Civil Procedure and Practice

- · Definition of causes of action
- · Consideration of mis joinder of causes of action and misjoinder of parties

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL DIVISION MILIMANI

CIVIL CASE NO 476 OF 1999

AMI DEVELOPMENT SERVICES LTD……………………..……..1ST PLAINTIFF

HAND CARVERS DEN LIMITED ……………………….…….2ND PLAINTIFF

AKSES INDUSTRIAL COMPANY LTD……………………..……..3RD PLAINTIFF

HARUN EDWARD MWANGI ……………………………...…..4TH PLAINTIFF

HELEN PILALE NKAISSERY……………………………..……5TH PLAINTIFF

NDABA & ASSOCIATES ……………………………………………6TH PLAINTIFF

BUREAU GRAPHICS ………………………………………...………7TH PLAINTIFF

VERSUS

DAVID KAHUHUA GITAU

ROBERT JAMES KIGUNDA

PHILLIP MWANGI GATHERU

JOSEPH KAMAU MUCHEKEHU

ELIJAH MORRIS WANJE

Sued as THE TRUSTEES OF THE KENYA LOCAL GOVERNMENT

OFFICERS SUPERANNUATION FUND …………………………1ST DEFENDANT

KENYA COMMERCIAL BANK NOMINEES LIMITED………2ND DEFENDANT

And

L Z ENGINEERING CONSTRUCTION LIMITED ……….FIRST THIRD PARTY

TS NANDHRA trading as NANDHRA & ASSOCIATES..SECOND THIRD PARTY

R U L I N G

The 1st third party has moved this court by an application dated 8th October 2001.

At the hearing of the application the 1st third party only argued in favour of one prayer in that application and abandoned the others. The prayer argued is as follows: -

"**That this suit be dismissed or plaint be struck out on the grounds that it is incurable/bad for mis joinder of causes of action and of plaintiffs and as the plaintiffs have no joint claim against the defendant."**

Counsel argued in favour of this prayer and said that there was no joint cause of action in the plaintiff's claim. He said that the plaintiff's claim offends two rules; that is Order 1 and rule I and Order 2 rule 2. That when both these rules are offended the court has no option but to strike out the plaint. Here, he further argued, was a misjoinder of causes of action and mis joinder of parties. The plaint, had 7 plaintiff each being a separate entity and each being tenants but with separate tenancies on the suit property.The plaint alleges that fire broke out on the plaintiff's 14 shops, which destroyed goods belonging to the plaintiffs. 1st third party counsel, argued that it is misconceived for the plaintiff to pray for the loss of kshs 63 million for each plaintiff, the misconception was because each plaintiff had a different claim against the defendants. The other argument was that each plaintiff had separate tenancies with the defendants; accordingly each has a separate contractual relationship with the defendant landlord, and duty owed to each plaintiff was separate and distinct. On the allegation that the defendant's negligence caused the fateful fire, counsel argued that if goods were burnt the cause of action belonged exclusively to each plaintiff separately but it did not belong to all tenants together. Counsel submitted that the plaintiff should not be assisted by the provisions of Order 1 rule 9 because this rule dealt with mis joinder of parties but in our present case we are faced with mis joinder of causes of action and mis joinder of parties.

Counsel relied extensively on Mulla on the code of Civil Procedure 14th Edition and read portions from pages 816, 818 and 819. Counsel also relied on the case; Barclays Bank D.C.O V C.B. PATEL AND OTHERS (1959) E.A. 214. In this case the defendant took preliminary objection that the suit was not mainatable as the plaintiff had improperly joined different causes of action against different defendants in one suit. It was held "**dinstint causes of action accrued on different dates and against different defendants and the circumstances in which the liability of different guarantors arose were separate and distinct; accordingly the two cause of action could not be disposed of together"**

Counsel also relied on the case of YOWANA KAHERE AND OTHERS V LUNYO ESTATES LIMITED (1959 E.A. 319. in this case eight plaintiffs, each of whom claimed to be a tenant of the defendant company, sued for alleged interference with their right to possession. The plaintiffs claimed that they each were tenants of a separate holding and they claimed that they were unlawfully evicted on different dates from their rented property and their crops were destroyed. An objection was raised against this suit by the defendant on the ground that there was a misjoinder of parties and causes of action. It was held that: **"(i) the cause of action set out in the plaint did not arise out of the same act or transaction or series of acts or transactions but out of wholly distinct and independent acts of dispossession or possession; (ii) there was no question of law or fact common to the several plaintiff and there was mis joinder of plaintiffs and a mis joinder of causes of action."**

The third party in support of the application submitted that each plaintiff/tenant have demised their own premises and the property so leased is identified. That each lease constituted a separate contract which were entered into on different dates and accordingly the foundation of that cause of action is contained in separate leases and this made it impossible for the suit to proceed as pleaded further that each plaintiff even though they tabulate their individual losses they all jointly claim in the final prayer for judgment for kshs 63 million. The third party supported the application for dismissal of the suit.

The defendants did not oppose the application.

The plaintiff's counsel opposed the application and in so doing relied on the replying affidavits sworn on 2nd November 2001. in part that replying affidavit stated

"That the plaintiffs are properly joint in this suit as their right of relief arose out of the same act and if the said plaintiffs were to bring separate suits common questions of law and fact would arise. The plaintiffs were all tenants of Langata shopping central which premises burnt down and as such they are entitled to bring this suit to recover their losses as against the defendants who are owners of the said premises as shown in the plaint."

The plaintiff relied on the case of THE UNIVERSITIES OF OXFORD AND CAMBRIDGE – V – GEORGE GILL ICH 55. in that case plaintiff brought an action for injunction against the defendant to restrain the defendant from publishing books bearing the titles "*The Oxford and Cambridge Publications*" or "*The Oxford and Cambridge Edition*". *It was held "that the action arose out of the same series of transaction; that common question of fact would arise……"*

Plaintiff's counsel argued that the plaintiffs have a right to bring this action to avoid multiplicity of claims. That the common facts to the plaintiffs claim were: firstly, all the plaintiffs are tenants of Langata shopping center; secondly all the plaintiffs complained of fire that gutted the premises on 20th September 1998; thirdly, all the plaintiffs are claiming the same relief. Counsel distinguished this case with the previous cases relied upon by the applicant by saying; there is a distinction between claims of separate tenancies and a claim out of construction of building. He was adamant that there were no several causes of action but added that if the court found that there were, the court can order for separate trials. Counsel gave the example of the case SACCHARIN CORPORATION LTD – V – WILD (1903 I CH 410 and said that the judge having found that there were 23 causes of action reduced them to three and the judge did not dismiss the suit.

In answer to third party's argument, the plaintiff stated that those are matters of evidence, which can only be dealt with at the trial. He ended his submission by saying the dismissal of a suit is a draconian measure which should only be exercised sparingly.

Having summarized the arguments presented before me I wish to begin my consideration of the same by defining cause of action. In the case of READ – V – BROWN (1888) 22 Q.B.D. 128 LORD ESHER M.R. defined the words "cause of action" comprise every fact (though not every piece of evidence) which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the court. From this definition it seems that the plaintiff would have to prove that damage caused by the fire that broke out was as a result of the defendant's failure to abide with statutory obligations and or negligence and they each would have to prove their individual loss. These I believe are the cause of action hereof. Order 2 rule 2 (1) provides: -

> "**Save as otherwise provided, a plaintiff may unite in the same suit several**
>
> **cause of actions against the same defendant or the same defendants jointly;**
>
> **and any plaintiffs having causes of action in which they are jointly interested**
>
> **against the same defendant or the same defendants jointly may unite in the same suit.**

Having found the causes of action are as stated above I find that there is no mis joinder of causes of action in this suit, because these are causes of action which the plaintiffs are jointly interested against the same defendant. I accept the plaintiff's submission that the various amounts claimed as loss by each plaintiff will be subjected to proof at trial but cannot be the basis of an application for dismissal for mis joinder of causes of action. I also find that since the liability of the defendant, if any, is statutory or is subject to the law of negligence it matters not what would be the provisions of each individual tenancy agreement. To quote MULLA 16TH edition page 1652 which supports my holding **"joint interest in the main questions raised by the litigation is a condition precedent the joinder of several causes of action against several defendants.**

The next issue to consider is whether there is mis joinder of plaintiffs. Order 1 rule 1 state

"All persons may be joined in one suit as plaintiffs <u>in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction</u> is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise". (Underling mine.**)**

It is clear from this rule that if the right to relief claims does arise from the same act or transaction or if there is no common question of law or fact, the plaintiffs cannot all join in one suit, unless they are jointly interested in the cause of action as provided in Order 2 rule 2 (1).

The plaintiffs in this suit allege that the fire that broke out was as a result of breach of statutory duty and act of negligence of the defendant. These acts alleged by the plaintiff arise out of the same act or transaction and I accept that if the plaintiffs brought separate suits, all such suits a common question of law and fact would arise.

As result of my findings herein before I find that the 1st third party cannot succeed in its application. The order of this court is as follows: -

· **That the first third party's application dated 8th October 2001 is hereby dismissed with costs to the plaintiff.**

Dated and delivered at Nairobi this 4th day of May 2005.

MARY KASANGO

JUDGE