REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO 365 OF 2000

SUPERMARINE HANDLING SERVICES LTD....................................APPLICATION

VERSUS

COMMISSIONER GENERAL, KENYA REVENUE AUTHORITY.............DEFENDANT

RULING

Application by way of Notice of Motion dated 30th October 2002 and filed into the court on the same date is seeking two orders. These are an order that the court's leave be granted to have Mr Alois Oceano D'Sumba and Rajni Shah joined/added to the suit as the 2nd and 3rd plaintiffs and one order that the plaint be amended to add the names of Alois Oceano D'Sumba and Rajni Shah. It is also praying for costs to be provided for. The reason for the application is that the relief being sought arises out of the same act or transaction; that it is necessary for the determination of the real issues in the controversy that the same people be joined/added as plaintiffs' that the same persons financed the acquisition of the goods/ rice; that the plaintiff's name was used but he did not make any direct financial contribution in acquiring the rice the subject matter of this suit; that various parties played a part in clearance and transportation and sale of the commodity and are hence entitled to substantial commission which forms part of the expenses to be borne by the parties particularly Grace Waita, Francis Mungai, the estate of the late Edward Ogutu and the late Charles Bulimo and that the addition is necessary to protect/secure the applicants' interests and to avoid any possible wrangles when the matter is finalized. There is an affidavit sworn by Alois Oceano D'Sumba in support of the application together with annexures to the same affidavits.

The plaintiff/respondent opposed the application maintaining in its Grounds of Opposition that the suit is already part-heard and the said notice by interested parties is an abuse of the court process; that the interested parties have no cause of action against the defendant in this suit and so cannot be parties to this suit, and that the interested parties' claims against the plaintiff are well provided for by the plaintiff in form of agreements and undertakings and have nothing to do with the defendants. There is also an affidavit filed by the plaintiff company sworn by Solomon Ngwata the Managing Director of the plaintiff company. There is annexture to the affidavit.

The defendant also opposed the application and filed grounds of opposition in which they maintain that interested parties do not have a course of action; they have not shown that they have been aggrieved in any way.

This case is partly heard and one witness has given evidence. That however would not be a genuine reason for barring a genuine applicant from being joined as a party in the case and amending the plaint

suitably. The application however is brought under order 1 rule 1 and rule 13. Order 1 rule 1 states as follows:

> "1. All persons may be joined in one suit as plaintiffs in 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 such persons brought separate suits, any serious questions of law or fact would arise."

In this case, it does appear to me that the applicants' claim that Alois Ociano D'Sumba was the initiator of the idea of purchasing the subject commodity and that the present plaintiff and Rajni Shah all did take part in the purchase of the same commodity is not disputed. In fact the plaintiff admits the same and sets out in its affidavits what arrangements it has for settling the claims of each interested party. The only difference is that the plaintiff says Rajni Shah was no more than a money lender and was approached to finance the plaintiff company. This means, according to the plaintiff that Rajni Shah's interests remains with a claim if any from the plaintiff to which he did lend money for the purchase of the commodity and Shah's interests does not go beyond that; so that Rajni Shah has no claim as against the defendant Kenya Revenue Authority for once he lent the money for purchase of the commodity whoever was lent the money and purchased the commodity is the one interested in the commodity and Shah would only be interested in his money which the plaintiff would have to refund as money lent and not necessarily as proceeds of the commodity. The plaintiff states that it paid Mr Shah his money which was lent to it and it is making arrangements for whatever other monies are outstanding in favour of Shah. It is clear to me that the plaintiff's version as far as Rajni Shah is concerned has not been rebutted. In fact Alois Ociano D'Sumba in his affidavit to an extent confirms in principle the same when he says at paragraphs 6 and 7 and follows:

> "6. That in view of the volume of the container I requested Messrs Supermarine Handling Services Ltd through its Director Mr Solomon Ngwatu to join hands with me to purchase the commodity in partnership and in the name of Supermarine Handling Services Ltd." from Inchcape Shipping Services Kenya Ltd.
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> 7. That upon discussions with Mr Solomon Ngwatu it became clear that both his company and myself were not financially able to carry out the intended venture and consequently we decided to approach Mr Rajni Shah a businessman at Mombasa known to both of us to become our partner and finance the venture."

At paragraph 8 of the affidavit he says that Shah substantially financed the business venture as requested and he gives the evidence of the same. It is clear to me that Shah would possibly have his claim against the plaintiff but I doubt if he may have claim against the defendant as it is the plaintiff's name that was used in the transaction and not Shah's. Shah indeed need not even wait for the case between plaintiff and defendant to be finalized so as to claim his money from the plaintiff. I am not satisfied that adding Shah as a plaintiff in this case would add anything to the case, neither would Shah suffer any loss if he is not made a party as his claim against plaintiff will still be there.

As for Mr Alois Oceano D'Sumba, he says in his affidavit at paragraph 6 as follows:

> "That in view of the volume of the container I requested Messrs Supermarine Handling Services Ltd. through its Director Mr Solomon Ngwatu to join hands with me to purchase the commodity in partnership and in the name of *Supermarine Handling Services Ltd from Inchcape Shipping Services Kenya Ltd."*

He thus agrees the suit commodity was purchased in the name of the plaintiff. Thus as far as the defendant is concerned, the purchaser of the same commodity was the plaintiff and not Mr Alois Ociano D'Sumba. However to protect his interest as the initiator of the deal who was behind the scenes all the times he entered into an agreement with the plaintiff. That agreement is annexture AOD 6. The plaintiff is not denying that allegation and is not denying the existence of the agreement. In fact it says at paragraph 5 of the affidavit in reply as follows:

> "THAT as relates to Mr Alois Ociano D'Sumba, has assisted initially in informing the plaintiff company of the existence of the said goods and his interests are provided for as per the agreement dated 20th October , 1998 marked as 'AOD 6.' The plaintiff company, if successful in this suit shall pay him less after all expenses and statutory deductions as stated in the said agreement."

The applicant, Alois may have no direct cause of action as against the defendant as he acted on the background and the purchase of the suit commodity was made in the name of the plaintiff. If he is added, what claim will he make as against defendant other than saying that the plaintiff's claim is valid as he knew about it and initiated the transaction. He is but a witness.

In my humble opinion, whereas the transaction may have been one, I do not think there is common fact in law. The legal issue between the present plaintiff and the defendant as I see it are whether the suit is *res judicata*; whether the suit commodity was fit for animal consumption: whether the destruction of the goods was unlawful or not and whether the plaintiff was in law bound to take steps to mitigate the losses. As opposed to that the legal issues as between Shah and defendant is as to whether in law Shah, not being the named purchaser of the commodity had any *locus standi* to sue the defendant company and whether Shah had proper cause of action against the defendant company. As between Alois and defendant, the legal issues would be whether a non registered partner who is not named as plaintiff would have a casue of action against the defendant. These legal issues are different. Again in my humble opinion, the questions of fact that arise in this matter as between plaintiff and defendant are not the same questions of fact that would arise as between the two applicants and the defendant. In the case of plaintiff and defendants the facts that arise are whether the rice was fit for animal consumption or not and whether the plaintiff paid all the statutory dues etc whereas in case of Shah, the facts that arise are as to whether the defendant knows Shah financed the transaction and whether the defendant knew in what capacity he was financing the transaction and also whether in such capacity the defendant was doing business with him. In the case of Alois, the facts are whether defendant knew he initiated the transaction and whether the defendant knew Alois was an interested party in the transaction and whether defendant ever entered into any transaction with him. In the case of the *Universities of Oxford and Cambridge vs Geroge Gill & Sons* (1898) CHD 5-62 it was held as follows:

> "That the action arose out of the same series of transactions; that common questions of fact would arise ----- and that consequently the plaintiffs were entitled to join in one action."

And at page 60 of the same case the court stated:

> "Now, according to the interpretation put upon the rule by the Court of Appeal (and indeed it seems plain upon the face of the rule itself), there are two conditions to be satisfied; first, that the right to relief alleged to exist in each plaintiff should be in respect of or arise out of the same transaction, and secondly, that there should be a common question of fact or law."

I do feel certain in my mind much as it is necessary to bring all interested parties in a transaction into one suit to avoid numerous suits and to reduce expenses, this is not a case where the joining of interested parties as plaintiffs will ensure that the right of the interested parties will be ensured for they are parties that strictly want to protect their right against the plaintiff and not against the defendant. Joining them as plaintiffs will not enable them get their remedies against the plaintiff who will be a coplainitff.

Before I conclude this ruling I want to state further that I do entertain some doubts as to whether this application has been properly brought into the court. This application is also brought under order 1 rule 13. Order 1 rule 13 states as follows:

> "13. Any application to add or strike out or substitute a plaintiff or defendant may be made to the court at any time before trial by summons or at the trial of the suit in a summary manner."

This application was brought by Notice of Motion and not by summons. Secondly, the hearing of the case has started so that this application is not made before trial. It could not be made even by summons. Order 1 rule 22 specifies the applications which should be made by summons, but does not touch on order 1 rule

1 but order 1 rule 13 states the procedure for adding a party. I do not under these circumstances think order 50 rule 1 should have been invoked to have the application brought by way of Notice of Motion. However, this is a matter which I do agree will need more consideration in view of the apparent conflict in the rules involved but I do feel certain that as this application was made during the hearing of the case, it should not have been made by way of order 1 rule 13.

Lastly, as I have said the mere fact that trial had started would not have been a serious impediment to the granting of the application, but the fact that the hearing has started means that the court has to consider any addition of new parties very seriously as the same may mean an unnecessary delay in finalizing what is already proceeding and it may mean doing away with what has been done and starting a fresh. That being the case the applicant seeking such orders must adduce compelling reasons for the application before the same application can be granted. Here as I have said, I am not satisfied that proper reasons have been adduced and I am not satisfied that the rights of the applicant may never be realized if they are not joined as plaintiffs in the suit. The sum total of all the above is that this application is refused. It is dismissed with costs to the plaintiff and to the defendant.

Orders accordingly.

Dated and delivered at Mombasa this 29th day of November, 2002

J.W ONYANGO OTIENO

JUDGE