



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

Civil Case 910 of 2004

MOSES G. MUKURIA (t/a MODANA PHARMACEUTICALS).....1ST PLAINTIFF

STEPHEN K. HINGA (t/a PWANI PHTO STUDIO).....2ND PLAINTIFF

FRANCIS MWANGI AND PETER MWERI MAINA (t/a EIGHT FOODS) ..3RD PLAINTIFF

ABDALLAH O. NOORANY4TH PLAINTIFF

ELIZABETH WAMBUI MUNGAI5TH PLAINTIFF

V E R S U S

MADATALI CHATUR (t/a CHATUR RADIO SERVICE)DEFENDANT

R U L I N G

This is an application by the Defendant (chamber summons dated 30th September, 2004) for an order that the suit be struck out under Order 6, rule 13 (1) (a), (b), and (d) of the Civil Procedure Rules (the Rules) which provides that the suit may be struck out at any stage of the proceedings if it discloses no reasonable cause of action, or that it is scandalous, frivolous or vexatious, or that it is otherwise an abuse of the process of the court. The Defendant's case in the application is that there is misjoinder of the Plaintiffs as they do not claim a common right to relief in respect of, or arising out of, the same transaction. It is also argued that the Plaintiffs have not set out particulars of their alleged tenancy contracts with the Defendant as required by law. Finally, it is the Defendant's case the affidavit sworn in verification of the plaint is fatally defective for having been sworn by more than one person.

The Plaintiffs' answer is that a suit cannot be struck out for misjoinder of parties. They also urge that they were entitled to bring the joint suit. Finally they urge that they have given sufficient particulars of their claims in the plaint and that, in any case, the Defendant is at liberty to request for further and better particulars under Order 6, rule 8 of the Rules.

I have considered the submissions of the learned counsels appearing, including the authorities cited. Rule 9 of Order 1 of the Rules provides as follows:-

“No suit shall be defeated by reason of the misjoinder or nonjoinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”.

Clearly, the Plaintiffs' suit cannot be struck out merely for the reason that the Plaintiffs are misjoined in the suit. But, are they indeed misjoined? Rule 1 of Order 1 provides:

“All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any common question of law or fact would arise.”

I have looked at the plaint and the defence. It is apparent that each Plaintiff entered into a separate tenancy with the Defendant in respect to different premises within the same building. However, it cannot be in question that had they filed separate suits common questions of law and fact would have arisen. The Plaintiffs' alleged rights to relief as claimed arise out of a series of transactions, those transactions being the various tenancy contracts allegedly entered into separately with the Defendant. Their alleged rights to relief are not joint or in the alternative. They are several. They were entitled to bring this common suit, and I so hold. I note that their separate tenancies are set out in paragraph 7 of the plaint. Their several and separate claims are pleaded in paragraph 9 of the plaint. However, joint reliefs are sought. These may cause a problem. Separate and distinct reliefs should have been sought. But this is a problem that can be easily rectified by amendment.

Regarding the affidavit sworn in verification of the plaint, the same has been sworn jointly by all the Plaintiffs in accordance with rule 5 of Order 18 of the Rules which states:-

“Every affidavit shall be drawn in the first person and divided into paragraphs numbered consecutively which shall be confined as nearly as may be to a distinct portion of the subject.”

It is to be noted that this rule does not state that the affidavit shall be drawn in the first person **singular**; it therefore permits for an affidavit to be drawn in the first person **plural**. The affidavit in question is drawn in the first person plural by all the Plaintiffs. All the Plaintiffs have therefore taken responsibility for the affidavit, as they should, this being their suit. All of them can be cross-examined on the affidavit, should that become necessary. Given the wording of rule 5 of Order 18, therefore, I must respectfully disagree with my learned brother, J. B. Ojwang', J that an affidavit must be drawn in the first person singular (**Nairobi High Court Civil Case No. 720 of 2005 (OS) – unreported**).

In the result I must refuse this application. It is hereby dismissed with costs to the Plaintiffs. Order accordingly.

DATED AT NAIROBI THIS 26TH DAY OF JUNE 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 29TH DAY OF JUNE 2007