



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/Applicant has filed a Chamber Summons under Order 1 Rule 3, 10, Order VIA rule 3 Civil Procedure Rules and Section 3A Civil Procedure Act seeking leave of Court to join **RAFFIQ SHARIFF, NOOR SHARIFF ALIBHAI SHARIFF AND SONS LTD AND UBM OVERSEAS LTD** as defendants, that the amended plaint, attached here to be deemed as filed and costs be provided for.

The grounds in support are set out in the body of the application and oral submissions in court. The major reason for seeking amendments is to bring in new defendants as listed because one is an investor, others are directors who misused their directorship and one neglected his duty. He plaintiff had given instructions to his then lawyers on record to have them joined as defendants but the then plaintiffs lawyers acted contrary to his instruction and that is why he withdrew instructions from them. It is important for these people to be joined to the proceedings because they were involved in initiating the subject matter of the proceedings and so if they are not joined to the proceedings the plaintiffs claim might become irrecoverable hence the need to amend.

The Respondent has opposed that application on the basis of the grounds in the replying affidavit as well as oral submissions in court. The deponent of the replying affidavit has deponed in paragraph 1 that he had authority from the intended fifth defendant to swear that affidavit but that authority has not been exhibited. This means that in the absence of the annexing of the authority to swear, that affidavit is deemed to operate in favour of the deponent only.

Turning back to the merits of the replying affidavit Counsel for the defendant has submitted that the nexus in the employment between the incumbent defendant and the intended incoming defendants is not shown. It is his view that managers as well as shareholders are not susceptible to suits between contracting parties. That question arises as to whether parties can be joined to the proceedings after the expiry of the fixed term of the contract. That there was a termination clause which was exercised by one party. It is their stand that parties brought in will just crowd the issues as they are irrelevant. That there is nothing to show that the foreign investor is about to wind up to defeat the judgment when it has been in

operation for 11 years since the suit was filed.

The Court was referred to an **ENGLISH AUTHORITY LIFF VERSUS PEASLEY AND ANOTHER [1980] 1 ALL ER 623** whose central theme in the holding is that the theory of “*relation back*” on joinder of parties does not apply where the limitation of action, period has become operational in favour of a party sought to be joined. Further the issue of misjoinder can be raised after a party has entered an unconditional appearance.

Upon hearing both parties on this application it is clear that the applicants application is simply an application to join in additional defendants. Order 1 rule 3 Civil Procedure Rules cited gives general power to join a party 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 questions of law or fact would arise. Order 1 rule 10 (2) gives the court power to add the name of a defendant as in this case whose presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit where as Order VIA rule 3(2) empowers the court to allow the amendment even if the time for limitation of action period had accrued at the time of filing the original claim if it is satisfied that it is just to do so. Section 3A Civil Procedure Act on the other hand empowers the court to do all that is necessary for ends of justice to be met and to prevent abuse of the due process of the law.

When the provisions of law cited here in as well as the principle in the authority cited by the defence are applied to the facts of this application it is clear that two issues emerge for determination by this court namely:-

- (1) The issue of limitation
- (2) The issue of necessity of the presence of intended defendants in these proceedings.

The issue of limitation was raised by the defence on account of the transaction herein being a contractual relationship for a specified period which period has expired and thus according to the defence making the action time barred. In response to this the court takes judicial notice of the provisions of the Law of Limitation of Actions Act Cap.22 Laws of Kenya

regards the life span of a cause of action arising from a contractual relationship which is six years. Section 4 (1) (a) states “*The following actions may not be brought after the end of six years from the date on which the cause of action accrued*

(a) actions founded on contract”

From the pleading in the plaint paragraph 6 there of the contract was allegedly un lawfully brought to an end by a letter dated 8.5.1996. The 6 year period started running from that date. The original plaint herein is dated 9th March 1998 and filed on 25.6.1998. By then six years had not elapsed. The filing of the action interrupted the six year period from running against the plaintiff. This means that all persons whose activities contributed to the action herein and those who claim through the defendant sued or through whom the defendant sued claims are covered by the action in so far as the action herein is concerned and the period of limitation does not affect them. Anybody else outside that bracket is protected by the period of limitation. The authority cited by the defence of **LIFF VERSUS PEASLEY AND ANOTHER [1980] I.A.ER 63** prohibits the doctrine of “relating back” from taking place to validate an action against a person to be joined to the proceedings at a later date if at the time of joinder the said action had become extinct by virtue of limitation period. This authority is however distinguishable from the Kenyan situation as order VIA rule 3(2) permits the joinder of such a person if the court thinks it is just to do so. In which case the doctrine of “relating back” operates to protect the claimant as the effectiveness of joinder “relates back” to the date of the filing of the suit to validate the action against the incoming party event if at the date of joinder the claimant’s action against him has become barred by virtue of limitation of action legislation. This doctrine operates to shield the plaintiff

herein.

As regards the next issue of necessity to join the party, this is to be determined by pleadings by the claimant of what claims he intends to raise against the incoming parties in relationship to the existing claim against the party already on board. This is to be determined by the averments in the plaint against these persons. The plaintiff gave reasons for wanting to join them in his oral submissions in court namely one is an investor, another one is a managing director while the others are brothers who have misused their Directorship and are guilty of negligent performance of their duty. This court has had occasion to peruse the annexed amended plaint and does not find averments along side the reasons given by the plaintiff as reason for wanting to join these people to the proceedings. In the absence of such reasons being averred to in the plaint there is nothing to show that these people should be joined to the proceedings. The plaintiff has stated that his case will be jeopardized if these people are not brought on board. In wanting the court to indulge him in this respect, he has to bring himself within the principles of law governing the standard of pleading required in a joinder application. The standard is 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.

Since the introduction of additional parties calls for the indication as to whether the claim is to be against the totality of the defendants sought jointly, severally or in the alternative, this has to be explicit in the pleading. It was mandatory for the plaintiff to indicate what capacity each of the defendants is going to meet his claim.

The plaintiff has cited Section 3A of the Civil Procedure Act, saving clause and the question is whether this section is to be called in to play to cure the defect mentioned above and allow the amendments to sail through. 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. The only benefit that the plaintiff can draw from Section 3A Civil Procedure Act is that in view of what he has stated that his claim will be prejudiced if the incoming defendants are not joined in, justice demands that the current application be disallowed but he be given leave to present a proper amended plaint along side the guidelines mentioned herein.

The last point to be considered is the locus standi to attack the intended amendment. This arises from the fact that one **RAFIGUE SHARIFF** swore the replying affidavit on behalf of himself as a director of the current defendant and one **NOOR SHARIFF** whose relationship to the current defendant has not been disclosed. **Rafique** had locus standi to attack the application by virtue of this directorship with the current defendant. But Noor Shariff has no locus standi to do so. He has to wait till he is joined to the proceedings and when he discovers that the Plaintiff has no claim against him apply for striking out the said claim.

For the reasons gives the application dated 9th January, 2006 and filed on 2.2.2006 be and is hereby dismissed with costs to the defendant. However since he has claimed that without the intended joinder his claim will be rendered useless, for ends of justified to be met in this matter, the plaintiff is given leave to present another application with a properly amended plaint along the observations made herein.

DATED, READ AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY 2007.

R. NAMBUYE

JUDGE