REPUBLIC OF KENYA

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

Civil Case 240 of 2005

QUASAR LIMITED..…….....……..PLAINTIFF

VERSUS

METRO PETROLEUM…….....……DEFENDANT

R U L I N G

This is an application by the Defendant who seeks leave of the court to join Azim Rajwani as a co-defendant to the Counter-claim. The Defendant also seeks leave to amend the Defence and Counter-claim in terms of a draft annexed to the application.

The primary reason advanced by the defendant for making this application was that by joining Mr. Rajwani as a co-defendant to the Counter-claim, and by allowing the proposed amendment, the court would have facilitated the determination of the real issues in question.

Mr. Azim Rajwani, who is sought to be enjoined, is said to be a director of the plaintiff. The defendant now intends to raise several claims against him, based on fraud and misrepresentation. For instance, the applicant is saying that Mr. Rajwani issued cheques to the plaintiff, whilst he well knew that the said cheques would not be honoured. It is also suggested that Mr. Rajwani diverted funds belonging to the 1st defendant.

For those and other reasons, the 1st defendant believes that it is entitled to judgement against the plaintiff and Mr. Rajwani.

Therefore, in order to enable the court adjudicate on those issues, it is deemed to be necessary to enjoin the said Mr. Azim Rajwani into the suit, and to also effect some amendments to the Defence and Counter-claim.

The plaintiff does not buy the application. First, it was pointed out that the affidavit in support of the said application is fatally defective, on the grounds that the deponent did not state that he was duly authorised to make the affidavit. For that reason, the plaintiff feels that there is every possibility that the defendant was not even aware of the application.,

To my mind, the fact the deponent did not expressly state that the defendant company had authorised him to swear the affidavit cannot by itself imply that the company was not aware of the application. I say so because the application itself was filed through the firm of Singh Gitau Advocates. It was not filed by Mr. Pankaj Somaia Vallabhdas. Therefore, unless the plaintiff has material which would show that the said advocates had no authority to file the application, to suggest that the defendant may be unaware of

the application, would appear to be no more than idle speculation.

At the other extreme end, the fact that a deponent of an affidavit expressly stated that he was duly authorised to swear an affidavit, say by a defendant, would not necessarily mean that the said defendant was aware of the application. Of course, one would like to believe that every deposition in an affidavit is factually correct. However, in reality there are numerous affidavits, which are in the same suit, but which contain inconsistencies or even contradictions. In such instances, it is more probable than not that one or the other affidavit is not telling the truth. Or, to put it in another way, one or another of the deponents would have told some untruths in his affidavit . Such untruths may include the assertion that his company had duly authorised him to swear the affidavit. But the court or the other party to the suit may never get to know until and unless the company itself were to disown the alleged authorisation.

So much for that. I must now revert to the effect of the failure by the deponent to state the sources of his authority to swear the affidavit. There is no doubt that that issue was ably dealt with by the Hon. Ringera J. (as he then was) in **MICRSOFT CORPORATION LTD –VS- MITSUMI COMPUTER GARAGE LTD & ANOTHER**, **HCCC NO. 810** of 2001, whereat he held as follows:

"**To conclude, the only merit I find in the first point of the preliminary objection is that the deponent Pearman does not state that she makes the affidavit with the authority of Microsoft. To my mind that is a substantial defect which renders the said affidavit incompetent and courts its being struck out. I accordingly order it struck out for that reason."**

I wholly agree. Therefore, should I now strike out the affidavit of Pankaj Somaia Vallabhdas? I do not think so.

The reason I decline to strike out the said affidavit is that the plaintiff allowed the defendant to make its submissions, based on it, and only thereafter asked that it be struck out. If the court were to strike out the affidavit at that stage, it would be extremely prejudicial to the defendant. Whereas, if the plaintiff had taken up the objection to the supporting affidavit as a preliminary point, the defendant may well have been accorded an opportunity to file a compliant affidavit, for use in the same application. That is exactly what transpired in the case of **MICROSOFT CORPORATION V MISTUMI COMPUTER GARAGE LTD & ANOTHER** (abovecited).

Meanwhile, by virtue of the provisions of Order 1 rule 10 (2) of the Civil Procedure Rules, the court is empowered to grant leave to parties, to amend pleadings by substitution or addition of parties,

"**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."**

In the light of the express wording of that sub-rule, I hold that there is no merit in the plaintiff's assertion that Order 1 rule 10 only deals with the substitution or addition of plaintiffs; and not defendants.

Having given due consideration to the draft Amended Defence and Counterclaim, I am satisfied that it will be necessary to enjoin Mr. Azim Rajwani into the suit, as the 2nd defendant to the counterclaim. He is a necessary party, for the effectual and complete adjudication of all the questions involved in the suit.

Order 1 rule 10 (4) of the Civil Procedure Rules provides as follows:

" **where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant, and if the court thinks fit, on the original defendants."**

In this case, the defendant who has been added to the suit is a defendant to the counter-claim. In effect that constitutes the counterclaim as the "**plaint"**, and the original plaintiff as the 1st defendant. Therefore, following the addition of the new defendant to the counterclaim, the rules stipulate that the counterclaim

shall be amended as necessary, unless the court otherwise directs.

I find no reason to direct that the counterclaim should not be amended, so as to reflect the addition of Mr. Azim Rajwani, as a defendant thereto. I also find no reason to direct that the counterclaim should not be amended in such manner as may be necessary, to enable the defendant bring out the issues which may be necessary to be determined between all three parties.

Accordingly, the application dated 24th November 2005 is allowed. The defendant shall file its Amended Defence and Counterclaim within fourteen (14) days from today. The said Amended Defence and Counterclaim will be served not only on the new defendant, but also on the plaintiff, within seven (7) days of filing. Finally, the costs of the application dated 24th November 2005 shall be borne by the applicant, in any event.

Dated and Delivered at Nairobi this 19th day of May 2006.

FRED A. OCHIENG

JUDGE