REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 318 of 2003

BEN YOUNG WAFULA

MICHAEL BARASA WANYONYI

KEN KAKHA FUCHAKA

NOBERT ALLOISE WAFULA …… PLAITNIFFS

VERSUS

ELISHA CHEBII CHESIYNA ……..…… 1ST DEFENDANT

BETTY MAINA CHEMAIYO ……..…… 2ND DEFENDANT

RULING

The Applicant seeks to amend the Plaint in accordance with the proposed amended Plaint.

Mr. Arusei opposes the Application and seeks to strike out the Plaint even as proposed to be amended on the grounds that under O.36 rule 4 the question raised in the amended plaint should be brought by way of Originating Summons. O.36 rule 4 states as follows: -

> " When the existence of a partnership, or the right to partnership, or the fact of the dissolution thereof, is not in dispute, any partner in a firm or his representatives may take out an originating summons returnable before he judge sitting in chambers against his partner or former partners or their representatives (if any) for the purpose of having the partnership dissolved (if it be still subsisting and for the purpose of taking the accounts of and winding up such partnership."

Mr. Arusei says, however, that there was no partnership only an arrangement to create a partnership, which collapsed. Whatever,it is clear that the Defendants do not admit the existence of a partnership nor any other of the matters referred to in the rule.

Mr. Arusei also says that a new cause of action is being introduced with the Original Plaint. He relies on the *Central Kenya Ltd versus Trust Bank Ltd & Others C.A No.222 of 1998* in which the Court of Appeal quoted with approval a passage from AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao where it is stated: -

> "That a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of

> action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side"

I find no new or inconsistent cause of action.

The original plaint which is I am informed a layman's plaint alleges in paragraph 1 that the parties are partners in Garage Restaurant. It made a number of allegations and seeks relief against the 2nd Defendant and a declaration that the 1st Defendant wrongfully involved the 2nd Defendant in the suit.

I would agree with Mr. Arusei that the original plaint disclosed no cause of action. However the courts discretion to amend is wide.

Mr. Arusei relied on the Judgment of Omolo **JA in, Nasir Ibrahim Ali & Others versus Kamlesh Damji Pattni Court of Appeal No.72 of 1998** where he said at page 3: -

> "The plaint does not specifically allege that the 1st and 2nd Defendants were directors of the 3rd Defendant but the proceedings are still in early stage and amendments can always be sought, to breath more life into the Plaint. I say "breath more life" into the plaint deliberately because I do not myself subscribe to the view expressed by Madan, **J.A in D.T. DOBIE & CO. (K) LTD V JOSEPH MBERIA MUCHINA AND ANOTHER, CIVIL APPEAL NO.37 OF 1978** (Unreported) that an amendment can always be done at any stage to inject life into any claim with a semblance of a cause of action. In my view, a claim must at the at the very beginning have some life in it before an amendment can be granted to breathe more life into it"

In my view the amendments proposed shows a reasonable cause of action and Mr. Arusei relied on **Auto Garage versus Motokov E. (1971**) E.A page 519 spay V.P. stated: -

> "I would summarize the position as I see it by saying that if a plaint shows that the Plaintiff enjoyed a right, that the right has been violated and that the Defendant is liable, then, in my opinion, a cause of action has been disclosed and any omission or defect may be put right by amendment. If, on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible. I think this accords with the words I have quoted from Law, J., in lake Motors' case with which I respectively agree "

In this case there was an allegation of a partnership and violation by the 1st Defendant of the Plaintiff's right. I consider that costs would be a palliative to take care of the Defendants fear that the Amendment could cause them injustice.

Mr. Arusei took a further point that the verifying affidavit offended O1 Rule 12, as there is no authority in writing. Also under O.7 Rule 1(3)

The original verifying affidavit stated that the deponent was authorized by the other Plaintiffs. Again bearing in mind this was a layman's plaint and Affidavit I do not think this is a case where I should strike out the Plaint for breach of O. 1 rule 12.

In the result I do not consider that Order 36 Rule 4 applies. The matters in dispute are properly brought by way of plaint.

I also exercise my discretion to allow the amendment to set out the true matters in controversy between the parties in this suit. I therefore will not strike out the plaint but order the Amended Plaint to be filed within 14 days from today together with a further Verifying Affidavit and an authority under O.1 rule 12.

The costs of both applications to be the Respondent's in any event.

Dated and delivered at Nairobi this 6th day of July,.2005

P.J. RANSLEY

JUDGE