



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 149 OF 2012

ANDY FORWARDERS SERVICES LIMITED1ST PLAINTIFF

PETER MUTHOKA2ND PLAINTIFF

VERSUS

PRICE-WATERHOUSE COOPERS-LIMITED1ST DEFENDANT

MARTIN WHITEHEAD2ND DEFENDANT

RULING

1. This ruling is in respect of two related applications by three different persons who are seeking leave to be joined together with **Price-Waterhouse Coopers Ltd**, 1st defendant, and **Martin Whitehead**, 2nd defendant, as defendants.
2. The first application is dated 14th March, 2012 and was filed by C.M.C. Holdings Limited, hereinafter referred to as **“the proposed 3rd defendant”** and C.M.C. Motors Group Ltd, hereinafter referred to as **“the proposed 4th defendant”**.
3. The second application is dated 19th March, 2012 and is by **Daniel Kabuba Maina**, hereinafter referred to as **“the proposed 5th defendant”**.
4. Before I embark on a consideration of the two applications a brief background of the dispute between the plaintiffs and the 1st and 2nd defendants is necessary.
5. The 2nd plaintiff is the Chairman and Chief Executive Officer of the 1st plaintiff while the 2nd defendant is a Director and head of Regional Forensic Practice of the 1st defendant, an Auditing and Consulting firm.
6. The 1st plaintiff supplied logistics services to the proposed 4th defendant.
7. On 23rd September, 2011 the proposed 3rd defendant engaged the services of the 1st defendant to carry out a forensic investigation into various allegations relating to the rendering of the logistics services and payments made for the same. The plaintiffs contended that the engagement of the defendants to carry out the forensic investigations was without approval and sanction of the Board of Directors and was

undertaken in a manner that was in violation of the proposed 3rd defendant's Memorandum and Articles of Association.

8. The 1st defendant proceeded to conduct the forensic investigations and compiled a report which the plaintiffs are challenging. Consequently, the plaintiffs sought, *inter alia*, various declaratory orders against the defendants.

9. The first application was supported by an affidavit sworn by **WILLIAM LAY**, the Chief Executive and Group Managing Director of the proposed 3rd and 4th defendants.

10. He stated, *inter alia*, that:

- **Sometimes in September 2011 the 3rd proposed defendant commissioned the 1st defendant to conduct forensic investigations into the dealings between the 1st plaintiff and the 3rd and 4th proposed defendants.**
- **The 1st defendant conducted the investigations and prepared a report dated 23rd January, 2012 and forwarded the same to the proposed 3rd defendant.**
- **The proposed 3rd defendant paid the 1st defendant for the services rendered. The Board of Directors of the proposed 3rd defendant reviewed the Audit Report, adopted it and embarked on implementing the same.**
- **The proposed 3rd and 4th defendants even amended their plaint in HCCC No. 503 of 2011 (CMC Holdings Ltd & CMC Motors Group Ltd vs Andy Forwarders Services Limited, Peter Muthoka and Joseph Mumo Kirai) to include a prayer for restitution of sums alleged to have been overcharged by Andy Forwarders Ltd.**
- **Any orders issued in respect of audit report will directly affect the proposed 3rd and 4th defendants and therefore they wish to be joined in these proceedings as defendants.**

11. In respect of the application by Daniel Kabuba Maina, the same was supported by his own affidavit.

12. The proposed 5th defendant is a small shareholder of the proposed 3rd defendant, he owns 15000 shares. He referred to the forensic audit report which at page 13 contains the following summary:

“Based on our findings and computations presented in section 1.5 below, it is our view that as a result of the dealings between AFS and CMC Group, CMC Group has suffered a substantial loss of around Kshs.1 billion – 1.1 billion which loss would have been avoided had CMC Group used rival competitor suppliers for the same services procured through a standard tender process. In broad terms AFS charged CMC Group around double what it would have paid on an open tender basis.”

13. On the basis of that report, the proposed 5th defendant filed **Miscellaneous Cause No. 147 of 2012** against the plaintiffs herein seeking to prohibit them from participating in the affairs of CMC Holdings and for recovery of the funds lost by CMC Holdings.

14. On the other hand, the plaintiffs want to have the findings of the report expunged and if that is not done, the proposed 5th defendant will suffer irreparable loss and damage, it was alleged.

15. The proposed 5th defendant further lamented that as a 88 years old retired person, he had spent his retirement benefits in purchase of the shares he now holds in the troubled company and has great interest in the outcome of the case. That is why he wishes to be joined as a defendant in the suit as he believes he will help the court to fairly determine the dispute.

16. The two applications were strenuously opposed by the plaintiffs. The 2nd plaintiff swore a replying affidavit and filed grounds of opposition.

17. The issues raised by the plaintiffs in opposition to the two applications may be summarized as hereunder:

(a) The claims by the plaintiffs against the two defendants are founded on the tort of negligence and no legitimate relationship arises in tort between the plaintiffs and the applicants.

(b) The plaintiffs have sued the two defendants in their professional capacity as forensic auditors on the ensuing duty of care in execution of their professional duty and the applicants have no role with the defendants in their professional capacity.

(c) The applicants have not laid any factual or legal basis for joinder to the plaintiff's suit.

(d) The plaintiffs have no claims against the applicants and seek no relief against them.

(e) The applications are an abuse of the court process and are intended to pervert the cause of justice.

18. **Mr. Oduol** appeared for the plaintiffs, **Mr. Kimani** for the defendants, **Mr. Munyu** for the proposed 3rd and 4th defendants while **Mr. Ahmednasir** and **Mr. Mosota** represented the proposed 5th defendant.

19. Mr. Munyu submitted that given the fact that the plaintiffs had questioned the authority of the Board of the proposed 3rd defendant to authorize the preparation of the audit report, it is only the proposed 3rd defendant who can respond to that question and therefore ought to be joined as a defendant. Further, any order made in respect of the audit report will directly affect the proposed 3rd and 4th defendants.

20. He added that no prejudice will be occasioned to the plaintiffs if his clients are added as defendants to the plaintiff's suit.

21. On his part, Mr. Ahmednasir emphasized that the petition by his client in **Miscellaneous Cause No. 147 of 2012** is entirely based on the findings of the forensic audit report which the plaintiffs now seek to impeach and therefore his client ought to be heard before any consideration is made with regard to the plaintiffs' case.

22. Counsel added that the audit report was prepared for the benefit of the proposed 3rd and 4th defendants and all the shareholders, including his client.

23. Mr. Ahmednasir opposed the plaintiffs' contention that their claim is founded on the tort of negligence. In his view, the suit is founded on contract and company law.

24. Mr. Oduol submitted that his clients were aggrieved by the negligent manner in which the defendants prepared the forensic audit report. The plaintiffs had sought general damages and compensation for breach of duty and/or negligence in addition to various other prayers.

25. Counsel further submitted that the forensic audit report dated 23rd January, 2012 could not have been the basis of the suit filed by the proposed 3rd and 4th defendants, **HCCC No. 503 of 2011**, since that suit had already been filed when the report was released.

26. He added that the mere fact that the proposed 4th defendant had paid for the report does not give it a right to appear in this suit.

27. He further submitted that none of the applicants had taken any part in the preparation of the report and therefore they ought not to be added as defendants since they are not joint tortfeasors with the defendants. By allowing the applications, he added, the plaintiffs would be forced to amend their plaint to include parties whom they do not intend to sue.

28. Counsel cited the case of **SANTANA FERNANDES v KARA ARJAN & SONS [1961] E.A. 693** where it was held that in a suit in tort the defendant cannot be added, even if willing, if the plaintiff opposes since a plaintiff being the *dominus litis* (the party who makes the decisions to sue) cannot be compelled to sue a person for damages in respect of a tort, whom he does not wish to sue.

29. Responding to Mr. Oduol's submissions, Mr. Munyu stated that the prayers sought in the plaint relate to contractual obligations and not tort and thus the case cited by the plaintiffs' advocate is distinguishable. He added that prayers (a) and (b) in the plaint directly relate to the proposed 3rd and 4th defendants.

30. In reply, Mr. Ahmednasir reiterated his earlier submission that this is not a cause of action in tort, the plaintiffs' case is based on contract and company law. If the plaintiffs were seeking damages only the proposed 5th defendant would not want to be joined as a party, he added. He urged the court to give a liberal interpretation to **Order 1 rule 10** of the **Civil Procedure Rules**, adding that the plaintiffs will not suffer any prejudice if the applications are granted.

31. The provisions of **Order 1 rule 10** are well known but that notwithstanding I will reproduce the relevant portions thereof as hereunder:

“10 (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

32. The provisions of **Order 1 rule 10 (1)** are not relevant in these applications because there is no contention that the suit has been instituted in the name of the wrong persons as plaintiffs and neither is it doubtful that the suit has been instituted in the name of the right plaintiffs.

33. The two applications, in my view, can only be considered under the provisions of **Order 1 rule 10 (2)**. Under this rule, an applicant who wishes to be joined as a defendant (not **enjoined**, as wrongly spelt out by the applicants herein, and which has a totally different meaning), must demonstrate either:

“(a) he ought to have been joined, or

(b) his presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.”

34. Where the court, either upon an application or on its own motion, orders that a person be added as a defendant, the plaint has to be amended in such a manner as may be necessary, unless the court otherwise directs.

35. Each of the three applicants herein contend that their presence before the court is necessary if the court is going to make a conclusive and effectual determination of the issues in dispute.

36. That contention is however denied by the plaintiffs and the reasons thereof have already been stated hereinabove.

37. To determine whether the presence of the applicants is necessary the court must critically analyse, *inter alia*:

- (i) **the nature of the plaintiffs' case,**
- (ii) **the remedies sought by the plaintiffs**
- (iii) **the reasons advanced by the applicants for their desired inclusion as defendants,**
- (iv) **the effect of grant or refusal of the orders sought by the plaintiffs, the existing defendants and the persons seeking to be joined as defendants.**

38. **Sarkar's Law of Civil Procedure** Volume 1 at pages 531 to 532 sets out two tests for determining the question who is a necessary party in civil proceedings. They are:

- (a) **there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and**
- (b) **it should not be possible to pass an effective decree in the absence of such party.**

39. But that is not all. A person may be joined in a suit not because there is a cause of action against him, but because that person's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter, see **AMON v RAPHAEL TUCK & SONS LTD [1956] 1 ALL ER 273.**

40. It is on the basis of the above principles that this court shall determine these applications.

41. The plaintiffs stated at paragraph 7 of the plaint that CMC Holdings Ltd engaged the services of the 1st defendant to carry out forensic investigations and thereafter prepare an appropriate report.

42. However, the plaintiffs contended that the engagement of the defendants to carry out the forensic investigations was without approval and sanction of the Board of Directors of CMC Holdings Ltd, the proposed 3rd defendant.

43. The plaintiff further averred that the report is false in material particulars, reckless, baseless and seek, *inter alia*, a declaration that it is invalid, null and void and of no effect. If the plaintiffs were to successfully challenge the propriety of the report they would be automatically relieved from the demands being made against them by the proposed defendants.

44. The names of the proposed 3rd and 4th defendants feature prominently in the plaintiffs' pleadings. In my view, the court cannot conclusively determine whether the engagement of the defendants to carry out the forensic investigations was without the approval of the proposed 3rd defendant and in violation of the company's Memorandum and Articles of Association unless it allows the proposed 3rd defendant to be added as a defendant so that it can give its own side of the story.

45. Further, if it were to be established that the proposed 3rd defendant gave instructions to the defendants to conduct the forensic investigations without the Board's approval, I believe the plaintiffs would have a right to some relief against the instructing party.

46. It is for these reasons that the proposed 3rd defendant wishes to be joined as a defendant.

47. I also think that if the court were not to allow the proposed 3rd defendant to participate in the

proceedings, being a necessary party, that may amount to a miscarriage justice because adverse orders may be made against her without having given her an opportunity to be heard.

48. As regards the proposed 4th defendant, its operations are closely inter-linked with those of the proposed 3rd defendant. The impugned report relates to services rendered by the 1st plaintiff to the proposed 3rd and 4th defendants pursuant to separate clearing and forwarding contracts between the plaintiffs on the one hand and the proposed 3rd and 4th defendants on the other hand.

49. The proposed 3rd and 4th defendants are the plaintiffs in **HCCC No. 503 of 2011** where they are seeking, inter alia, restitution of huge sums of money paid to the 1st plaintiff. The presence of the proposed 4th defendant is also necessary for the proper determination of the real matter in dispute.

50. I now turn to the proposed 5th defendant. Mr. Maina is a small shareholder who believes that his life time savings are really threatened by the power play amongst the major shareholders of the proposed 3rd defendant and the payments made to the plaintiff by the company as a result of the controversial contract for provision of logistics services.

51. He believes that the 2nd plaintiff breached his fiduciary duties to the proposed 3rd defendant. That is the gravamen of his claim in **Misc. Cause No. 147 of 2012**. His case is fully based on the contents of the forensic audit report which the plaintiffs want expunged.

52. The proposed 5th defendant therefore wants to participate in full in this case in which the court will determine whether the impugned report will be expunged or not.

53. Is the proposed 5th defendant's presence necessary in these proceedings? My answer is in the affirmative. The plaintiffs' case is not entirely based on tort, it is also based on the law of contract and company law.

54. If it was a pure claim for damages the court would have had no hesitation in holding that the proposed defendants cannot be added since that would be tantamount to forcing the plaintiffs to claim damages against them when the plaintiffs do not wish to do so, as was held in **FERNANDES vs KARA ARJAN & SONS (Supra)**.

55. It is on the basis that the proposed defendants' presence is necessary to enable the court effectually and completely adjudicate upon the issue of the forensic audit report and settle all the questions involved in the matter that I allow the proposed defendants to be joined in these proceedings as per the decision of **AMON v RAPHAEL TUCK & SONS LTD (Supra)**.

56. I may add that the overriding objective of the Civil Procedure Act and the rules made thereunder as stipulated in **Section 1A (1)** is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The court is enjoined to expedite disposal of all disputes before it without undue regard to procedural technicalities. See **Article 159 (2) of the Constitution of Kenya, 2010**. Besides, no prejudice will be occasioned to the plaintiffs by the joinder of the proposed defendants.

57. Consequently, I grant the orders sought by the proposed defendants and direct that the plaint be amended accordingly. The costs of these applications shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2012.

D. MUSINGA

JUDGE

In the presence of

Alex – Court Clerk

Mr. J. Oduol for Plaintiff

Mrs. Kashindi for Defendant

Miss Odari for C.M.C. Holdings & C.M.C. Motors

Mr. Mosota for Mr. K. Maina