**Cahill and others v Nandhra and others**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of judgment:** 5 April 2006

**Case Number:** 57/02

**Before:** Tunoi, Githinji and Waki JJA

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**Summarised by:** E Ongoya

*[1] Civil practice and procedure – Representative actions – Applicable principles.*

**Editor’s Summary**

The respondents brought an action in the superior court as their plaintiffs on their own behalf and in a representative capacity on behalf of depositors of Trust Bank Limited as at December 1998, against the appellants. Three main causes of action were pleaded against the appellants, namely; firstly, as auditors of Trust Bank Limited, they failed to perform their statutory duties under the Banking Act by failing to disclose to the respondents the true and correct financial position of the Bank thereby causing the respondents to continue depositing their funds with the bank which bank was placed under statutory management and ultimately in liquidation with the consequence that the respondents lost their deposits.

Secondly, the appellants performed their duties as auditors of the bank in a negligent manner and that such negligence resulted in the respondent’s loss of their deposits. Thirdly, as drafters or promoters of the scheme of arrangement of the reconstruction of the Bank the appellants fraudulently altered the agreed terms of reconstruction agreed between the respondents and former shareholders of the Bank by discharging the latter from their obligations to repay the money embezzled from the bank. The appellants filed a defence denying *in toto* the averments and further denying that the respondents had a right to bring the suit in a representative capacity as pleaded in the plaint. They prayed that all references to the representative nature of the suit be struck out. The respondents took out a Chamber Summons under

Order I, rules 8 and 22 of the Civil Procedure Rules for orders that notice of institution of the suit be given to all depositors of the Bank as at 18 December 1998. The appellants opposed the said application but the superior court judge granted the application as prayed hence the appeal.

**Held** – For a representative suit, the superior court’s permission under Order I, rule 8 is mandatory.

The conditions necessary to bring a suit within Order 1, rule 8 are:

(i) numerous persons;

( ii) same interest;

(iii) authority or permission of the court; and

(iv) notice of suit.

A representative suit is one which is filed by one or more persons or parties under Order I, rule 8 on behalf of themselves and others having the same interest.

There is no requirement that a person seeking to institute a suit in a representative capacity must establish that he had obtained sanction of the persons interested on whose behalf the suit is proposed to be instituted.

In order to invoke Order I, rule 8 of the Civil Procedure Rules, it is not necessary that the “cause of action” must be the same. What is required is that there should be the “same interest”, that is:

(i) common interest; or

( ii) common grievance.

All the respondents were depositors of Trust Bank. They were numerous in number but their exact number could be ascertained through the Bank records. It mattered not that some of them were in or out of Kenya. They were concerned with the loss of their deposits which they allege, *inter alia* to have arisen due to the appellants’ negligence and breach of their statutory duty. The respondents claimed a specific sum of money and damages. They, therefore, had a common interest and a common grievance against the appellants.

The object for which Order I, rule 8 of the Civil Procedure Rules was enacted was to facilitate the decision of questions in which a large body of persons are interested without recourse to the ordinary procedure. The main purpose of the order was forestall insuperable practical difficulties in the institution of separate suits in cases where the common right or interest of a community or members of an association or large sections were involved.

In this age of economic advancement and age of consumerism, Kenya courts should adopt the

Australian approach in construing Order I, rule 8.

Though the rule on representative actions should be relaxed and developed liberally to meet modern requirements of representative civil litigation, representative actions should not be allowed to work injustice to any litigating parties.

Order I, rule 8 of the Civil Procedure Rules being a facilitative one must be given a broad interpretation which will secure its purpose of enabling several parties to come to justice in one action rather than in separate actions.

Appeal dismissed.

**Cases referred to in judgment**

***East Africa***

*Balwant Singh v Joginder* [1962] EA 395

*Daud Abdulla and Osman Haji Ladha v Ahmed Suleiman* (1946) 13 EACA 1

*JJ Campos and LD Cruz v CL De Souza and others* [1933] (XV) KLR 86

***United Kingdom***

*Bedford v Ellis* [1901] AC 24

*Carnie and another v Essanda Finance Corporation Limited* [1995] 127 ALR 76

*CBS/Sony Hong Kong Limited v Television Broadcast Limited* [1987] 13 FRS 262

*Duke of Bedford v Ellis* [1901] 70 LJ

*Duke of Bedford v Ellis and others* [1900-1903] All ER 694

*Irish Shipping Limited v Commercial Union Assurance Company and another* [1989] 2 All ER 853

*Markt and Company Limited v Knight Steamship Company Limited* [1910] 2 KB 1021

*Prudential Assurance Company Limited v Newman Industries Limited* [1981] Ch 229

*Prudential Assurance Company Limited v Newman Industries Limited and others*