



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

Civil Case 213 of 2007

HORST KRUMEICHPAINTIFF

V E R S U S

- 1. CAPITAL MARKETS AUTHORITY**
- 2. NAIROBI STOCK EXCHANGE LIMITED**
- 3. A. BAUMANN AND COMPANY LIMITEDDEFENDANTS**

AND

ORIENTAL COMMERCIAL BANK LIMITED.....APPLICANT

R U L I N G

Order I, rule 10 of the Civil Procedure Rules (the Rules) donates to the court power to order substitution, addition or striking out of parties in the following instances:-

- (i) Where a suit has been instituted in the name of the wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff (subrule (1)).
- (ii) Where any party has been improperly joined, whether as plaintiff or defendant, and where the name of any person ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit (subrule (2)).

Orders for substitution, addition or striking out of parties may be made at any stage of the proceedings. Under subrule (1) of rule 10, the court may be moved by any party or interested person. Under subrule (2), the court may move itself. The guiding principles set out in rule 10 are as follows:-

1. Under subrule (1) the court must be satisfied that the suit has been instituted in the name of the wrong person as plaintiff through a *bona fide* mistake. It must also be satisfied that the substitution or addition of the party sought is necessary for determination of the real matter in dispute.
2. Under subrule (2) the name of any party improperly joined, whether as plaintiff or defendant, may be struck out upon such terms as appear to the court to be just.
3. Under the same subrule, the name of any person who ought to have been joined, or whose presence before the court is necessary, may be added upon such terms as may appear to the court to be just.

The Interested Party herein, ORIENTAL COMMERCIAL BANK LTD (formerly called DELPHIS BANK LTD) has applied by chamber summons dated 25th April, 2007 to be joined in this suit as a defendant. The grounds for the application are on the face thereof. The application is supported by the affidavit of one ATUL KUMAR I. DAVE, the deputy general manager of the Interested Party. The 1st and 2nd Defendants have not opposed the application. However, the Plaintiff and the 3rd Defendant have. They did not file any papers in response to the application, despite the clear provisions of Order 50, rule 16 (1) of the Rules which states:-

“Any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition, if any, not less than three clear days before the date of hearing”.

But I allowed them to address the court on points of law. It turned out that the 3rd Defendant’s learned counsel wanted to submit on matters of fact. As the 3rd Defendant had not filed any replying affidavit, I could not permit him to do so.

I have considered the submissions of the learned counsels for the Interested Party and the Plaintiff, including the authorities cited. I have also perused the pleadings herein. The Interested Party has demonstrated that it has an interest in the subject-matter of the suit herein, that is, the shares of the 3rd Defendant. See paragraphs 3, 4, 6, 7, 8 and 9 of the replying affidavit. Any order in respect thereto that may be entered herein would likely affect the Interested Party. I am therefore satisfied that the presence of the Interested Party before the court is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. It is not a sufficient answer that there is another suit (**Nairobi HCCC No. 1074 of 2007**) where the Interested Party has applied to protect his interest in the said shares of the 3rd Defendant. It is entitled also to protect its interest in the present suit. Needless to say, the rival claims of all the parties will be determined in accordance with their respective legal and factual merits.

Having applied the principles set out in Order I, rule 10 to the present application, I must allow it. The Interested Party is hereby joined in this suit as the 4th Defendant. The plaint shall be appropriately amended as required by subrule (4) of rule 10 aforesaid within 14 days of delivery of this ruling. The 4th Defendant shall be served with summons to enter appearance and copy of the amended plaint within 14 days of filing of the same. The other defendants shall be served with copies of the amended plaint, also within 14 days of filing of the same. Costs of the application shall be in the cause. It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2007

H. P. G. WAWERU

J U D G E

DELIVERED THIS 16TH DAY OF NOVEMBER, 2007