



REPUBLIC OF KENYA

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

Civil Case 276 of 2008

- 1. KARL HEINZ STRAUS**
- 2. NELLIE OCHANDA**
- 3. KENYA ONE TOURS LIMITEDPLAINTIFFS**

V E R S U S

- 1. RUSEEL WILMOT**
- 2. K. A. T. O REGISTERED TRUSTEESDEFENDANTS**

R U L I N G

The Plaintiffs instituted this suit against one defendant only. Then, by an amended plaint filed on 11th September, 2008 under **Order 6A, rule 1** of the **Civil Procedure Rules** (the Rules) the 2nd Defendant was added. When the application by chamber summons dated 14th October, 2008 came up for hearing on 21st October, 2008 the court raised the issue whether the 2nd Defendant has been properly enjoined in the proceedings without the leave of the court under **Order I, rule 10** of the Rules, and invited learned counsel for the Plaintiffs to make submissions on the point. Such submissions were made on 4th November, 2008.

I have considered the submissions of the learned counsel, Mr. Obura, including the cases he cited. He argued that since the suit arises out of a contract it is the Plaintiffs prerogative to join as parties all or any of the persons severally or jointly and severally liable under the contract as provided by **Order 1, rule 6** of the Rules. Further, submitted Mr. Obura, leave of the court is necessary only for joinder of a plaintiff and not for a defendant under Order 1, rule 10 of the Rules.

Obviously a plaintiff has the prerogative to sue whomever he chooses. But once he has filed suit, he cannot, in my respectful view, add a defendant merely by amendment of the plaint without leave of the court for such addition. Order, I rule 10 (2) of the Rules appears to me to be clear enough on this point. It provides:-

“(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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Granted, a plaintiff may sue whomever he chooses. But once he has filed suit, it is not open to him to add defendants as he may wish. He must obtain the leave of the court under the above quoted rule. It is entirely the court's discretion, not the plaintiffs' prerogative, whether any other person may be added as a defendant.

The cases cited by Mr. Obura do not assist him at all. In the case of **LOMBARD BANKING KENYA LTD –vs- SHAH BHAICHAND BHAGWANJI [1960] EA 969**, the predecessor of this court stated that a defendant may be joined as a party without his consent. It did not address the issue whether a defendant may be added without the leave of the court. In the case of **AHMED –vs- COMMISSIONER OF CUSTOMS & EXERCISE [2000] 2 EA 293** the Court of Appeal held *per curiam, inter alia*, that in principle joinder of parties is allowed as of right, subject to the discretionary power of the court. The point here, of course, is that it is ultimately in the court's discretion whether any party should be joined in a suit whether as plaintiff or defendant; it is not the Plaintiff's prerogative without leave of the court. In the last case cited, **EAST AFRICAN DEVELOPMENT BANK –vs- APOLLO INSURANCE CO. LTD & ANOTHER [2006] e KLR** the High Court (Waweru, J) merely noted that the amendment of the plaint required by sub-rule (4) of rule 10 of Order I of the Rules is a necessary consequence of an order of the court to add or substitute a defendant. The case did not address the issue whether a plaintiff can add or substitute a defendant without leave of the court merely by amendment of the plaint.

I therefore hold that the Plaintiffs, having filed this suit against one defendant only, were not entitled to add the 2nd Defendant without leave of the court under Order I, rule 10 merely by amendment of the plaint under Order 6A, rule 1 of the Rules.

But Mr. Obura has now applied orally for such leave. Such oral application is permitted by **rule 22 of Order I**. Bearing in mind that a plaintiff has the right to sue whomever he may wish, I will grant the application. The 2nd Defendant is hereby deemed to be duly added. The amended plaint filed on 11th September, 2008 is also deemed to be duly filed under Order 1, rule 10(4) of the Rules. The same shall be served upon the Defendants.

There will be no order as to costs.

DATED AT NAIROBI THIS 5TH DAY OF NOVEMBER, 2008

H. P. G. WAWERU

J U D G E

DELIVERED THIS 7TH DAY OF NOVEMBER, 2008