REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

Civil Suit 36 of 2007

SAFI PETROLEUM PRODUCTS LTD. …….…….. APPLICANT

VERSUS

ABDIRAHIMAN ABDI ……..…… RESPONDENT

RULING

The application for consideration of this court is Chamber summons dated 23rd March, 2007 filed by the Plaintiff. It is premised under Order 1 Rule 10 and Order 6A Rules 3 (1) and 8 of the Civil Procedure Rules as well as Sections 3A and 100 of the Civil Procedure Act. It seeks substantially to add the four persons (named in prayer no. 1 thereof) as defendants to be placed as 5th to 8th Defendants as to amend the amended plaint a draft whereof is enclosed to the application.

It is supported on the grounds set forth on its face and on a supporting affidavit of Mohamed Juma Noor one of the directors of the Plaintiff company.

Before I deal with the merits of the application, it is desirable to deal with various objections raised as to competence of the application and admissibility of the supporting affidavit in support of the application.

In short the following issues were raised:

1. The application is defective as it does not set out the notice at its foot as required under Order 50 Rules 15 (2).

2. The supporting affidavit offends Order 18 Rule 4 as the deponent has failed to show true place of abode.

3. The supporting affidavit is fatally defective as it has failed to show source of information or to show which facts are within knowledge and/or information of the Deponent.

As regards issue no.(1) aforesaid it is true that the application by chamber summons before the court lacks the words prescribed under Rule 15 (2) order 50, namely;

"**If any party served does not appear at the time and place above mentioned such order will be made and proceedings taken as the court may think just and expedients."**

It is also true that the word '***shall***' is used for the said requirement, which generally donates the stamp of mandatory requirement.

This court is enjoined to do substantial justice while also taking into account the statutory requirements as to the procedure and form. Generally, the rules are made for their application and obedience, but I shall accept that the procedural rules are the servants of the court and not its mistress.

The court shall, using its inherent power and wide discretion given under Section 3A of the Civil Procedure Act, in appropriate case, make orders to suit the interest of Justice.

The said rule is properly enacted so as to give notice to the opposite parties of the consequences of their non-attendance. That is the purpose and purport of the said sub-rule. In this case, the parties raising the issue are properly notified and are present. If the application is heard minus the appearance of the words prescribed, no prejudice shall be faced by the parties present.

In the premises for the purposes and circumstances of this application, I do find that the omission by the applicant, though improper, is not fatal and I shall thus reject ground No.1 raised by the Defendants. I may just add to that. I have support for this finding from **Express Escorts Ltd. vs. Securicor Security Services Kenya Ltd. H.C.C.S. NO.268/2002 Milimani (***unreported).*

I shall take the second and third grounds together.

The objection as to absence of mention of place of abode by the deponent is rejected simply that it is an irregularity of form (if that it is which I can overlook under the provisions of Order 18 Rule 7 of Civil Procedure Rule.

As regards the third issue, it is true that the supporting affidavit is minus the general paragraph averring to the effect that what is stated in the affidavit is true to the deponent's knowledge or information etc.

Order 18 Rule 3 (1) stipulates:

"**3(1). Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove: provided that in interlocutory proceedings or by leave of the court, an affidavit may contain statements of information and belief showing the services and grounds thereof."**

The Court of Appeal in the case of First American Bank of Kenya

and another vs. Grand-ways Venture Ltd. (2003) EACAK 60 has held at page 61 thereof that "failure to state the source of information or knowledge (*sic*) in an affidavit was an irregularity curable under Order XVIII Rule 7 of the Civil Procedure Rules".

I do add here that the court has to determine on the facts and circumstances of each case whether it shall exercise the discretion under Rule 7, which is in any event a judicial discretion.

I do note that the affidavit in question is filed in an interlocutory proceedings and the law always the litigants to file affidavit containing information and belief in such proceedings.

I have read carefully the contents of the impugned supporting affidavit. Apart from stating the existence of the present suit filed by the plaintiff company of which he is a director, the deponent largely avers on the information received from the Advocate of the plaintiff. In most of the paragraphs, he has averred that he verily believes the information received and has annexed the correspondence initiated and received by the plaintiff's Advocate. There are no averments made in the affidavit which can be disputed or frowned upon. It depones the facts which are supported by the annexures to the affidavit.

The omission to insert the general averments of the end of the affidavit as regards knowledge and information, in my view, so far as this affidavit it conerned, deserves the admission under the discretion vested in the court as per Order XVIII Rule 7 of Civil Procedure Rule. I do thus reject the 2nd and 3rd grounds of opposition as to the farm of the supporting affidavit.

Having dealt with the procedural grounds, I shall deal with the merits of the case.

The Plaintiff had filed this case against four Defendants and the subject matter in issue is a parcel of land bearing Land Reference number 209/10772.

Originally, it did not include the company Chemech Laboratories (k) Ltd. which sold the suit property to the plaintiff.

After an application for interim orders was filed, and the same was responded and opposed by the initial four Defendants (the 1st Defendant claiming the ownership of the suit premises by transfer agreement signed by the 3rd and 4th Defendant as trustees of Kenya African National Union). The plaintiff filed this application to include the vendor company KANU and its two officials as 5th to 8th Defendants.

I may at the outset state that the proposed 5th Defendant through its advocate has raised no objection to be joined in as a Defendant in the suit.

Both the counsel representing 1st, 3rd and 4th Defendants opposed the application and contended raising similar submissions.

The learned counsel for the plaintiff, Mr. Hassan submitted that the addition of further four defendants and amendment requested are necessary for the just and proper determination of the suit. In the affidavit in support, it is shown that the proposed 6th Defendant Kenya Association of National Unity (referred to as 'KANU' hereinafter) did not respond to the pertinent issues raised as regards its ownership of the suit property claimed in the defence.

It is thus submitted by the Plaintiff's counsel that the issue of ownership of the suit property claimed both by the plaintiff and the …cannot be resolved unless KANU and its officials are added as parties. Both parties have titles to the suit property and vendors are necessary parties.

The counsel lamented that the Commissioner of Lands 2nd Defendant has failed to resolve this issue and this court has to now determine the case from the evidence of all the necessary parties.

The amendment sought for is to put forth facts so that the court can determine the issue properly.

It is urged that neither by adding the proposed defendants nor by allowing the proposed amendment, non of the Defendants on record shall face any prejudices and they can be properly compensated by award of costs.

Two cases of **Eastern Bakery vs. Castelino (1958) EACA 461 and Hasham Merali and another vs. Javer Kassam and sons Ltd. (1957) EACA 503** were cited in support of the prayers sought in the application.

I may note that the said authorities deal with the amendments of the pleadings only.

Mr. Adan the Learned Counsel for the 1st Defendant attacked the application on the ground that the plaintiff has failed to show that omission of the parties in the original plaint was due to bonafide mistake. He withdrew his contention, for the purposes of this application that the deponent was also a director of the proposed 5th Defendant.

He added that there is no evidence to show that the proposed Defendant are necessary or whether the proposed 7th and 8th Defendants are the real trustees of KANU the proposed 6th Defendant He urged the court to dismiss the application with costs.

Mr. Momanyi the Learned Counsel for the 3rd and 4th Defendants adopted the submissions made by Mr. Adan and added that the application is made in bad faith and suggested (without substantiation of course that for the purposes of this case the 3rd and 4th Defendants described as trustees of KANU are sufficient to determine the suit. In short he submitted that the application is made to delay the court process and should be dismissed.

Mr. Momanyi relied on the case of RICO Steel Fabricators Ltd. and another vs. Commercial Bank of Africa Ltd. HCC (Milimani) case No.223/04.

This case dealt with an application to be joined some parties as interested parties. The court, on the facts of the case, declined to allow the application on the grounds that it was not demonstrated that the interested party was to be either a Plaintiff or the defendant and it also failed to demonstrate any case of action of any kind.

On the issue of absence of demonstration of bona fide mistake, the case of **Margaret Wairimu and 118 others vs. Unga Group Ltd. {H.C.C.S. (Nakuru) 435/1999**} was relied upon.

In this case, an application to join some persons as plaintiffs was made under order 1 Rule 10 of Civil Procedure Rule. The court found that bonafide mistake was one of the circumstances under which the court can grant the order and similarly found that the orders can be given if the court is of the opinion that it would be necessary to enjoin a party, to the suit for the effective determination of the matters in dispute.

Thus it cannot be gainsaid that as per provisions of Order 10 (1) and specially sub-rule (2) thereof gives the power to the court to join or strike out the parties at any stage of the proceedings either upon or without the application of either party.

The care consideration to be applied is whether it is necessary for the determination of the real matter and to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

I may thus not agree that if the applicant has failed to show the bona fide mistake in not bringing the proposed parties at the earlier initial stage, the same is fatal or the same divest the court of its power to grant orders seeking to add parties to the suit.

Having found so, I shall deal with the merits of the application.

The proposed 5th Defendant is the company which sold the suit property to the plaintiff. I may not have to expound to find that the same is a necessary party to determine the real issue in the matter. Moreover, there is no objection from the said company.

Some logic can apply to the proposed 6th Defendant. It is the registered party which through 3rd and 4th Defendant passed on the ownership of the suit property to the 1st Defendant. In my view, it is a necessary party to enable the court to effectively adjudicate the questions involved in the matter.

The proposed 7th and 8th Defendants are Secretary General and Treasurer of KANU the proposed 6th Defendant. Considering the controversy on the ownership of the suit property and the issuance of two title documents by the 2nd Defendant and claims by the 1st Defendant. That he was sold the suit properly by KANU the involvement of the two important office bearers would be necessary to gather the facts behind the sale transactions, receipt of payments and the issuance of transfer deed.

The suit is at its nascent stage in my view, no prejudice shall be faced by the present defendants, if the proposed defendants are added to the suit. I may add that their presence may enable the court effectually and completely to adjudicate upon and settle all questions raised and to be raised in the matter.

In the premises, I allow prayer No.1 of the application dated 23rd March, 2007.

As law on amendment of pleadings is well crystallized the amendments should be freely allowed, sought before the hearing if no injustice or prejudice shall be faced by the other parties. No claim is made that the amendments sought shall result in prejudice to any of the defendants on record.

Accordingly, I also allow prayer No.2 of the application dated 23rd March, 2007. The costs of the application and of all the consequent pleadings filed are awarded to the Defendants.

Dated and signed at Nairobi this 8th day of May, 2007.

K. H. RAWAL

JUDGE

8.5.07