REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 101 of 2008

CHARLES MWANGI WANYAI ..... PLAINTIFF

VERSUS

NELSON MURAGURI MBEKENYA ..... 1ST DEFENDANT

ISAAC NGATIA KIHAGI ..... 2ND DEFENDANT

CHARLES MAINA KINGONGO ..... 3RD DEFENDANT

R U L I N G

The defendants herein have by an application dated 19th March 2009 sought leave to amend their statement of defence and counterclaim. The application is expressed to be brought under order VIA rule 5 of the Civil Procedure rules. It became necessary for the applicants to file the application in order to completely and effectively adjudicate on the issues in the suit, that due to an oversight the title to the proceedings in the defence and counterclaim omitted the party they intend to add in the event that the application is allowed, that in order to comply with Order VIII rules 7 and 8 of the civil procedure rules the amendment is necessary, no prejudice will be occasioned to any party by the amendment and if anything, it will be in the interest of justice.

The application was supported by an affidavit sworn by the J. N. Nderi Esq., learned counsel for the applicants. In the main he deponed that the applicants filed their defence and counterclaim on 17th October 2008. That it has become necessary to have the title therein amended in order to join a 3rd party who is a necessary party for effective determination of all the issues herein. That the omission was occasioned by his oversight.

The application was opposed. Through a replying affidavit sworn by the respondent, he deponed where appropriate that the application was incompetent and incapable of being granted as joinder of parties cannot be granted through an application for leave to amend a pleading, a defence or counterclaim cannot introduce a new party to a suit Nor can a party be forced to take up the role of a plaintiff against his wish. Finally he deponed that the issue between the defendants and the intended 3rd party was res judicata and incapable of being ventilated in this suit.

On 20th July 2009 when the application came before me for interpartes hearing, **Mr. Nderi** and **Mr. Macharia**, learned counsel for the applicant and respondent respectively agreed to argue the same by way of the submissions. Subsequently, they filed and exchanged written submissions which I have carefully read and considered.

The gist of this application is to allow the defendants to amend their defence and counterclaim so as to bring in 3rd party as the 2nd plaintiff. In other words the intention of the amendment is to join one **Elijah Wanyai Mwangi** as a second Plaintiff in the suit. Can a party be enjoined or added as a plaintiff by defendant(s) in a pending suit without his knowledge, free will and or consent and thereafter forced to answer to a counterclaim? I do not think so. As correctly submitted by **Mr. Macharia**, the status of a party as a plaintiff is a very deliberate and voluntary one. It cannot be forced upon a person. An amendment of a pleading that has the effect of joining a person as a plaintiff and thereafter held to

account to a counterclaim is to me absurd. For if that was to be allowed, what kind of pleading is such party to file against the defendants. The defendants cannot be allowed to drag somebody into a suit he has no idea about and force upon him a counterclaim. Neither can a defendant force an uninterested party to file suit against him. That is exactly what the applicants are seeking to achieve by this application. They want to force **Elijah Wanyai Mwangi** into filing a suit against them. That is an untenable position in law and fact. It cannot be an argument that the amendments sought are just to enable the defendants comply with the requirements of the law.

Much as amendments of pleadings are liberally allowed by courts at any stage of the proceedings, that has to be balanced with the need for bonafides and the fact that the intended amendment is not oppressive to other parties. I have no doubt in my mind that if the intended amendment is allowed, it will be oppressive to the intended plaintiff. Supposing the intended plaintiff ended up loosing the case and he is saddled with costs, who will bail him out considering that it was not out of his choice in the first place that he was dragged into the suit. As stated in the case of **Santana Fernandes v/s Kara Arjan & Sons (1961) E.A. 693** "**..... It appears from the latter case that a plaintiff being the dominus Litis cannot be compelled to sue a person, for damages in respect of a tort, whom he does not wish to sue. The instant case has demonstrated only too clearly the impossible situation in which an unwilling plaintiff is likely to find himself at the trial while a defendant is forced upon him against his will.....**" The same situation obtains here. Further it is now a requirement that a plaint has to be verified. How will the intended plaintiff verify the averments in the plaint that he has no idea and or knowledge of.

The applicants have invoked Order VIA rule 5 of the civil procedure rules in support of the application. That order and rule deals with general powers to amend pleadings. However I do not think that the said rule can be invoked so as to bring into this suit by force a plaintiff. In the written submissions in support of the application, the applicants have made reference to order VIII rules 7 and 8 of the civil procedure rules. However those provisions of the law were not invoked in the application.

For all the foregoing reasons I find myself unable to exercise my unfettered discretion in favour of the applicants. Accordingly the application is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 29th day of October 2009

M. S. A. MAKHANDIA

JUDGE