



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Civil Case 186 of 2006**

**BARTHOLD ONNO ALYIVA VAN GINKEL.....PLAINTIFF**

**VERSUS**

**COMMERCIAL BANK OF AFRICA  
LTD.....DEFENDANT**

**RULING**

The defendant in this suit has applied, by Chamber Summons dated 28<sup>th</sup> January 2009, for one order that Ali Omar Mwachipanga and Dennis Mwakio Maghanga be added as defendants. The application is premised on the main ground that the presence of the said intended additional defendants before the court is necessary in order to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. The defendant contends that the cheques, the subject matter of this suit were drawn in favour of the proposed additional defendants.

The application is supported by an affidavit sworn by one Jerusha Mwamburi described as a manager of the defendant. The said affidavit elaborates the said ground of the application. In his written submissions which were filed by consent, counsel for the defendant contends that the court has a wide discretion to order the addition of parties to a suit, the object being to avoid multiplicity of suits and expense provided that the questions to be determined arose from the same act or transactions or series of acts or transactions. According to counsel, circumstances exist in this case which require the presence of the proposed additional defendants before the court.

The application is opposed by the plaintiff who contends that the proposed additional defendants should be enjoined as Third Parties. The plaintiff further contends that the action against the proposed additional defendants is time barred and their being joined shall occasion him great prejudice.

The application is expressed to be brought under the provisions of Order 1 Rule 10 (2) and (3) of the Civil Procedure Rules.

I have considered the application, the affidavit in support of the application, the grounds of opposition, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. It is plain that the court has a wide discretion under the said rule to order the name of any person who ought to have been joined added either as a plaintiff or defendant or in any other capacity. The plaintiff in his plaint did not in his wisdom join the proposed additional defendants. That was way back on 6<sup>th</sup> September 2005 which is almost four years ago. In its written statement of defence filed on 13<sup>th</sup> October 2006, the defendant avers, *inter alia*, that the plaintiff's claim if any should be directed against the proposed additional defendants. Notwithstanding that averment, the defendant did not seek to join them as additional parties at the time of delivering its defence. Despite blaming the proposed additional defendants the defendant did not take out Third Party proceedings against them.

The plaintiff contends that he will be greatly prejudiced if the proposed additional parties are added as defendants because his claim if any against them is statute barred. The defendant did not address the plaintiff's fears. Those fears are not in my view unfounded. Should the proposed additional defendants be joined and successfully plead Limitations; the plaintiff will be saddled with costs against them, an event that shall not arise if the proposed additional defendants are not added.

In the premises, despite the wide discretion given it by the rules, the court cannot determine the status or capacity of any additional party to the prejudice of an existing party. Addition of parties or striking out of parties should only be made without injustice to the parties already before the court. Parties are the best judges of their causes of action. The plaintiff has chosen to proceed against the defendant. The court cannot impose another party against him. If the defendant claims against the proposed additional defendants, it is at liberty to move the court under the provisions of Order 1 Rule 14 (1) of the Civil Procedure Rules or any other relevant provision of the Law. That option is still available to the defendant.

In the premises, the defendant's application dated 28<sup>th</sup> January 2009 and filed on 3<sup>rd</sup> March 2009 is refused. The plaintiff shall have the costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 8<sup>TH</sup> DAY OF MAY 2009.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Odera for the Defendant and Oloo holding brief for Ouma for the Plaintiff.

**F. AZANGALALA**

**JUDGE**

**8<sup>TH</sup> MAY 2009**