



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 108 OF 2003**

**ZUBER NOOR t/d REFLOS ENTERPRISES ..... PLAINTIFF**

**VERSUS**

**MEFREIGHT SHIPPING LTD ..... DEFENDANT**

**Coram: Before Hon. Justice Mwera**

**M. Ananda & Co. Advocates for Plaintiff.**

**Ananda for M/s Warsame for 1st Plaintiff**

**Otieno for Musinga Munyithya for the Defendant/applicant.**

**Court clerk: Sango.**

**RULING**

The 2nd Plaintiff/Applicant's chamber summons dated 16.12.03 was brought under 0 6 r.13(1) (b) (c) (d) and S.3A Civil Procedure Act. The main prayer which was argued before this court was for orders:

*1. That the defence filed herein by the defendant be struck out for being scandalous and or an abuse of the process of court and judgement entered for the second plaintiff against the defendant in terms of the further amended plaint herein.*

The defendant filed grounds of opposition, a replying affidavit and a notice of preliminary objection. The court being of the view that all those amounted to the same thing directed that the application be heard without having to clear the preliminary objection first. And that points raised therein would feature in opposing the said application.

Mr. Ananda started off by submitting that from the further amended plaint dated 20.11.03 it was clear that the 2nd plaintiff rendered transport services to the defendant between November 2002 and February 2003. That the total bill for those services came to Sh.17,953,118/35 of which Sh.12,443,140/- was paid as at 24.02.03. That the balance of Sh.5,504,017/20 was left outstanding and the defendant has not paid up. That as such the 2nd plaintiff continued to suffer loss and damage. There were other aspects brought in the arguments which the court hardly found relevant e.g. about suit CMCC 1370/2003 in the lower courts; an injunction there regarding some monies involving companies and bodies not parties here etc and that the defendant was insolvent and its directors were quarreling and suing each other. It was not found necessary to go into all those in order to determine the present application. But Mr. Ananda put them forth as highlighted in the affidavit in support by one Festus Munyoki Kilonzo to show that the defence herein ought to be struck out and judgment given to his client. That the 2nd plaintiff had elected to move by this course rather than by taking the summary judgement course. The counsel referred to the defence

in which it was averred inter alia that the owed sum had not been demanded at any time. He did not see at this point why the defendant could ask to have the further amended plaint struck out on the basis that it came on record by consent. That in any case it could not be acceptable to seek to strike out that pleading without properly and formally applying to do so.

Mr. Otieno began by arguing some procedural aspect of this application that the applicant was lumping prayers and grounds together and about the affidavit seeking final orders. Not much was made of these but the more substantive point of attack was that the 2nd plaintiff would not base his claim on the further amended plaint because it was defective and unprocedurally brought on the record. That it was irregular in the following manner.

The court heard that the initial plaint was only between Zubeir Noor (the 1st plaintiff herein) against the defendant. It was prepared and filed here by M/s Warsame & Co. Advocates. That the defence sought to be struck out followed on 17.6.03 again between these same two litigants with the plaintiff still represented by M/s Warsame Advocates. That then without due notice of change of advocate for the (1st) plaintiff on 21.10.03, m/s Ananda & Co. Advocates, after a successful application, filed an amended plaint, bringing in the 2nd plaintiff. Then came the further amended plaint which was marked to be served on the defendant's lawyers M/s Musinga & Co. Advocates as well as M/s Warsame & Co. Advocates for the 1st plaintiff. The record has a notice of change of advocates filed on 11-2-04 by M/s Warsame, Hassan Advocates for the plaintiff i.e. that first plaintiff.

In essence there are two plaintiffs in this cause with separate lawyers! Now is this tenable in law and procedure? This court does not think so. One claim in which several plaintiffs feature ought to be brought through one counsel. This avoids conflict of interest and therefore the confusion and chaos in the manner the claim can be presented. If one plaintiff's claim does not necessarily have the same character as the others, then even the defendant(s) will be put in jeopardy answering conflicting claims forming the suit. Where each person's claim differs from the other against the same defendant then the claimants should file separate suits against that defendant. The plaintiffs should only come together when their claim is common and this they must do through one counsel. Mr. Ananda seemed to be of the view that there is no law in Kenya to this effect but common sense where the law and practice has not been put in place must prevail. This court nonetheless holds the view that to practise in this country is as it has been put.

The court is fortified in the stated procedure by having recourse to **Halsbury's Laws of England, 3rd Edition Vol.30 paragraph 577** – Joinder of Plaintiffs:

*“All persons may be joined in one action as plaintiffs, in whom any right to relief, in respect of, or arising out of, the same transaction, or series of transactions, is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate trials, any common question of law or fact would arise; but separate trials may be ordered, to prevent embarrassment or delay.”*

A note added to this principle says:

*“All plaintiffs must act together and appear by one solicitor and one set of counsel.”*

Indeed under the same author (Vol. 3 BARRISTERS) it is emphatically put:

*“108. Representation of different litigants on same sides. Co-plaintiffs must appear by the same counsel, and cannot sever their case,”*

and that co-defendants may be represented by different counsel. But it can be added that the counsel appearing for co-plaintiffs may acquire services of a leader and that is not considered separate at all.

In our present case it is clear that the two plaintiffs here have two separate counsel in one cause. That shall not be and on that basis alone the 2nd plaintiff's application may be classified a nonstarter and dismissed. But there is the aspect of facts and another element of procedure.

The court was of the view that had it to consider the application as laid, the 2nd plaintiff hardly placed before it material to demonstrate that the defence in question is scandalous and an abuse of the court process. It seems to properly and squarely respond to each and every claim laid by the plaintiff(s). Such responses require to be examined with evidence at a trial. The court did not think the defence is such as can be struck out at this point – drastic as such a step can be. For instance in para 6 of the defence it was averred:

*“6. The defendant shall however aver at the hearing hereof that the defendant did enter into an agreement with M/s Freight Forwarders Ltd. for transportation of some wheat from Mombasa to Nairobi and which contract has been fully paid for and/or is not yet due for payment and neither has the said M/s Freight Forwarders (K) demanded any such payment and/or at all .”*

*(underlining added)*

When Mr. Ananda was asked whether his client had demanded payment, the answer was in the negative. So how does one sue for money owed, but not demanded? Curious.

In sum this application is dismissed with costs.

**Delivered on 25th February 2004.**

**J.W. MWERA**

**JUDGE**