REPUBLIC OF KENYA

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

CIVIL SUIT 1224 OF 2004

DANIEL KARIIYU MUNGAI…….....……PLAINTIFF

VERSUS

1. **EQUITY BUILDING SOCIETY……..DEFENDANT**
2. **JOHN K. MWANGI…...…..……..PROPOSED 2ND DEFENDANT**
3. **JAMES N. MWANGI…...……..…..… PROPOSED 3RD DEFENDANT**
4. **AMBROSE MAKANGA…..……..…….. PROPOSED 4TH DEFENDANT**
5. **RAHAB MWIKALI KAROKI…….....…. PROPOSED 5TH DEFENDANT**

R U L I N G

1. This suit is between **Daniel Kariiyu Mungai and Equity Building Society** as per the plaint dated 23/10/2003 and filed in court on 21/11/2003. The case concerns a dispute involving Land Reference Number 14702/27 situate at Garden Estate Nairobi (the suit property) which the Plaintiff charged to the Defendant through a joint charge dated 30/11/1999. An amended plaint dated 21/01/2004 was filed herein on 9/02/2004. The Plaintiff's suit is based on alleged misrepresentation and fraud on the part of the Defendant.

By an application dated 18/05/2007, filed through the firm of Thomas Otieno & Associates Advocates for the Plaintiff, the Applicant seeks **ORDERS THAT**:-

1. John K. Mwangi, James N. Mwangi, Ambrose Makanga Ngari and Rahab Mwihaki Karoki be joined as Defendants in this suit

2. Leave be granted for amendments to be effected on the plaint in terms of the annexed Further Amended Plaint and the same be deemed as duly filed.

3. The costs of the application be provided for.

2. The application is supported by the grounds on the face thereof and also by the sworn affidavit of **Daniel Kariiyu Mungai** and such other or further grounds as were adduced at the hearing hereof. The grounds on the face of the application are that:-

(a) The Proposed Defendants jointly with the Defendant herein perpetrated fraud and

misrepresentation against the Plaintiff as particularized at paragraph 8 of the plaint for their several and or joint benefits. The basis:

(i) John K. Mwangi, James N. Mwangi and Rahab Mwihaki Karoki are liable for signing a fake backdated letter of loan offer, which never existed and which was authored fraudulently to justify the unlawful activates of the Defendants.

(ii) John K. Mwangi and Ambrose Makanga Ngari are liable for preparing and signing fake fiction statements of accounts to perpetrate fraud against the Plaintiff.

(b) The Defendant herein has distanced itself from the actions of the proposed Defendants and denied the allegations of fraud and misrepresentation against it by asserting at paragraph 9 that it is a stranger to the same.

(c) Upon ordering for the joinder of the proposed Defendants, amendments are necessary to add their names and to further plead, if need be, against them, in order to place for determination materials facts before court. *(sic)*

(d) The joinder of the parties and amendments are necessary for the determination of the real questions raised by the proceedings.

(e) It is in the interest of Justice that the orders sought are allowed as the same will neither prejudice the Defendants nor delay the hearing of the suit.

3. In his supporting affidavit, **Daniel Kariiyu Mungai** says that the misrepresentation and fraud which he has alleged against the Defendant herein was perpetrated by the joint efforts of the Defendant and the proposed Defendants and that he believes that the impropriety so committed was for the joint and several benefit of the Defendant herein and of the proposed Defendants. He says **Mr. John K. Mwangi** (then Chief Executive Officer of the Defendant), **James N. Mwangi** (then Financial Director of the Defendant), **Ambrose Makanga Ngari** (then in the employ of the Defendant) and **Rahab Mwihaki Karoki** (the Plaintiff's estranged wife) fraudulently prepared, signed and witnessed a fake backdated letter of loan offer which never existed and which he says was authored to justify the unlawful activities of the Defendants; and that in fact the said fraudulent letter was written after he had questioned why he was being excluded from the loan proceeds under a charge jointly executed by himself and his estranged wife Rahab Mwihaki Karoki, the proposed 5th Defendant. The deponent has attached to his supporting affidavit the alleged fraudulent letter marked "***DKM 1".***

4. The deponent also says that **John K. Mwangi** and **Ambrose Makanga Ngari** are the ones who also prepared and signed fake and fictitious separate statements of accounts in an attempt to cover up their suspicious activities as per annexture "***DKM 2"*** being copies of conflicting Statements of Accounts. He goes on to say that because by its defence the Defendant has distanced itself from the allegations of fraud and misrepresentation committed by the proposed Defendants, it is necessary to join the proposed Defendants with a view to availing them an opportunity to defend themselves against those allegations; and that for the above reasons, it is in the interest of justice to order joinder of the proposed Defendants before the suit can be set down for hearing and that in doing so, no prejudice will accrue to the Defendant and/or the proposed Defendants.

5. The application is opposed. Grounds of Objection were filed by **Evans Thiga Gaturu** on behalf of the Defendant and the proposed 2nd Defendant, John K. Mwangi. These are that:-

1. The Application is incompetent and misconceived, frivolous and vexatious and is an abuse of the due process of the court as the same is defective and contrary to the Provisions of Order VIA Rule 8, Order 4 Rule 1 and Order 1 and Order L Rule 1, Rule 13 of the Civil Procedure Rules and the defects are incurable.

2. The Law of Amendment of Pleadings is breached and the breaches are completely incurable and

cannot be entertained by this Honourable Cout.

3. The application is completely defective and is in breach of Order 1, Order VIA, Order L Rule 3 and 15, of the Civil Procedure Rules.

4. The Application flies in the face of the Law of Amendment of pleadings the Rules of Natural Justice and is an abuse of the due process of the court.

5. The Amendments are bound to compound the just and fair trial of the suit, three (3) of the intended/proposed Defendants being witnesses for the current defendant Equity Building Society as its employees at the material time, and bringing them as co-defendants might prejudice the defence evidence of the Defendant and the interests of justice which should not be allowed.

6. The intended amendments are misconceived and incompetent vague and ambiguous and are an abuse of the due process of the court and the intended 2nd Defendant and current Defendant pray that the same be disallowed the application struck out with costs to them.

6. **M/s Waweru Gatonye & Co., Advocates** for the proposed 3rd and 4th Defendants also filed their grounds of Opposition on 13/09/2007 to the effect –

1. THAT the application is frivolous, vexatious, bad in law and an abuse of the court's process as no cause of action lies against the proposed Third and Fourth Defendants as agents of a disclosed principal.

2. THAT the application is incompetent, misconceived, bad in law, frivolous, vexatious and an abuse of the due process of the court as the proposed amendments of fraud and/or misrepresentation are statute barred and contrary to the law as provided under section 4(2) and 27 of the Limitation of Actions Act, Cap. 22 Laws of Kenya.

3. THAT the application is incompetent, misconceived, bad in law, frivolous, vexatious and an abuse of the due process of the court as the said proposed amendments are contrary to the spirit of the provisions of Order 1 Rule 3 of the Civil Procedure Rules.

4. THAT as agents of a disclosed principal, it would be manifestly unjust and contrary to the public interest in the administration of justice to enjoin the said persons as Defendants.

7. The parties filed written submissions. Learned Counsel for the Applicants submitted that under Order 1 rule 3 of the Civil Procedure Rules

"***all persons may be joined as Defendants against whom any right or relief in respect of or arising out of some act or transaction or series of acts or transaction --- whether jointly or severally ----"***

and that because the transaction that gave rise to the instant suit is one and the same as concerns the Defendant and the proposed Defendants, it is only proper that the proposed Defendants ought to be enjoined in the suit. Learned counsel for the Applicant dismissed as inconsequential the proposed Defendants' objection to their being enjoined in the suit and especially on grounds that they were employees of the Defendant herein. The Applicant also relies on Order 1 rules 7 and 10(4) of the Civil Procedure Rules which state:-

"***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 the parties.***

"***10. (4) Where a Defendant is added or substituted the plaint shall, unless the court otherwise, directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new Defendant and, if the court thinks fit on the original defendants."***

8. Under O.1 rule 13 of the Civil Procedure Rules, an application to join a party may be made to court at any time before trial or at trial in a summary manner. Learned counsel for the Applicant also submitted that this court has unlimited discretion to allow amendments at any stage of the proceedings and he urged the court to exercise that discretion in favour of the Applicant.

9. Counsel for the Applicant cited two cases of persuasive authority to support his client's case. In **HCCC No.205A of 1996 – Premier Savings & Finance Ltd. –vs- Hamendra Mansukhlal Shah,** the court was of the view that the decision to join or not to join a party to a suit "***is a matter in the interests of justice to the parties involved***". Learned counsel Mr. Otieno for the Applicant urged the court to find that it would be in the interests of justice to allow this application, and that the only constraint the court should consider is whether the joinder of the proposed Defendants would cause injustice or prejudice to the proposed Defendants. Counsel also invited the court to consider the rationale in the case of **Antony Gachoka –vs- National Hospital Insurance & Others – HCCC No.834 of 2005,** and to find and to hold, that it would be in the interests of justice to allow the present application as this would prevent further litigation and would give every interested party an opportunity to be heard in the same cause and afford the court an opportunity to complete justice at once.

10. In his further submissions, learned counsel for the Applicant dismissed the grounds raised by the 1st – 4th Respondents in opposition to the application, arguing that the proposed Defendants acted in carhoots with the Defendant in perpetrating the illegal and fraudulent acts against the Applicant. Nor did counsel for the Applicant see any merits in the Respondents' contention that by alleging fraud against the Respondents, the Applicant is thereby introducing a new cause of action. Counsel relied on **Blacks Law Dictionary,** 8th Edn. At page 235 where it is said that:-

"***amendments relate back to the date the suit was filed and if it was filed in time, any amendments can be made without offending the statute of limitation."***

11. As for the 5th Defendant, no Replying Affidavits or grounds of opposition have been filed against the Applicant's application. Counsel for the Applicant interpreted the omission to mean that the 5th Defendant has no resistance to offer against the said application. Counsel for the Applicant also contends that the Respondents are all necessary parties to the suit and that their inclusion would assist the court in determining the real issues in controversy.

12. Learned Counsel for the Defendant and 2nd proposed Defendant submits that the proposed amendment is unjustified and not in the interest of justice. He also says that it would be in the greater interests of justice for the proposed Defendants, and especially the 2nd proposed Defendant to be called as witnesses in the case and not to be joined as parties to the suit if the truth of the allegations made against the Defendant is to come out. Learned Counsel also contends that if the Plaintiff eventually succeeds on his claim, any damages sought would be met by the Defendant and as such there is no need in enjoining the proposed 2nd Defendant or any other Defendant.

13. On the law governing amendment learned counsel for the Defendant and 2nd proposed Defendant readily agrees that Order VIA gives wide and generous power to the court to grant leave for amendment of pleadings at any stage of the proceedings to enable the court to adjudicate the dispute with all the facts and/or parties before it. He however contends that the discretion given to the court must be exercised judiciously. In learned counsel's view, to allow the further amendment of the plaint in the manner proposed by the Applicant would only distort and compound issues with the result that the court may find it difficult to adjudicate the dispute. In any event, counsel argues that with a sound financial base, the Defendant would be in a position to pay any damages payable to the Plaintiff should the latter's claim succeed. In learned counsel's view the proposed amendments are misconceived and incompetent, vague and ambiguous and fly in the face of the Law of amendment of pleadings and the Rules of Natural Justice and are an abuse of the due process of court. It is also contended on behalf of the 2nd proposed Defendant that the proposed amendments are aimed at embarrassing the Defendant and the said 2nd proposed Defendant.

14. Learned counsel for the Defendant and the 2nd proposed Defendant referred the court to a plethora of case law. Although it is not possible to refer to each case in any appreciable detail, a few of the cases are worth of mention. In the case of **Joseph Ochieng & 2 Others –vs- First National Bank of Chicago** - Court of Appeal at Nairobi, Civil Appeal No. 149 of 1991 the court adopted the reasoning of Lord Griffiths in the case of **Ketteman vs Hansel Properties Limited** [1988] 1 AII ER 38 where the learned Lord said the following at page 62:-

"***Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Further, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful Defendant an opportunity to renew the fight on an entirely different defence."***

In the same **Joseph Ochieng** case, the court quoted the following passage from **Ransley & Another –vs- KNCC Ltd. – Civil Application No. NAI 116 of 1988** (unreported)

"***Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of proceedings."***

It is worth nothing that the instant application has not been brought at a very late stage in the proceedings.

15. The 3rd and 4th proposed Defendants also filed their submissions to augment their grounds of opposition filed on 13/09/2007. It is contended on their behalf that no cause of action lies against the said proposed 3rd and 4th Defendants as agents of a disclosed principal, and that they are sought to be brought into this suit on account of purported acts of fraud collusion and misrepresentation during the course of employment and as officers of the Defendant, with the Applicant alleging that the said 3rd and 4th Defendants were the principal officers whose actions allegedly led to the breach of the terms of the loan facility secured by way of charge over the suit property. Relying on the case of **Wareham t/a A.F. Wareham & 2 Others –vs- Kenya Post Office Savings Bank** [2004] 2 KLR 91, learned counsel for the proposed 3rd and 4th Defendants (Mr. Ngacha) contends that the Applicant's application should be dismissed since prima facie, the proposed 3rd and 4th Defendants are being impleaded as agents of a disclosed principal and that to allow the joinder of the proposed 3rd and 4th Defendants would be contrary to "***the clear principle of common law that where the Plaintiff is disclosed, the agent is not to be sued***."

16. Further, it is contended on behalf of the proposed 3rd and 4th Defendants that there was no privity of contract between the Plaintiff and the 5th Respondent on the one hand and the proposed 3rd and 4th Defendants on the other hand; that the mere denial by the Defendant that he is a stranger to the Plaintiff's allegations of fraud and misrepresentation does not provide a passport to the Plaintiff to enjoin other parties to the suit without proving privity of contract.

17. It is also contended on behalf of the proposed 3rd and 4th Defendants that the cause of action against the said proposed Defendants is incompetent, bad in law and misconceived on grounds that it is statute barred by the provisions of section 4(1) and (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya. I think that on this particular point the law is clear that if the proposed amendments relate back to the date the suit was filed and if it was filed in time, any amendments can be made without offending the statute of limitation.

18. It is also the contention of the proposed 3rd and 4th Defendants that it would be manifestly unjust and contrary to the public interest in the administration of justice to enjoin the said persons as Defendants. Citing the case of **Premier Savings & Finance Limited –vs- Hamendra Mansukhal Shah –** (Supra), Mr. Ngacha contends that the court must be extremely cautious in exercising its discretion in order to ensure that the exercise of that discretion does not occasion any injustice to parties.

19. In summary counsel for the proposed 3rd and 4th Defendants says that (a) it is immaterial whether the Plaintiff reasonably suspects that fraud and misrepresentation were allegedly committed by the proposed 3rd and 4th Defendants so long as the same were done in the course of their employment with the Defendant; (b) that this court has statutory and inherent power to prevent joinder of parties where such joinder would cause injustice to parties; (c) the court must seek in considering the Applicant's application to protect its ability to function in such a way that its processes are used fairly by Plaintiffs and Defendants alike (d) where the principal is disclosed, the agent should not be sued and (e) on the score of costs the court should exercise its power by refusing the Applicant's application and protect the proposed 3rd and 4th Defendants from expenditure on a civil trial that has no basis.

20. The above are the facts of this case, the submissions and the law. I have carefully and critically considered submissions by all counsel appearing. I have also considered the law as set out in the Civil Procedure Rules and also in the authorities cited to me. It is not disputed that the Plaintiff's case arises out of a contract that was executed between the Plaintiff and the 5th Defendant on the one part and the Defendant on the other. It is also not disputed that the 2nd proposed Defendant is the Chief Executive Officer of the Defendant and that the proposed 3rd and 4th Defendants were employees of the Defendant at the time when the alleged breach of contract by the Defendant occurred. The Plaintiff claims that the loss he has suffered as a result of the alleged breach of contract came about as a result of joint efforts and collusion of the proposed Defendants (the officers of the Defendant) and the Defendant and that in the circumstances the proposed Defendants ought to be brought to book. The Plaintiff further says that it is only fair and in the interest of justice to give the proposed Defendants an opportunity to defend themselves against these allegations to which the Defendant avers is a stranger (see paragraph 9 of the Plaintiff's supporting affidavit sworn on 18/05/2007 and filed in court on 22/05/2007). On the other hand, the main argument of the proposed Defendants (save for the 5th proposed Defendant who has not filed any replying papers), is that since the principal of the 2nd, 3rd and 4th proposed Defendants is disclosed there would be no value adding to the suit to enjoin the said 2nd, 3rd and 4th proposed Defendants.

21. After carefully considering the above, and taking into account the law, I am of the view that since the principal in this case is disclosed, a fact that is not denied by the Applicant, there would be absolutely no value adding to the suit to enjoin the proposed 2nd, 3rd and 4th Defendants. If the Plaintiff's claim against the Defendant should succeed, the Defendant is the one to meet that liability with or without the proposed 2nd, 3rd and 4th Defendants being party to the suit. As for the 5th proposed Defendant she has said nothing about the Plaintiff's application. The court can infer that she has no objection to becoming a party to the suit. It was indeed herself and the Plaintiff who were party to the contract which, they signed with the Defendant, and which contract is the basis of the Plaintiff's claim against the Defendant.

21. In the result, I dismiss the Plaintiff's application dated 18/05/2007 as against the proposed 2nd, 3rd and 4th Defendants with costs to the said proposed 2nd, 3rd and 4th Defendants. The Plaintiff's application against the 5th proposed Defendant being uncontested is allowed but with no order as to costs. Leave to amend the plaint is hereby granted but only limited to the proposed 5th Defendant. The further amended plaint in the above terms to be filed and served within 14 (fourteen) days from the date of this ruling. The Defendant is to file and serve its amended defence within 14 (fourteen) days of service of the further amended plaint.

It is so ordered.

Delivered and Dated at Nairobi this 24th day of November, 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-

……For the Plaintiff/Applicant

……For the Defendant and 2nd Proposed Defendant

..…….For the 3rd and 4th Proposed Defendants

..…….For the 5th Proposed Defendant