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

Civil Case 1394 of 1998

YUSUF ABDALLAH GITAU .....PLAINTIFF

VERSUS

THE BUILDING CENTRE (K) LTD .....DEFENDANT

RULING

The Plaintiff had moved to this Court earlier on vide an application by way of chamber summons dated 9th January, 2006, and filed on 2002 February, 2006. It had also been brought under order 1 rule 3, 10, order VIA rule 3 of the Civil Procedure Act and all enabling provisions of the law. The said application sought orders of Court to join certain persons as defendant. He also sought leave to amend the plaint in the manner shown, the said attached plaint to be treated as being duly filed and costs be provided for.

This Court heard both parties on this application and gave a ruling delivered on 11th may 2007. The salient features of the said ruling are that the said ruling are that:-

(i) the court disallowed the defence objection to the plaintiffs application on the ground that the cause of action sought to be introduced was time barred.

(ii) The reasons given, in the oral submission, as to why the plaintiff intended to join the persons sought to be joined were not contained in the averments in the annexed plaint.

(iii) That in order for the Court to allow the Plaintiffs' application him Plaintiff was required to bring himself within the principles of law governing the standard of pleading required in a joinder application. The standard was simply to disclose what wrongs the party to be joined committed against the claimant and what claims he wishes to lay against the persons intended to be joined. (emphasis own).

(iv) Since the introduction of additional parties calls for the indication as to whether the claim is to be against the totality, severally or in the alternative this had to be explicit in the pleading. (emphasis own).

(v) It was mandatory for the plaintiff to indicate in what capacity each of the defendants was going to meet his claim.

(vi) That the standard of pleading for the main plaint is the same as that of the amended plaint. It is supposed to comply with the provisions of order VI rule 3 civil Procedure Rules where by the Plaintiff is

required to show in the amended plaint the brief facts of the claim and the reliefs he seeks against the incoming defendants and in what capacity he seeks the said claim against them as stated earlier, either jointly, singly, severally or in the alternative.

(vii) That in view of what the plaintiff had stated that his claim will be prejudiced if the incoming defendants are not joined in, justice demanded that they be given leave to present a proper amended plaint along side the guide lines mentioned herein.

In pursuance of the leave granted to the plaintiff in the ruling delivered on 11.5.2007 the Plaintiff has presented another application dated 7th June 2007 and filed on the 8th June 2007. It is brought under the same provisions as the previous one namely order 1 rule 3, 10 Order IV of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the law. It seeks the same reliefs as the previous one. The only anomaly noticed is that order IV Civil Procedure Rules has been cited instead of Order VIA rule 3 Civil Procedure Rules. Order IV deals with institution of suits, where as order VIA is the one which deals with amendments. This error does not affect the validity of the application as the same is curable under Order 50 rule 12 Civil Procedure Rules which states "*Every Order, Rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated but no objection should be made and no application shall be refused merely by reason of a failure to comply with this rule* ".

The plaintiffs/application is therefore properly before Court and the same will be disposed off on merit. The Plaintiff stood by the ground in the body of his application as well as the supporting affidavit. A perusal of the same reveals the reiteration of the earlier grounds in support and in elaboration of the reasons given for the amendment.

The respondent defendant filed a preliminary objection but intimated to the court that instead of having it ruled upon before going into the merits of the application would prolong the proceedings and decided to argue the preliminary objection as a ground of position to the application. The grounds put forward are as follows.

(1) That the cause of action arose on 8.5.96 when the plaintiffs' services were terminated. Him plaintiff is now coming to Court 12 years later to introduce new defendants.

(2) That the company sought to be introduced is an overseas company and service of the summons overseas will be an enormous task which is likely to delay the disposal of the suit. This will defeat the spirit and protection accorded to litigants guaranteeing speedy hearing of matters within a reasonable time.

(3) They contend that the plaintiff is litigating against his interests by this belated application which is standing in the path of the defendant who is ready and willing to have the matter disposed off speedily.

(4) It is his view that the Plaintiffs claim against these incoming parties can be severed from the current defendants' claim and then have the two actions tried separately.

(5) They contend that this courts' ruling of 11.5.2007 has not been complied with as he has failed to disclose the wrong committed against him by the persons sought to be introduced into these proceedings.

(6) The only reason advanced is that the Plaintiff wants something to fall back on in the event of the company becoming insolvent. There is no way the company is going to be insolvent as it is in business and it has been doing so since his termination.

In response the plaintiff stated that there are means to enable one to serve summons overseas as there are laid down procedures for effecting such service. He maintains that the intended parties are relevant to these proceedings as they were involved in the running of the company as at the time he was terminated. It is his view that he has spelt out the claim against each intended party as required by law.

The Courts assessment of the facts in this application is that the key consideration in this matter is for this court to determine whether the applicant in this current application has presented in this current application has presented his plaint intended to be amended within the guidelines set by this court in its ruling of 11th May 2007. This Court has already set out herein the salient features of that ruling. The Court has applied these features to the annexed plaint, considered them in the light of the presented rival arguments for and against the plea to amend and moves to make the following findings on each of the issues raised by the defence.

(1) As regards the defence arguments that the cause of action against the persons intended to be joined has become time barred, the court makes findings that this was also an issue in the earlier ruling. It is on record that this Court examined the grounds raised by the defence in opposition to the earlier move to join these same persons, and considered them in the light of the relevant provisions of the law and made findings that the rule of relating back of the claim from the date of amendment to the date of filing of the claim operates to defeat assertion that the claim against the intended defendants is time barred. The defence did not appeal against that finding and so the issue of the claim being time barred is foreclosed against them as it is res judicata because it was argued and substantively ruled upon.

(2) As regards the defence claims that the company sought to be introduced is an overseas company and effecting of service of summons on the company might take long thus delaying the disposal of the matter, the court makes findings that indeed service on a foreign company, in a foreign country may take a bit of time. However this is no justification for denying a party a right to join a foreign company to a proceeding if he is convinced that the joining of the foreign company is necessary in order to enable the court determine the really issues in controversy and finally determine the matter.

In this courts view, what the plaintiff is moving to do in this matter is not peculiar to these proceedings. It is a matter anticipated by the law, and that is why there is provisions made in order 5 rule 27 for service of the summons in a foreign country. On this account the objection is therefore not valid and the same is disallowed.

(3) Concerning the defendants allegations that the amendment is belated, as observed by this court in its earlier ruling, and as per the relevant provisions on the subject namely Order VI A rule 5 Civil Procedure Rules, there is room for amendment of pleadings at any stage of the proceedings. This provisions reads:-

"5(i) for the purposes of determining the real question in controversy between the parties or of convicting any default or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just".

The Plaintiff/applicant is therefore within the provisions of the law when moving to amend at this point in time, in view of the fact that the trial has not yet commenced and no prejudice will be suffered by the defence as they will have a chance to amend their defence to correspond with the new changed state of affairs of the plaint.

(4) Concerning severance of the claims and having separate trials, this court has judicial notice of a judicial practice and principle that in circumstances where a dispute arises from the same set of circumstances, but against several defendants, it is preferable to have all those issues settled in one trial as opposed to separate trials to avoid having different tribunals arriving at conflicting decisions over the same subject matter, making execution difficult, and thus prolonging litigation. Herein the plaintiff alleges that those sought to be introduced either misused their official position or failed to take action thus leading to his termination of employment. In such circumstances a joint trial is preferable to separate trials. In addition to there being a likelihood of conflicting decisions arising, there is also likely to give rise to increased litigation costs as well as prolonging the trials. This objection too is disallowed.

(5) The last contention is that the plaintiff has not fully complied with this courts ruling of 11.5.07, in that the complaints against each incoming defendant have not been specified as required neither is the

mode of liability. This court has revisited that issue and finds that the plaint sought to be introduced contains some complaints which are not so refined, in a manner that a legal mind would have presented them. They are in the form of presentations by a lay person. They in essence lack a refined form. This however does not rob them the right of being adjudicated upon. They are curable under the provisions of order V1 Rule 12 of the Civil Procedure Rules which states "*No technical objection may be raised to any pleading on the ground of any want of form"*

Further while still on want of form, there is the failure to state whether liability of the defendants is joint, several or in the alternative. This too is not fatal as the same is curable under the provisions of order 1 rules 3, 4, 5, 6 and 7 of the Civil Procedure Rules. These promote Order 1 rule "*(3). All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly severally or in the alternative, where if separate suits were brought against such persons any common question of law or fact may arise for determination.*

(4). *Judgment may be given without amendment.*

(a) *for such one or more of the plaintiffs as may be found to be entitled to relief or such reliefs as he or they may be entitled to .*

(b) *Against such one or more of the defendants as may be found to be liable according to their respective liabilities.*

(5). *It shall not be necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him.*

(6). *The Plaintiff may at his option join as parities to the same suit all, or any of the persons severally, or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes.*

(7). *Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable and to what extent may be determined as between all parties"*.

Of importance to the plaintiff is order 1 rule 7 which gives the court the licence to determine which defendant is liable to the plaintiff and to what extent. It is therefore this Courts findings that the plaintiffs failure to draw up his complaint against each intended defendant clearly does not bar this court from proceeding to allow him adduce evidence on the same and then rule and determine who is liable to him and who is not liable to him.

The Court also takes judicial notice of the fact that even in instances where a plaintiff has pleaded that he claims against the defendant jointly and severally or in the alternative, an adjudicating court is not bound by that. It has a free hand to determine the extend of the liability of each defendant to the plaintiff inclusive of an order that neither of them is liable to the plaintiff as claimed.

There is also the issue of particulars of figures set out in paragraph 9 of the intended plaint not being reflected in the prayers to be granted. The court is aware that those figures should have been reflected. However it is of the view that failure to so specify should not defeat the plaintiff's claims as the figures can be inserted even though an oral amendment at an appropriate time.

It therefore follows that what the court has identified above as matters showing want of form, in the intended plaint sought to be introduced, can be cured under order VI rule 12 Civil Procedure rules which prohibits the faulting of a pleading on the ground of want of form.

Alternatively what the defendant seems to be raising is an alleged failure to comply with the rules or procedure. This court had occasion to consider the effect of failure to comply with the rules of procedure

in this courts ruling delivered on the 13th day of December 2007. In the case of **EDWIN ASAVA MAJANI & 2 OTHERS VERSUS TELECOM LTD.** Discussed at pages 21-23 of the said ruling guidance was sought from case law which this court proceeds to reflect here. The Court referred to the case of **SARAH HERSI VERSUS KENYA COMMERCIAL BANK CIVIL APPEAL NO 165 OF 1999, NAI.** in which Akiwumi J as he then was ruled that rules are hand maidens of this court which court is called upon to ensure, that the handmaidens, do not become bad masters. In the case of **NDEGWA WACHIRA VERSUS RICARD WANJIRU NDANJERU [1982] 1KAR** it was held inter alia that when a breach of the rules is not fundamental the proceedings will not be set aside. In the case of **CONSOLATA NDINDA JULIUS AND 4 OTHERS VERSUS BANUEL BOVIS OMAMBIA NAIROBI HCCC NO. 2050 OF 1993,** Kubo J. held inter alia that a court must at least be prepared to do substantial justice to the parties in undeterred by technical, procedural rules. . . . errors or omissions should not always enjoy clemency, but court procedures are made for a purpose to ensure orderly, effective and predictable management of cases. But there will from time to time be cases where substantive justice demands priority over technicalities over procedure. Lastly in the case of **MACHAKOS RANCHING COMPANY LTD VERSUS JOSEPH KYALO MUTISO CIVIL APPEAL NO NAI 12 OF 1997 CONSOLDIATED WITH MACHAKOS RANCHING COMPANY LTD VERSUS WAEMAI ITUMO MUOKA CIVIL APPEAL NAI. 123 OF 1997**. In this case A.B Shah JA as he then was (now retired) held inter alia that it is the duty of the court to strife to do justice between the parties undeterred by technical rules. Rules of procedure are good servants but bad masters.

When the foregoing guiding principles are applied to the facts herein, the court is of the opinion that this is a proper case where the court should lean towards upholding of substantial justice as opposed to technical justice.

The court is also alive to a judicial practice, doctrine to the effect that a court of law is a court of justice and not a court of sympathy. Further that when a litigant chooses to litigate on his own human he should be taken to be competent to comprehend the court procedures and be able to conduct h is/her proceedings smoothly and at no time should the standard required to be met by such litigants' papers be less than that required of a litigant assisted by legal advise. That both stand on equal footing before the feet of justice. This Court has given due consideration of these doctrines and applied them to the facts herein, and makes a finding that the court in ruling as it has ruling has simply exercised its discretion judiciously and within the limits provided by the ruled and it has not at any one particular time applied sympathy to either party herein.

Lastly the defence also raised the issue of delay in the speedy disposal of the matter guaranteed by section 77 of the Kenya Constitution Section 77 (9) of the said Kenya Constitution provides "*A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority the case shall be given a fair hearing within a reasonable time*".

The fundamental gurantee given in this provision is not one sided. It applies to both. A reading of it does not rule out allowance of time to a litigant to comply with all the procedural steps necessary to be employed in order to have such a claim perfected so that the really issues in controversy are presented before the adjudicating body. By the Plaintiff, moving to perfect this claim before adjudication, he is not in breach of this provisions as the same is permitted by law.

For the reasons given, the court finds merit in the plaintiffs' application dated 7th August, 2007 and filed on 8th August 2007. The same be and is hereby allowed on the following terms.

(1) The amended plaint to be filed and served within 14 days from the date of reading of this ruling.

(2) The defendant already on board to have 14 days from the date of service upon him of the amended plaint to file an amended defence if need be.

(3) The Plaintiff will have 14 days from the date of filing of the amended pliant to take out summons to

enter appearance and serve the same on the incoming defendants.

(4) Thereafter parties to proceed according to law.

(5) The defendant already on board to have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 25TH DAY OF APRIL 2008.

R.N. NAMBUYE

JUDGE