



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

Civil Case 575 of 2000

STOKMAN ROZEN KENYA LIMITEDPLAINTIFF

STOKMAN ROZEN B. V.INTENDED 2ND PLAINTIFF

VERSUS

NJAGU LIMITEDDEFENDANT

RULING

The application is the one dated 12th April, 2007 by an intended 2nd plaintiff **M/S Stokman Rozen B. V.**, who wants to be joined as a 2nd plaintiff. The grounds are that:

- (1) The rose plants, the subject of the contract pleaded in the plaint were supplied by the intended second plaintiff but subsequently the defendant agreed to pay the balance of the purchase price to the plaintiff herein.**
- (2) The defendant has denied in paragraph 2 of the defence that it is indebted to the plaintiff or that the plaintiff ever supplied it with any rose plants. It has further in paragraph 3 denied it received any plants directly from the plaintiff.**
- (3) There is need to bring in the intended second plaintiff for the court to determine who the defendant is liable to, if at all as between the plaintiff and the intended 2nd plaintiff either jointly or severally.**
- (4) There are bonafide issues for determination between the plaintiff, the intended 2nd plaintiff and the defendant some being;**
 - (a) Who did the defendant contract with,**
 - (b) who did the defendant make part payments to,**
 - (c) whether the defendant agreed to pay the balance to the plaintiff and why,**
 - (d) Whether the defendant made payments to the plaintiff and to the intended plaintiff,**
 - (e) Whether the transfer of debt was valid,**
 - (f) Consideration and part payments.**

The affidavit in support of the application is made by **Mr. Herman H. Stokman** who is a director of both companies and who is familiar with all the facts giving rise to the debt. He states that the 2nd intended plaintiff owns shares in the 1st plaintiff company. He contends that the rose plants in issue in this case were supplied to the defendant by the 2nd intended party. And the defendant made some payments leaving a balance which it was agreed would be paid by the defendant to the plaintiff herein. But despite that, the defendant has denied liability to the plaintiff herein and averred that the plaintiff company did not supply it with any roses directly and that it does not owe any money to the plaintiff.

It is the contention of the applicant that it is necessary to join it as a party for the court to fully and finally determine to whom the defendant is indebted if at all.

The defendant filed grounds of opposition in that the proposed amendment seeks to enjoin a party to the suit, outside the prescribed limitation period. Secondly that the alleged acknowledgement by the defendant if any has also been caught up by the limitation period. Thirdly no reasons have been tendered for the inordinate delay in making the present application. And lastly the proposed amendment seeks to enjoin the suit a new party/plaintiff whose cause of action against the defendant is bound to introduce a new cause of action into the suit.

The position of the applicant is that it wants to be joined as a second plaintiff in this case and thereafter the plaint be amended to reflect the new status of the parties to the dispute. As a general rule amendment of pleadings would be readily allowed if the interest of justice so required. It is upon the applicant to show and/or demonstrate satisfactory or adequate reason why the amendment is necessary. It is also clear that an amendment cannot be allowed if it is sought to introduce a new cause of action which was not in existence at the time the suit was filed.

In my understanding amendments of pleadings would be allowed at any time before judgement and any damages or prejudice that may arise as a result of the amendment can be and should be cured by way of costs. It means the court is empowered to generally view an application for amendment sympathetically in order to achieve justice between the parties. The essence of the court is to determine disputes/conflicts in a manner commensurate with justice and fairness.

I agree that where an amendment has the effect of joining a new party, the new party should not be used to prejudice the defence of the defendant. In my view any defence given to the defendant cannot be a reason to reject the introduction of a new party. It is the case of the defendant that the addition of the intended party is done outside the prescribed limitation period. And that the proposed amendment is bound to introduce a new cause of action into the suit. If the effect of the amendment is to introduce a new cause of action, then the defendant would have the liberty of filing defence.

The defendant also pleads limitation period and contends the new proposed party is affected by the period of limitation of the cause of action. The defence of limitation cannot be taken away because a new party is added as a plaintiff into the suit. The purpose of allowing amendments is to enable the court to determine the real question in controversy and with a view to avoid/guard against multiplicity of suits over the same subject matter in dispute. The court of appeal severally held that amendments of pleadings and joinder of parties should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder will not result in prejudice or injustice to the opposite party, which cannot properly be compensated for in costs.

In Civil Appeal No.222/1998 Central Bank of Kenya Ltd. vs

- (1) Trust Bank Ltd.**
- (2) Trust Finance Ltd.**
- (3) Floriculture International Ltd.**
- (4) First National Finance Ltd.**

(5) Registrar of titles

The Court of Appeal held;

“The jurisdiction of the court under Order 1 Rule 10(2) and Order VI Rule 3(1) of the Civil Procedure Rules respectively is specific. The decision as to who to sue is essentially that of the plaintiff and the court’s duty thereafter is to consider the allegations made against the named defendants and if it considers that there are other parties who should have been joined or were improperly joined give appropriate directions under Order 1 Rule 10(2) above.

...likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs”.

On my part I am guided by that sound principle of law as expressed by the highest court in the land. I do not think that the case of the applicant is one which would prejudice the defendant beyond monetary compensation by an award of costs. I therefore see no reason to disallow the application by the intended 2nd plaintiff.

The upshot is that the application dated 12th April, 2007 is allowed. The proposed 2nd plaintiff shall pay costs of Kshs.3,000/= to the defendant for any prejudice it may suffer. The defendant is at liberty to file its amended defence within 10 days after service of the amended plaint, which must be filed and served within the next 7 days from the date hereof. I direct the suit be listed on priority basis in the registry.

Dated and delivered at Nairobi this 4th day of July, 2007.

M. A. WARSAME

JUDGE