of the same shows that invocation of the power as subject to order 1 rules 9 and 10 and order XXIII rules 3, 4, 5 and 7. A perusal of these provisions reveals that these provisions relate to amendment where vide rule 3 it covers situations where death of one of the several plaintiffs, or sole plaintiff had died, rule 4 applies to where a sole defendant or one of the defendants, has died while rule 5 it is for determination of how issues of who is and who is not a legal representative of a deceased party can be determined by the court. Where as rule 7 deals with Bankruptcy, all of which situations have no application to the matter herein subject of this ruling.

Turning to order 1 rule 9 and 10 CPR, a perusal of order 1 rule 9 CPR there is prohibition for any suit, being defeated by reason of the misjoinder or non joinder of parties. Applying this to the argument herein, the court, makes a finding that the court, has not been requested to rule on the joinder and misjoinder of the parties, but an amendments which should have been effected either with or without leave of court.

Order 1 rule 10 CPR on the other hand reads:-

" *Order 1 rule 10 (1) where a suit has been instituted in the name of the wrong person as plaintiff, or whether 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 indispute 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 added…."

Applying this provisions to the rival argument herein, it is clear that in order for this provision to apply the following should be present

(i). A suit should be in place and already instituted.

(ii). The suit, must have been instituted in the wrong name as plaintiff

(iii). Or alternatively it should be doubtful whether it has been instituted in the name of the right plaintiff.

(iv). It must be at any stage of the proceedings.

(v). The addressee is the court.

(vi). The role assigned to the court, is to determine to its satisfaction that the suit has been instituted through a bona fide mistake.

(vii). The court, has to be satisfied 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.

Due consideration of the above ingredients have been made by this court, in line with the rival arguments herein and the court, moves to make the following findings:

(i). Indeed before the said amendments was initiated, there was already in place, a suit already instituted.

(ii). As regards the issue as to whether the suit, was instituted in a wrong name as a plaintiff, the submissions of the plaintiffs' counsel on record is that the added plaintiff is the title holder, he consents being joined as a party, to the proceedings and has in fact already filed documents he intends to use in these proceedings. From this submission, it is evident that it can safely be construed that the facts demonstrate, it was doubtful whether the suit, had been instituted in the name of the right plaintiff. Being the alleged title holder, then the introduced plaintiff is the one in whose name the suit should have been instituted in.

(iii). As regards the introduction being made at any stage of the proceedings, this has been demonstrated.

(iv). As regards the addressee of the command, it is the court which is mandated to determine to its satisfaction that the suit, has been instituted through a bona fide mistake. Indeed here, if the introduced party was the title holder of the substratum of the proceedings, then there exists a bona fide mistake, whereby a necessary party to the proceedings was left out. It therefore follows that indeed the introduced party is a necessary party to the proceeding.

Having established the introduced party as a necessary party to the proceedings, the question that arises for determination is whether the said party has been properly introduced in to the proceedings. Due consideration has been made by this court, concerning that question and the same has been considered in the light of the order VIA and order 1 rule 9,10 CPR provisions, and the court, finds that a proper construction of the two provisions of the law, is that neither can alleged to be superior to the other. It is also now trite law, that these rules of procedure are not meant to be for cosmetic value, but were meant to be obeyed and adhered to by the consuming litigants, and enforced by the courts. It is also now trite, that, their primary role in the dispensation of justice to the litigants, is that these rules. were and are still meant

to be hand maids and or vehicles of justice and not bad masters and mistresses in the dispensation of justice.

Applying these constructions to the rival arguments herein, the court, is of the opinion that, the intention of the rules committee in promulgating the above due procedures, was that the order VIA procedures were meant to facilitate the amendment of the consent of the plaint but not inclusive of the parties. Where as, the order 1 rule 9 and 10 procedures, were meant to facilitate the addition and removal of parties to and from proceedings. It is also the finding of this court, that the organ mandated to do the addition to and removal of parties to and from proceedings, is the court. The reason for this mandate is obvious, in that it is necessary for the court, to determine at an earlier stage of the proceedings as to whether the addition, or subtraction, of a party to or from the proceeding is necessary in the determination of the real issues in controversy, to avoid frivolous claims being laid, and in conviniencing parties unnecessarily by drawing them into proceedings, they have no business to be drawn into. The court, therefore agrees with the stand of the defendant, that the addition should have been facilitated by the court.

Having ruled that the facilitation of the amendment should have been fcilitted by the court, a question arises as to whether the defendants' objection to the same is belated and therefore ousted as it was not made within the 14 days mandated by the rules, order VIA rule 2 (1) reads:- "*within fourteen days, after the service on a party of a pleading amended under rule 1(1), that party may apply to the court to disallow the amendment.*"

This court, has no doubt that this is the provision that the plaintiffs' counsel relied on when he asked the court, to disallow the objection because it has been raised out of time. It is on record, that the amended plaint was filed on 4th September 2008. The return of service to show when it was served on the defence is not on record. But the memo of appearance was filed on 30th September and defence and counterclaim filed on 2nd October 2008. Taking into account, the fact that these two processes are the ones which conferred locus standi to the defendant to take action in this matter then it follows that, the 14 days would start running from the date when locus standi is gained and then would have run upto around mid October 2008. It would therefore appear that an application filed on 10th March 2009 would definitely be outside the 14 days stipulated. The question is whether by reason of that ouster, the defendant/applicants' application subject of this ruling stand ousted. In this courts', opinion, the said application does not stand ousted because of the following reasons:-

1. The centrol command in the said enabling provision is the word "may". In this courts's construction of the said word "may", it applies both to the action to be taken, and the period. It means that a party is not obligated to object within the stipulated 14 days on the one hand. And on the other hand, an objection outside the 14 days cannot be ruled out.

Alternatively even if this court, were to take it that the 14 days rule within which objection to an amendment should be made were to hold, that in itself would not oust the operation of the inherent jurisdiction of the court, donated by section 3A of the CPA cited by the applicant. The section empowers the court, to do all that is necessary for ends of justice to be met to the litigants and to prevent abuse of the due process of the court. In this courts,' opinion, allowing a party irregularly introduced to the proceedings to participate in the said proceedings, will be tantamount to the court, allowing the party faulted and itself to abuse the due process of the court. It is trite law, that this court, has judicial notice of the fact that a party entitled to participate in the proceedings should only be allowed to do so on a note of "*regularity".* For this reason, recalling that the court, has ruled that once a pleading is filed, it is only the court, which has a mandate to add or remove a party, allowing the amended plaint to stand would be condoning an irregularity. For this reason the defendants' application dated 10/3/2009 has merit. The same is allowed and the court, proceeds to make the following orders:-

1. An order be and is hereby made to the effect that the plaintiffs' amended plaint filed herein on 4th September 2008 be and is hereby faulted, the same is struck out for the reasons given in the assessment.

2. The plaintiff has leave to apply for leave of court, to introduce the same procedurally.

3. The defendant/applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE 2009

R.N. NAMBUYE

JUDGE