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

Civil Case No. 507 of 2005

KENYA COMMERCIAL BANK …….....……PLAINTIFF

VERSUS

TITUS KILONZO MUTUA T/A MBWALA AGENCIES ….....….....……1ST DEFENDANT

HELLEN NGINA KAATINE …….....……..…2ND DEFENDANT

MBWALA AGRO SUPPLIES LTD. …….....…..…….…..3RD DEFENDANT

GLADYCE LANGAT …….....……..…..4TH DEFENDANT

CHRIS A. ABELE T/A ABELE & CO. ADVOCATES ….....….....……5TH DEFENDANT

ERIC MUTISYA MUSYOKI ……..….....…..……..6TH DEFENDANT

JOSHUA IKITAI KIMEU …….....…….…….7TH DEFENDANT

PAUL MUTHOKA MBOLE …….....….....……..8TH DEFENDANT

DAVIS MAINA MAHINDA …….....…..…….……..9TH DEFENDANT

CYRUS N. MBUGUA ……..…….....…….10TH DEFENDANT

PRADIP KUMAR VASANT BHAI PATEL ….....…….11TH DEFENDANT

MOHINI HARDWARE LTD. …….....…..…12TH DEFENDANT

CO-OPERATIVE BANK OF KENYA LTD….....……..13TH DEFENDANT

BARCLAYS BANK OF KENYA LTD…….....….....….14TH DEFENDANT

STANBIC BANK KENYA LTD…….....……....15TH DEFENDANT

AFRICAN BANKING CORPORATION ….....……..…..16TH DEFENDANT

STANDARD CHARTERED BANK KENYA LTD….....….....…..…..17TH DEFENDANT

YARA EAST AFRICA LTD…….…….....….....…….18TH DEFENDANT

BHACHU INDUSTRIES LTD……..…….....…..…..19TH DEFENDANT

PRAVIN GULAB PARMAR …….....…..……..20TH DEFENDANT

RAMESHANDRA BULAB PARMAR ….....…….……21ST DEFENDANT

MARY MULWA NDUTO …….....…….....….22ND DEFENDANT

JOSEPH WAMBUA MUSYOKI ……...…….....…….23RD DEFENDANT

CALEB MUTUA (a minor sued through His mother and Guardian ad Litem

HELLEN NGINA KAATINE) ……..……..….24TH DEFENDANT

EMMANUEL MUUO (A minor sued through his mother and Guardian ad Litem

HELLEN NGINA KAATINE …….....…….25TH DEFENDANT

RULING

On the hearing of an amended Chamber Summons of the 16.9.2005, Mr. Ohaga for the 1st, 2nd, 3rd, 21st and 25th Respondents took by way of preliminary point an objection that there was misjoinder of the parties and causes of action in this suit and as such it should either be struck out or stayed.

Mr. Ohaga submitted that although a misjoinder of parties is not fatal under Order 1 rule 3, for a person to be joined as defendants there were two conditions, which must be satisfied:

1. the right to relief had to arise out of the same act or transaction or a series of the same act or transactions.

2. that if separate suits were brought against such Defendants any common question of law or fact would arise.

He further submitted that under Order 2 Rule 2(1) the causes of action must be joint and cannot be several. He also referred to Order 2 Rule 3, which allows only certain claims to be joined for the recovery of immoveable property.

That under Order 2 Rule 5, the causes of action cannot be separately tried and if the causes of action cannot be joined it is no longer a matter of convenience.

Mr. Ohaga then went through the Amended Plaint pointing out in what way he though there was a misjoinder of parties and causes of action.

He relied on the case of **Smurthwaite & others v Hannay & others [1891 – 1994] All ER page 865 , Stroid v Lawson & others [1895 – 1899] All ER page 469, Barclays Bank DCO v C B Patel & others [1959] EA page 214 and Yowana Kahere & others v Lunyo Estates Ltd [1959] EA page 319.**

Mr. Mwangi opposed the application.

The amended Plaint is somewhat intimidating involving no less than 25 Defendants and containing some 80 paragraphs and prayers marked from (a) to (xx).

However, it is the duty of the court to examine the Amended Plaint to ascertain if there has been a misjoinder of Defendants and of causes of action.

The action arises from an alleged conversion by the 1st Defendant, a former employee of the Plaintiff from the funds of the Plaintiff of sums of money which were distributed to various persons including the 1st Defendant, his wife the 2nd Defendant and a company owned by them, the 3rd Defendant, and the 24th and 25th Defendants the children of the 1st and 2nd Defendants.

The cause of action alleged against the 1st Defendant, 2nd to 12th Defendants and 18th – 25th Defendants is contained in paragraph 45 of the Plaint.

One of Mr. Ohaga's objection related to allegations, which appear in paragraphs 18, 19, 20, 22, 23, 29, 31, 32, 33, 34, 35, 36, 37, 38 and 39 of the Plaint. These paragraphs deal with allegations that converted money was used for the purchase of either moveable or immovable property with claims that either that property be returned to the Plaintiff or the person or persons who sold the property be required to return the price paid for the same.

The cause of action against these third parties appears to be based on the conversion – money had and received or on the equitable right of the Plaintiff to recover the property by way of equitable tracing.

Two questions arises;

1) is there been a misjoinder of Defendants?

Order 1 rule 3 states:-

"All persons may be joined as defendants 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 question of law or fact would arise."

And

2) Is there a misjoinder of causes of action under Order II rule 2(1) which states:-

"Save or otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit."

The relevant law can be found in the **Code of Civil Procedure Mulla 12th Edition pages 497 and 549**, the Indian provisions are in all respects similar to those in Kenya.

At page 498 of the Code of Civil Procedure under the rubric "New Rule" appears the following:-

"**Under the present rule, all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist, where if separate suits were brought against such persons, any common question of law or fact would arise, though the causes of action against the defendants may be different, A plaintiff is entitled under this rule to join several defendants in respect of several and distinct causes of action subject to the discretion of the Court to strike out one or more of the defendants on the analogy of O. 1, r. 2, if it thinks it right to do so. "Whatever the law may have been at the time when Smurthwaite v Hannay was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that, if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so if it thinks right". As a general rule, where claims against different parties involve or may involve a common**

question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter be disposed of at the same time, the Court will allow the joinder of defendants, subject to its discretion as to how the action should be tried."

at page 542 under the rubric "**Misjoinder of defendants and causes of action"** appears:

"**Where there are two or more defendants and two or more causes of action, the rule says that the "plaintiff may unite in the same suit several causes of action against the same defendants jointly." "Joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants". If the causes of action alleged are separate and the defendants are arrayed in different sets, the suit is bad for misjoinder of defendants and causes of action, and is technically multifarious.**

In this case there is one cause of action, namely the conversion by the 1st Defendant of the Plaintiff's monies. The cause of action against each Defendant is for the recovery of money, alleged to have been converted by the 1st Defendant, of which the 2nd to 25th Defendant were recipients or recovery of property into which such money has been converted.

I cannot see that the causes of action are separate. The causes of action clearly arise out of the same transaction or series of transactions namely; the alleged fraudulent conversion of the Plaintiff's money. Whether the recipients were innocent receivers of the same is a matter for determination in due course. However, each of the recipients are intrinsically involved with moneys which is alleged were converted.

At page 501 **Mulla (Supra)** states as follows:

Joint tortfeasors may be sued jointly or severally. Thus where more persons that are concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his option.

Thus in the case of **Yowana Kahere & others v Lunyo Estates Ltd** referred to above a number of tenants had been evicted by a landlord from their separate holdings. Bennet J held there was a misjoinder of parties and causes of action as there was no question of law or fact in common.

Also in **Stroud v Lawson (Supra)** the court held that the Plaintiff shareholder was not entitled to join two different causes of action in one suit because the right to relief claimed in his personal capacity and the right to relief claimed by him as representing the shareholders did not arise out of the same transaction or series of transactions.

The difference between these cases and this is that in that case an alleged wrong had been committed against each defendant separately although arising from a same wrongful act, whereas in this case the cause of action arises out of one transaction or series of transactions namely the alleged conversion by the 1st Defendant of the Plaintiff's moneys.

Mr. Ohaga relied on **Smurthwaite & others v Hannay & others (Supra)** which was based on the Old Rule which provided that all persons could be joined in one suit as Plaintiffs provided that the right to relief, alleged to exist arose from the same cause of action.

The present rule in both India and Kenya is much wider. The test under the new English rule as well as the present rule is no longer the identity of the cause of action, but the identity of the act or transaction**. (Mulla (Supra) page 495)**

These rules are difficult to interpret and apply. The reason I apprehend the rule is to avoid a court being faced with what amounts to different cases arising from the joinder of different parties and causes of action which will leave the court in difficulty in determining the suit as a result of what amounts to multiplicity of suits in the same matter.

Having perused the Plaint I am of the view that justice can only be done if the Defendants are all included in the same suit, in so far as the Plaintiff seeks to trace monies had and received by the Defendants from the funds allegedly converted, I say this because there is common question of law and fact namely did the 1st Defendant convert the Plaintiff's money and then disburse it to various Defendants, but for his (the 1st Defendant's) benefit. The allegation is as I understand it that the Defendants did not receive the money for any consideration but for the benefit of the Plaintiff.

Under Order 2 Rule 5 it appears to me that the matter raised in paragraphs 31, 32, 33, 34, 35, 36, 37 and 38 of the Plaint cannot conveniently be heard together with the other matters raised in the Plaint and as such I order a separate trial of these matters, but to take place consecutively.

The result, therefore, appears to be that the Defendants are sued as joint tortfeasors arising from the same acts or transactions or a series of acts or transactions and if the Defendants are sued separately, a common question of law; namely, conversion for money had and received would arise. I therefore, dismiss the preliminary objection with costs.

Dated and delivered at Nairobi this 30th day of March 2006.

P. J. RANSLEY

JUDGE