



**REPUBLIC OF KENYA**

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

**Civil Case 817 of 2006**

**DIMA COLLEGE LTD .....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD ..... DEFENDANT**

**RULING**

The Plaintiff herein has filed a suit by way of plaint against the defendant dated 27<sup>th</sup> July 2006 and filed on the same date. The averments relevant to this application are found in paragraphs 4,5,6,7,8 and 9 of the plaint. The spirit of those paragraphs is that there is in place a lease agreement in respect of the suit premises subject of these proceedings, which lease was made by way of exchange of correspondences between the defendant and the principal of the current plaintiff. The reliefs that the current plaintiff is seeking from the defendant relate or arise from that lease. In paragraph 2 of the defence, the defence admits paragraphs 4,5,6 and 7 of the plaint save that one letter was signed and rubber-stamped on behalf of the plaintiff and another on behalf of another party.

The Plaintiff has come to this court under order 1 rule 1 and order L rule 1 seeking to enjoin MUNDIA NO. GETERIA t/a DIMA COLLEGE as the second plaintiff herein and that costs be provided for.

The grounds relied upon are set out in the body of the application, supporting affidavit and oral submissions in court. These are that the proposed second plaintiff is the Managing Director of the current Plaintiff, that these proceedings relate to matters he undertook personally with the defendants, that in view of this relationship it is necessary for him to be joined in these proceedings as a party, that the current plaintiff's occupation of the defendants premises is on the basis of letters of offer made to the intended second plaintiff and if not joined to the proceedings the plaintiffs' case will be weakened.

Further that the intended plaintiff is the one who is the mind of the current plaintiff and it is necessary for him to come into the proceedings in order to protect his own interests and those of the current plaintiff. The intended plaintiff has the same cause of action hence the need to allow him ventilate his rights through the current proceedings to avoid duplication of suits. The intended plaintiffs' role is more than that of a witness and no prejudice will be suffered by the defence if he is joined to the proceedings.

The defendant opposes the intended plaintiff being joined to these proceedings because from the records available to them the intended plaintiff has assigned the tenancy rights to the first plaintiff and his role in the proceedings remain to be that of a witness and not a party. This is further supported by the current plaintiffs own pleading that they are the sole tenants. That the intended plaintiff has not shown sufficient cause to be allowed to be joined to these proceedings. It is their stand that by virtue of being a Managing Director of the current plaintiff, does not entitle him to join the proceedings as a party and him having transacted business on behalf of the current plaintiff only renders him as a witness and not a party.

In response to the submission of the defence counsel for the current plaintiff reiterated his earlier submissions and maintained that they have not assigned any lease as that could not be done without the involvement of the landlord. Further in another related matter they are joint plaintiffs and there is no prejudice alleged and there is no reason as to why this case should be treated differently.

Order 1 rule 1 of the Civil Procedure Rules gives general guidelines when it comes to dealing with applications of this nature. It states *“All persons may be joined in one suit as plaintiffs in which 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 such persons brought separate suits any common question of law or fact would arise”*

When the ingredients of this provision are applied to the facts of this application, it is clear that the correspondences signed by the intended plaintiff are central to the proceedings. That being the case, if the intended plaintiff were to file a separate suit against the defendant, common question of law and facts would be gone into. These are:

- In what capacity the intended plaintiff executed those letters?
- What is the effect of those letters to the rights of the parties?
- Do they support or prove the existence of a lease?

The court has been informed that he is already a party in another related matter and no prejudice has been suffered by the defendant. It is correctly submitted by the defence that he is useful to the proceedings as a witness. Indeed by virtue of him being the one who executed the letters forming the basis of the proceedings he is a very important witness. But nothing prevents him from doubling up as a party as well as a witness. Being a party will give him a better bargaining position than when he is retained as a witness.

The defendant's objection is premature. The best time for him to object is after the plaint has been amended and the cause of action against them stated. If they find that the amended plaint does not disclose a reasonable cause of action against them, room exists for them to apply to have the amended plaint struck out for the reason of disclosing no reasonable cause of action against them. For now they should hold their horses and wait for the amended plaint. The law allows a plaintiff to choose who to sue. The law allows a defendant to refuse to be sued on the basis of an existing pleading which the defendant uses to move the court to have it struck out for non-disclosure of a cause of action against them.

For the reasons given the plaintiffs application seeking to enjoin the intended plaintiff has merit and it is proper that it be allowed more so when it is not disputed that there is another related matter in which parties have sued each other in the same capacity as is sought to be introduced herein.

The defendant will be compensated for by way of costs.

The plaintiff's application dated 27.9.2006 and filed on 29.9.2006 be and is hereby allowed. Costs of the application to the Respondents.

**DATED READ AND DELIVERED AT NAIROBI AT THIS 27<sup>TH</sup> DAY OF APRIL, 2007.**

R. NAMBUYE

**JUDGE**