



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 374 OF 2012**

**ANDERS BRUEL T/A QUEENSCROSS AVIATION .....PLAINTIFF**

**Versus**

**NYABURA MUSYIMI .....1<sup>ST</sup> DEFENDANT**

**ANNE N. MBUGUA.....2<sup>ND</sup> DEFENDANT**

**LEAH KIGUATHA MUTERU .....3<sup>RD</sup> DEFENDANT**

**RULING**

**Amendment of plaint**

[1] The application dated 4<sup>th</sup> of November 2013 is seeking the leave of the Court to allow the Plaintiff/Applicant to amend its plaint dated the 4<sup>th</sup> day of June 2013 in terms of the draft amended plaint provided. It also seeks for Costs of the application to be in the cause. The nature of the amendment is to include a 4<sup>th</sup> Defendant, the Kenya Civil Aviation Authority (“KCAA”). The Application is grounded upon the affidavit of PATRICK KAHONGE and upon other grounds, including:

- i. That the Plaintiff has a cause of action against the intended Defendant whose actions has resulted in the losses suffered by the Plaintiff.
- ii. The amendment sought will crystallize and present all material facts and issues in dispute. Thus, the amendment is necessary to enable the court properly adjudicate over the issues in controversy.
- iii. The Defendants shall not suffer any prejudice upon the grant of the Orders sought herein as they be at liberty to amend their defence if necessary; and
- iv. The omission to enjoin the intended Defendant was inadvertent and not deliberate.

[2] The Plaintiff provided the factual basis of the amendment to be that: 1) KCAA cancelled the licences of two aircraft belonging to the Plaintiff, namely aircraft registration nos. 5Y-EKO and 5Y-BMA. The cancellation was informed by a false and misleading letter written by the 1<sup>st</sup> – 3<sup>rd</sup> defendants’ law firm, M/s Musyimi & Company Advocates and signed by the 2<sup>nd</sup> Defendant herein. The said cancellation occasioned huge losses to the Plaintiff who continues to suffer huge loses daily in loss of business, insurance costs, parking fees etc. 2) KCAA has, without any colour

or right, continued to maintain that there are injunctive orders issued in **HCCC NO. 16 OF 2006 – MOSES WACHIRA v NIELS BRUEL & OTHERS** barring the Plaintiff from “removing from the jurisdiction of the court, selling, giving in exchange, encumbering, charging, giving as security, trading on, wasting, parting with possession or in any other way alienating, limiting or prejudicing, their title and possession of aircrafts registration numbers Beechcraft King Air 200 BL-2 registration 5Y-EKO and King Air 200 BB 155 registration No. 5Y-BMA”, orders which the KCAA wrongfully maintains “are still in force”. 3) The actions by the Defendants herein and those of the intended Defendant form the same subject matter and have contributed to and caused great harm and losses to the Plaintiff. It is therefore necessary to bring on board the intended Defendant to enable the court to properly adjudicate the issues raised by the Plaintiff. And, 4) In the interest of justice the Kenya Civil Aviation Authority ought to be made a party to this suit as Defendant.

[3] The Applicant submitted elaborately on who may be joined as defendants, and cited ample statutory basis in Order 1, rule 3, 4, 10 of the Civil Procedure Rules. He was of the view that it is not necessary that every defendant should be interested as to all the reliefs claimed in any suit against him. The rules do not require that all questions of law or fact must be common to all the parties. It is sufficient that there is a common question either of law or fact. The right to relief against each defendant is based on the same act, namely the misrepresentation leading to the cancellation of the licence by the KCAA. There is a direct connection between the actions/misrepresentations by the defendants herein and those by the intended defendant, actions which have occasioned huge losses to the Plaintiff. This is so notwithstanding the fact that there may have been subsequent acts or transactions in which the different defendants are individually concerned and which may enable them to raise distinct defences. If different law suits were to be instituted, at least one common question of fact would arise, namely the cause of the cancellation of the licence by the KCAA, which would have to be investigated/ canvassed presumably on the same evidence separately adduced in several suits. In support of that proposition, the Applicant cited judicial decisions namely; 1) **THOMAS v MOORE (1918) 1KB 555** as per Lawrence J; and 2) **BANK OF INDIA V. AMBAL SHAH & OTHERS [1965] EA 18.**

[4] The Applicant also submitted on amendment of pleadings and cited both statutory provisions and judicial decision. He relied on Order 8 Rule 3 of the Civil Procedure Rules 2010. He was categorical that **an amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.** The policy of the law is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. The discretion of the court, being a judicial one, should, however, be exercised rationally and on well settled principles. He cited the principles stated in **EASTERN BAKERY V. CASTELINO [1958] E.A. 461.** He also cited the cases of; 1) **BLUE SHIELD INSURANCE CO. LIMITED v RICHARD MBONDO (being sued as the legal representative of the estate of the late ELIJA MBONDO NTHEKETHA) CIVIL CASE NO. 1811 OF 1999,** Ringera J; 2) **ROBERT OMBASO NYAREBU & ANOTHER V. BELDINA MOKAYA, KISUMU C.A.C.A. NO. 200 OF 2011;** and 3) **ALPHA KNITS LIMITED v KENINDIA ASSURANCE COMPANY LTD & ANOTHER, Civil Case 2030 of 2000.**

[5] The Applicant further argued that the Judgment in Petition No. 243 of 2012 was on a Petition alleging violation of constitutional rights and was premised upon violation of Articles 27, 40, 47 and 50 of the Constitution. Article 40 protects the rights of an owner of property. In that judgment, it was agreed that Queencross Aviation was the owner of the aircraft. The Petition was dismissed on the ground that Anders Bruel “had not demonstrated any right or interest in the two aircraft **on the basis of which he can make a claim for alleged violation of constitutional rights**”. Thus, according to the Applicant, the defendants have not demonstrated that they will be occasioned any prejudice or injury if the leave sought is granted. Further, they argued, the omission to enjoin the intended Defendants was in advertent and not deliberate. In the interest of

justice the Kenya Civil Aviation Authority ought to be made a party to this suit as Defendant.

### **The Defendants returned fire**

[6] The defendants opposed the plaintiff's application dated the 4<sup>th</sup> day of November, 2013 for joinder of a fourth defendant and amendment of the Plaintiff. They urged that, although amendment of pleadings will normally be allowed, but for the reasons set out in the Grounds of Opposition dated 14<sup>th</sup> January, 2014 it should be refused in this case. They condensed their opposition in two substantive grounds; the first one; the matters sought to be raised by the joinder and the amendments cannot properly be considered in the existing case. This is found in the fact that the cause of action set out in the Plaintiff against the first, second and third defendants is for damages for alleged misrepresentation which raises the questions whether there was a representation; if so, whether it was a misrepresentation; and if so, whether such misrepresentation influenced the action of Kenya Civil Aviation Authority. The cause of action sought to be introduced in the proposed Amended Plaintiff challenges the revocation of the plaintiff's registration by Kenya Civil Aviation Authority which will be a challenge of the exercise of jurisdiction and discretion by Kenya Civil Aviation Authority in revoking the registration. Paragraph 11B of the proposed Amended Plaintiff specifically states that the cancellation was unjustifiable, illegal and unprocedural. These are matters which should properly be raised in Judicial Review Proceedings or a Constitutional Petition - as the plaintiff has in fact already done in the Constitutional petition 423 of 2012. These causes of action had been pleaded in the original Plaintiff that the Court would have struck out one of the causes of action or ordered separation of the causes of action under Order 1 Rule 3 of the Civil Procedure Rules, 2010 on the grounds that these are different acts or transactions and there is no common question of law or fact. Therefore, combining these different causes of action, against different parties and for different reliefs will cause embarrassment and delay the trial of the action.

[6] The second broad ground was on res judicata. The Defendants argued that the plaintiff filed Constitutional Petition 243 of 2012 against the Kenya Civil Aviation Authority seeking orders to quash the revocation of the plaintiff's licences and to compel the reinstatement of the plaintiff as owner of the aircraft. The prayers sought in that Constitutional Petition are the same as the prayer sought in the proposed Amended Plaintiff. Ngugi J dismissed the plaintiff's application in Constitutional Petition 243 of 2012 as being without merit. By the proposed Amended Plaintiff the plaintiff is seeking to re-litigate the matters which were raised or should have been raised in Constitutional Petition 243 of 2012. This matter is res judicata under section 7 of the Civil Procedure Act, especially explanation (4). For those reasons, it was submitted that the application should be dismissed with costs.

## **THE DETERMINATION**

### **Joinder of parties and amendment of plaintiff**

[7] I need to say one important thing on joinder of Defendant and amendment of the plaintiff thereto. In my own view, in an application seeking a new defendant to be added or substituted, the correct approach should be to apply for joinder as the primary prayer and, then, the request for amendment of the plaintiff will be a necessary or corollary saddle. My reason for saying that is, once the application for joinder is determined, either way, the one for amendment of the plaintiff invariably is determined. If the request for joinder of a new defendant is denied, the request for amendment falls by the way side. Where joinder of a new defendant is ordered by the Court, the amendment of the Plaintiff must be carried through unless the Court otherwise directs. In the latter case, arguments on amendment of the plaintiff will only be useful to justify the exception in Order 1 Rule 4 of the Civil Procedure Rules or to bring clarity to the proposed amendment. Rule 4 is just as clear. It provides: -

**Where a defendant is added or substituted, the plaintiff 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.**

My statements on rule 4 find support in the substance of the rule itself and the general law applicable where a new defendant has been added in a proceeding. The new defendant is entitled under the law and the Constitution to be sufficiently notified of the case he is faced with and which he must defend. That explains why the rule makes it mandatory that **amended copies of the summons and of the plaint must be served on the new defendant.**

[8] On the basis of the foregoing, I will determine the application for joinder first, and depending on the outcome of the Court's analysis, I will determine the one for amendment of the plaint.

### **Joinder of new defendant: the argument on res judicata**

[9] I have promised to begin with the application for joinder. But there is another argument by the Defendants which has a direct bearing on the prospects of the application for joinder of the intended 4<sup>th</sup> defendant, i.e. the doctrine of res judicata. The reason is simple. The Defendants submitted that; 1) the proposed claim against the proposed 4<sup>th</sup> defendant was the subject of and was determined in Constitutional Petition 243 of 2012. Ngugi J dismissed the claim for lack of merit; and 2) the details or transactions being proposed to form the basis of the cause of action against the proposed 4<sup>th</sup> defendant in the amendment ought to have been pleaded in the said Constitutional Petition 243 of 2012. If the Court finds the matters being raised are res judicata, it will follow as a matter of course that the joinder will be denied. Therefore, let me deal with that issue first within the said framework.

[10] Res judicata is a common law doctrine which aims at bringing litigation to an end and answers to the constitutional principle on finality of litigation. It prevents disappointed parties from camouflaging already decided cases in new garment using the art of pleadings. The principle has, however, received statutory expression in section 7 of the Civil Procedure Act as follows:

#### **7 Res judicata**

**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.**

**Explanation. (1) – The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.**

**Explanation. (2) – For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.**

**Explanation. (3) – The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.**

**Explanation. (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

**Explanation. (5) – Any relief claimed in a suit, which is not expressly granted by**

**the decree shall, for the purposes of this section, be deemed to have been refused.**

**Explanation. (6) – Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

[11] Res judicata applies where the matter directly and substantially in issue in the existing suit was directly and substantially in issue in another suit which has been decided before the existing suit. The phrase “directly and substantially in issue” encompasses all matters which ought to have been pleaded in the decided case but were never pleaded. The decision must be on merit and by a competent court. And of course, the decided case must be between the same parties, or parties under whom they or any of them claim, litigating under the same title. All persons interested in a right in the decided case are deemed to claim under the person litigating in the existing suit. Judicial authorities and respected literally works on this subject are legion. I wish to only cite some few. For instance, see the case of **E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR** where it was held that:

**“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”** (Emphasis added)

[12] And on the issues which ought to have been raised in the decided case, I adopt the following passage in the dictum of Wigram V-C, in **HENDERSON V HENDERSON (1843) 67 ER 313**:

**“ ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.**

[13] The parties in Constitutional Petition 243 of 2012 were Anders Bruel and the proposed 4<sup>th</sup> Defendant. In the judgment by Ngugi J in Constitutional Petition 243 of 2012, it was agreed that Queencross Aviation was the owner of the aircraft. And the said Petition was, therefore, dismissed on the ground that Anders Bruel **“had not demonstrated any right or interest in the two aircraft on the basis of which he can make a claim for alleged violation of constitutional rights”**. In the proposed cause of action, the parties are Anders Bruel t/a Queencross Aviation. That kind of impleading is problematic and also raises intricate legal issues of parties. In this case, the Plaintiff is cited as Anders Bruel t/a Queencross Aviation. When a party in a suit is described as “trading as” the connection is that he is the proprietor of the firm or business name either

alone or with others and therefore, the trade name is not a legal person per se. So to speak, Anders Bruel is the same as Queencross Aviation. Thus, in law Anders Bruel is an interested person in the right being claimed by Queencross Aviation and vice versa. Explanation (6) of Section 7 of the Civil Procedure Rules becomes important here; –

**Where persons litigate bona fide in respect of...a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.**

[14] For purposes of res judicata, the description of the plaintiff as Anders Bruel t/a Queencross Aviation means the right claimed is in common, and therefore, both persons interested in such right are deemed to claim under the person litigating in the suit. The substance of Constitutional Petition 243 of 2012, being that Queencross Aviation was the owner of the aircraft; and the said Petition was dismissed on the ground that Anders Bruel **“had not demonstrated any right or interest in the two aircraft on the basis of which he can make a claim for alleged violation of constitutional rights”**, the application before me, is a sort of ‘appeal’ against the decision of Ngugi J; a course that is most unfortunate and untenable in law since this Court is of concurrent jurisdiction. If what the Applicant is claiming is the correct status of Queencross Aviation, the only course to have been taken was to appeal the decision by Ngugi J especially the part which the learned judge found that the Applicant did not have any right in the aircraft but Queencross Aviation did. For purposes of res judicata, both would be parties litigating under same title or person litigating. The first ingredient of res judicata is present in this case. I move to the others.

[15] Without doubt, Ngugi J was competent to try and determine Constitutional Petition 243 of 2012. Now, was the matter in issue before the learned judge also directly and substantially in issue in the proposed action against the proposed 4<sup>th</sup> defendant? Questions of the cancellation of the registration license of two aircrafts belonging to the Plaintiff, namely aircraft registration nos. 5Y-EKO and 5Y-BMA by KCAA, were directly and substantially in issue before Ngugi J in Constitutional Petition 243 of 2012; of great significance is that the Applicant sought the said decision by the KCAA to be quashed by the Court, and KCAA to be compelled to reinstate the plaintiff as owner of the aircraft. The details, transactions, evidence and cause of action which forms the substratum of the request for joinder and the amendment are matters which ought to have been made a ground in the Constitutional Petition 243 of 2012. Explanation (4) of Section 7 of the Civil Procedure Act is true guide. It provides:

**Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.**

[16] The core and essential meaning of Explanation (4) of section 7 of the Civil Procedure Act is brought out in a masterly fashion in the dictum of Wigram V-C, in **HENDERSON V HENDERSON (1843) 67 ER 313** which, despite possible and dull monotony, is worth reproducing in full as follows:

**“ ... where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.**

[16] These matters were directly and substantially in issue before Ngugi J and were determined on merit. The least I can say, the Applicant ought to have brought forward the whole case before Ngugi J; a Court which had jurisdiction to even issue injunctions, damages or any other appropriate relief under the Constitution and specifically Article 23. It is not tenable to argue, therefore, that the Judgment in Petition No. 243 of 2012 was on a Petition alleging violation of constitutional rights and was premised upon violation of Articles 27, 40, 47 and 50 of the Constitution in an attempt to show the petition is and should be seen to be different from the proposed cause of action in a set-up of a plaint. And so, there are no any special circumstances in this case which would impel this Court to permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest in the decided case, but which was not brought forward from negligence, inadvertence, or even accident, or omission on the part of the Applicant. The Applicant ought to have exercised reasonable diligence and lay his entire case before Ngugi J, and again, out of such diligence, he should have appealed the decision of the learned judge if he felt aggrieved by it. The plea of res judicata applies here. The upshot is that the request for joinder of the proposed 4<sup>th</sup> defendant is hereby dismissed with costs.

[17] In line with my avowed approach and I stated this earlier in this ruling, where an application for joinder is refused, the request for amendment of the plaint falls by the way side. Accordingly, I refuse the request for amendment of plaint as a natural ripple effect of my decision on joinder.

**Dated, signed and delivered in open court at Nairobi this 13<sup>th</sup> day of October, 2014**

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**F. GIKONYO**

**JUDGE**

**Present:**

Kimathi for Kahonge for plaintiff

Gathoni for Frazer for Defendant

Alex – Court clerk