



REPUBLIC OF KENYA



**China Wu-Yi Company Limited v Suraya Property Group Limited & 2 others (Civil Case 76 of 2019) [2022] KEHC 291 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 291 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 76 OF 2019  
DAS MAJANJA, J  
APRIL 28, 2022**

**BETWEEN**

**CHINA WU-YI COMPANY LIMITED ..... PLAINTIFF**

**AND**

**SURAYA PROPERTY GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MUGA DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**EQUITY BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is the 3<sup>rd</sup> Ruling in this matter. Before the court for resolution is the Plaintiff's Notice of Motion dated 11<sup>th</sup> January 2022 made under section 3A and 100 of the *Civil Procedure Act* and Order 8 Rules 5 (1) of the *Civil Procedure Rules* ("the Rules") principally seeking leave to amend the Plaint. In addition to the grounds on the application's face, the application is supported by the affidavit of Harrison Githinji, an advocate currently in conduct of this matter on behalf of the Plaintiff, sworn on 11<sup>th</sup> January 2022.
2. The Defendants oppose the application. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have filed Grounds of Opposition dated 21<sup>st</sup> January 2021 whereas the 3<sup>rd</sup> Defendant has filed a replying affidavit of its Director, Corporate Banking, Moses Ndirangu sworn on 9<sup>th</sup> February 2022 together with Grounds of Opposition dated 8<sup>th</sup> February 2022.
3. The facts giving rise to this application are common cause and have been set out in previous decisions of the court. The 2<sup>nd</sup> Defendant is the registered owner of LR No. 28223/33 situated on Kiambu ("the suit property"). It constructed a development thereon known as Fourways Junction Project ("the Project") comprising of housing units and ancillary facilities. In order to develop the suit property, it charged



the suit property in favour of the 3<sup>rd</sup> Defendant (“the Bank”) to secure facilities by a Charge dated 28<sup>th</sup> March 2011, a Further Charge dated 4<sup>th</sup> April 2012 and a Second Further Charge dated 4<sup>th</sup> April 2012 in order to secure advances. It also appointed the 1<sup>st</sup> Defendant as its agent to sell units to prospective purchasers.

4. In March 2009, the 2<sup>nd</sup> Defendant, through the 1<sup>st</sup> Defendant, advertised a tender for the construction of Phase I of the Project. The Plaintiff, a contractor, successfully bid and was awarded the tender. Upon successful completion of the Project at various stages, the Project architect issued various certificates in favour of the Plaintiff amounting to KES. 166,000,000.00. The final certificate of KES. 116,261,185.94 was issued on 20<sup>th</sup> April 2015 out of which the Plaintiff was entitled to KES. 73,668,495.04 and the balance is payable to subcontractors and other suppliers. Since the 1<sup>st</sup> Defendant was unable to pay the KES. 166,000,000.00, it was agreed that the amount to be paid would be settled in kind by way of sale of the following houses in the project: Hibiscus Villas – H036, H049, H060, H061, H105, H106, H107 and Tulip Apartments Court 6 Second Floor, Court 7 Ground Floor and Court 7 Third Floor (“the Houses”). The sale agreements were implemented by the sale of those houses to the Plaintiff’s nominee, Lixin Yang.
5. In due course, the Plaintiff took possession of some of the Houses but then approached the court by a Plaint dated 14<sup>th</sup> February 2019 complaining that it did not receive the title documents from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and that they had refused and or failed to transfer titles of all the Houses as intended. The Plaintiff also claimed that it is still owed KES. 73,668,495.04 by the Defendants. In an Amended Plaint dated 17<sup>th</sup> February 2020, the Plaintiff sought the specific performance of the sale agreements, delivery up of the titles to the Houses, mesne profits for the loss of income and rents from the Houses that were not handed over. In the alternative, it prayed for judgment for KES. 73,668,495.04 with interest thereon and general damages for breach of contract in this suit.
6. The Plaintiff also approached the court by the Notice of Motion dated 17<sup>th</sup> February 2020 seeking injunctive reliefs against the Defendants from dealing with the Houses pending the hearing and determination of the suit. By the ruling dated 3<sup>rd</sup> November 2020, the court dismissed the application.
7. In the course of the proceedings and after the court granted leave to the Plaintiff to amend its Plaint, the Bank filed an Amended Statement of Defence and Counterclaim dated 5<sup>th</sup> August 2021. In essence it claimed that the suit property was charged to it and it did not consent to lease, transfer or sell the Houses to the Plaintiff by the 2<sup>nd</sup> Defendant hence the Plaintiff is not entitled to possession of the Houses as claimed in the Plaint. The Bank subsequently filed and the court granted the application dated 5<sup>th</sup> August 2021 on 10<sup>th</sup> September 2021 seeking a mandatory injunction compelling the Plaintiff to hand over possession the Houses which were under the control of the Plaintiff and/or the Plaintiff’s nominee.

### **The application**

8. In its application, the Plaintiff avers that it has become necessary to amend the plaint in order to plead further outstanding amounts recently discovered and introduce two more defendants. It states that it has established that KES. 65,685,853.40 arising from Phase II of the Project requires to be pleaded. It urges that the purpose of the amendment is to bring out the real controversy between the parties and no party will suffer any prejudice if the Plaint is amended.
9. In the proposed Further Amended Plaint, the Plaintiff seeks to join Peter Kiarie Muraya and Joyce Sue Waceke Muraya as the 4<sup>th</sup> and 5<sup>th</sup> Defendants. It claims that they created a web of companies including the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in order to defraud the Plaintiff amongst others and avoiding personal liability. In the proposed amendment, the Plaintiff seeks judgment for KES. 275,354,348.44



against the 1<sup>st</sup> and 2<sup>nd</sup> and the proposed 4<sup>th</sup> and 5<sup>th</sup> Defendants and a declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's corporate veil be lifted and that they be ordered to pay the said KES. 275,354,348.44.

### **The 1<sup>st</sup> and 2<sup>nd</sup> defendants' reply**

10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants ("the Defendants") oppose the application. They state that it does not provide any basis, information and/or material in support of the proposed amendment. They contend that the application does not provide any documentation to demonstrate how the alleged further outstanding amount discovered comes up and that it has not demonstrated the necessity to introduce the proposed defendants to the suit. Consequently, the Defendants state that they are prejudiced and have been denied the opportunity to interrogate the material, information, facts and evidence relied upon in support of the amendment and addition of parties.
11. The Defendants further submit that the application to add a party to a suit ought to be made under a distinct provision of the rules and is not synonymous with and cannot be brought under Order 8 rule 5(1) of the Rules which deals with amendment of pleadings and not joinder of parties. They also complain that the application, being grounded on facts and material evidence which may be contested, ought to be supported by a deposition sworn by the applicant and not by the advocate as has been done.
12. The Defendants submit that the Plaintiff intends to convolute and confuse the suit by introducing additional claims and parties to the suit. They point out that the Plaintiff's cause of action as pleaded in the initial pleadings is contractual, arising from nonpayment of sums of money claimed under construction certificates issued between the years 2009 and 2010. In the circumstances, the aver that the proposed claim is statute barred and not enforceable in law as it is proposed to be filed outside the period of six years provided by the *Limitation of Actions Act* (Chapter 22 of the Laws of Kenya).

### **The bank's reply**

13. The Bank states that the application is an abuse of the court process in view of the rulings dismissing the application for injunction and granting the mandatory injunction delivered on 2<sup>nd</sup> November 2020 and 10<sup>th</sup> September 2021 respectively. The Bank submits that the Plaintiff has not challenged either of these two decisions where the court held that the Plaintiff had not proprietary interest in the houses. It further states that the Plaintiff should not be allowed to amend its plaint to assert a position that is contrary to rulings made by the court which have not been challenged as this would permit the Plaintiff to improperly get around previous decisions of the court.
14. The Bank therefore maintains that no case has been made for the grant of leave to amend the plaint and leave cannot be granted as a matter of course.

### **Analysis and determination**

15. The application before the court seeks to amend the Plaint as well as introduce other parties as defendants. I agree with the Defendants that prayers for amendment of pleadings and enjoinder of parties are to be sought separately as the two prayers are prescribed under different provisions of the Rules.
16. I must however point out that failure to cite a particular rule, in particular in respect of amendment and joinder, is not fatal to the application. The court nevertheless has inherent jurisdiction to amend and join parties necessary in order to resolve the matter in issue and to meet the ends of justice. This is borne out by Order 1 Rule 10(2) of the Rules which grants the court power to order joinder of a party as a defendant and Order 8 Rule 5(1) of the Rules which provide for amendment of pleadings. The provisions state as follows:
  1. Order 1 rule 10 (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. [Emphasis mine]

2. Order 8 rule 5 (1)

For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just. [Emphasis mine]

17. The general principle governing the court's exercise of discretion in such cases was summarized by the Court of Appeal in *Central Kenya Limited v Trust Bank Limited and Others* NRB CA Civil Appeal No. 222 of 1998 [2000] eKLR as follows:

It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, *Beoco Ltd v. Alfa Laval Co. Ltd* [1994] 4 ALL ER. 464).

18. From the aforesaid provisions, an applicant has to satisfy the court that the presence of the parties and the proposed amendments are necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Since a plea for amendment and joinder call for the court to exercise discretion, the application must demonstrate or establish by the affidavit facts and evidence from which the court may make an informed decision on whether or not to grant the prayer. Likewise, the respondents must know the basis of the proposed joinder and amendment in order to respond substantively. Without such a factual basis being provided, it is difficult to say whether and to what extent the respondents may be prejudiced and whether such prejudice is merely remedied by costs.

19. The affidavit in support of the application, which is sworn by the advocate on record, is threadbare. At the material part, it states as follows;

- (3) THAT upon perusal of the pleadings filed and evidence availed to us by the Applicant, we have established that there is a need to amend the Plaintiff.
- (4) THAT we have established from the Plaintiff/Applicant that a sum of Kshs. 65,685,853.40 arising from Phase II of the Project is not pleaded and need to be pleaded.
- (5) THAT it is also out considered opinion that there is need to introduce 2 further Defendants for completeness of the dispute.
- (6) THAT I wish to state that the intended amendment will bring the real controversy between the parties. A draft of the intended Further amended Plaintiff is attached and marked as HNG-1.
- (7) THAT the intended amendment will not prejudice any of the rights.



- (8) THAT the Plaintiff intends to amend the Plaintiff to introduce new numbers.
20. As shown above, I agree with the Defendants that no material, facts or evidence, have been placed before the court to demonstrate the importance of the intended defendants and how they will enable the court ultimately settle all the disputes between the parties in this suit. As is clear, the affidavit does not set out facts upon which the court can conclude that it is necessary to join the proposed Defendant or amend the Plaintiff.
21. Even going through the draft Plaintiff, save for the fact that the proposed 4<sup>th</sup> and 5<sup>th</sup> are said to be directors of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant, I do not find anything pleaded that sets out a cause of action against them. The Plaintiff makes general allegation of fraud against them without setting out the particulars of such fraud. The draft Plaintiff essentially remains a claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who are separate and distinct from their directors.
22. From the deposition I have set out above, the Plaintiff does not explain where the KES 65,685,853.40 from Phase II of the Project is coming from and why it is brought now when the Plaintiff has been in possession of this information from the time of filing the suit. The Plaintiff also does not state when the particulars sought to be pleaded came to its knowledge. I find that the amendment being sought is not borne out of discovery of evidence but lack of reasonable diligence. I further agree with the Defendants that there is also an issue of Limitation as this claim is being brought more than six years from when the cause of action arose which is against the Limitation of Actions Act and that allowing the additional claim may prejudice the Defendants in the absence of the facts which would enable the court make a contrary finding.

### **Disposition**

23. For the reasons stated above, I find that the Plaintiff's application dated 11<sup>th</sup> January 2022 lacks merit. It is dismissed with costs to 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

**DATED AND DELIVERED AT NAIROBI THIS 28<sup>TH</sup> DAY OF APRIL 2022.**

**D. S. MAJANJA**

**JUDGE**

Court Assistant: Mr M. Onyango.

Mr Mbugua instructed by Nyingi Wanjiru and Company Advocates for the Plaintiff.

Mr Kimondo instructed by L. Kimondo and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

Mr Kimani, SC with him Mr Ondieki instructed by Hamilton, Harrison and Mathews Advocates for the 3<sup>rd</sup> Defendant.

