



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COURTS

COMMERCIAL AND TAX DIVISION

CIVIL CASE NO. 35 OF 2015

EPCO BUILDERS LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

1. DR. ELLY N. OPOT

2. DR. LUKOYE ATWOLI

3. DR. SIMON KIGONDU SUED AS OFFICIALS OF KENYAMEDICAL

ASSOCIATION.....DEFENDANTS/RESPONDENTS

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 4th December, 2020 brought under **Section 1A** and **3A** of the **Civil Procedure Act** Cap 21 Laws of Kenya, **Order 1 Rule 10 (1)** and **(2)** of the **Civil Procedure Rules, 2010**, **Sections 26, 27** and **28** of the **Limitations of Actions Act** and all other enabling provisions of Law. The application seeks the following orders:

i. THAT the Court be pleased to order the Substitution of the 1st, 2nd and 3rd Defendants sued in their capacity as Officials of the Kenya Medical Association with the Kenya Medical Association.

ii. THAT in the alternative, the Court be pleased to extend time to allow joinder of Kenya Medical Association as a Defendant in place of the 1st, 2nd and 3rd Defendants sued as officials of the Kenya Medical Association; and

communications to the public, court documents or otherwise but instead have consistently used the name 'association'. It is also averred that the website of KMA clearly confirms that the Defendants are indeed officials of an association and their denial of this is only a ploy to make a mockery of justice.

5. It is further contended that the Defendants intentionally and maliciously failed to disclose material facts in clear subterfuge and as such, their claim that they are strangers to this suit in its entirety is malicious, vexatious, frivolous and amounts to an abuse of this Court's process and time. It is deposed that the said concealment of material facts amounts to bad faith and ought to be treated with utmost austerity. He deposed that Court has the discretion under Order 1 Rule 10 in circumstances where a suit has been instituted in the name of the wrong persons to, *suo moto*, 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 upon such terms as the court thinks fit.

6. Further, he averred that it is manifest that the institution of the suit as against the Defendants as the national officials of KMA, if at all erroneous, was a bonafide mistake instigated by the malicious non-disclosure of material fact and artifice of the Defendants. It is also his contention that the presence of KMA before this court in the present suit is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit.

7. In the alternative, it is averred that if indeed the Defendants organization is not an association but a company, this Court has the discretion to extend the time to enable the joinder and or substitution of the Defendants with KMA since the confusion as to the legal status of the latter was caused by the concealment of material facts. Finally, it is deposed that KMA would suffer no prejudice whatsoever if the application is allowed as the association and the company are the exact same entity and that such substitution will not affect the progression of the suit as it will rely on the same documents, pleadings and evidence that have already been filed herein.

8. The Application is opposed vide a Replying Affidavit (erroneously referred to as Supplementary Affidavit) sworn by **DR. ELIZABETH GITAU**, the current Chief Executive Officer of KMA. She avers that the application comprises a dual admission of key facts, with inescapable legal consequences; first, that the inclusion of prayer 2 on the Application is a clear admission by the Applicant that the application is time barred by virtue of limitation of time; and second, that ground 1 on the motion confirms that this matter is based on contract, with the attendant consequence that time cannot be extended by the court to enable the bringing in of a party beyond the time provided by the statute of limitation of time. She argues that the assertion by the Applicant that the Defendants waited six years to lapse before raising the issue that they are not an association but a company is baseless as it presumes that the Defendants had control of the court diary and schedules to dictate the continuance of this matter beyond six (6) years.

9. Further, she argues that the Applicant is merely inviting the court to engage in a matter of opinion and perception on the registration status of KMA whereas that is a matter that could have been ascertained by basic due diligence, which the Applicant was indolent on. To cement that argument, she asserts that a cursory glance at KMA's website opens with a clear statement that the association was founded in 1968 and incorporated in 1973 under the Companies Act, Cap 486 as a company limited by guarantee hence, it cannot be alleged that this fact was concealed or not disclosed.

10. She avers that KMA which is a limited liability company, together with Kenya Medical Investment Company Ltd which is a company set up by doctors for purposes of investments and who contribute financially to the intended and agreed investments are the shareholders in Kenya Medical Properties Limited, with KMA being the majority shareholder therein.

11. She stated that upon her appointment as the CEO of KMA, she was informed about the current suit in which the Plaintiff had sued the three doctors named as Defendants on behalf of KMA. That she instructed KMA's advocates on record to rectify the position since the Defendants herein were not parties to the contract dated 9th November, 2008 between the Plaintiff and KMA.

12. She deposes that the three Defendants were representatives of Kenya Medical Properties Limited and KMA, which are distinct and separate legal entities established on behalf of doctors with instructions as provided for under the Memorandum and Articles of Association, to represent the two companies in any and all investments to be undertaken by doctors and the said companies, and they would be changed after expiry of their term in office and new representatives appointed.

13. It is further contended that the Defendants engaged the Plaintiff at various meetings with regard to the construction of the company buildings and equally filed the defence dated 12th April, 2016 in their capacities as national officials and representative of KMA and not as directors of KMA Company. She confirms that she is aware that indeed the Plaintiff entered into a contractual agreement with KMA for the construction of apartments and an office block on L.R. No. 209/11335 which property belongs to Kenya Medical Properties Limited.

14. It is her contention that the Plaintiff was at all times aware that it was dealing with KMA which is a limited company in the contract herein, a fact expressed clearly in the standard building contract provided by the Plaintiff when defining the parties to the contract at page 5, Article 2.0 of the Articles of Agreement. Further, she contends that the Plaintiff by its own motion chose to institute the current proceedings as against the doctors cited as Defendants in utmost ignorance of the law.

15. In addition, she contended that the order sought by the Plaintiff for substitution of the Defendants with KMA is a clever and mischievous way to introduce KMA to the suit which will deny it the defence of limitation since the cause of action is now time barred under the statute of Limitation of Actions Act and this shall cause great injustice to KMA which cannot be compensated by costs. She averred that the would-be cause of action as against KMA accrued on 12th August, 2014, but the Plaintiff chose to institute the current proceedings as against the Defendants cited herein. In her view therefore, the prayer for substitution of the parties is incompetent and cannot be sustained.

16. It was further her contention that the court has no jurisdiction to extend time after the expiry of the limitation period in a cause that has arisen out of a contract. She argued that **Section 27 (1) of the Limitation of Actions Act** which the Plaintiff seeks to rely on is not available to it because the court only has powers to extend time in matters founded on tort which must relate to the torts of negligence, nuisance or

breach of duty in which the damages claimed are in respect of personal injuries suffered by an Applicant as a result of the tort.

Applicants' submissions

17. The application was canvassed by way of oral submissions. The Plaintiff was represented by learned counsel, Mr. Okwach whilst the Respondent was represented by Mr. Ligunya, advocate.

18. In his oral submissions, learned Counsel, Mr. Okwach argued that under **Order 1 Rule 10** of the **Civil Procedure Rules**, the court, *suo moto*, can strike out a party and enjoin another in case of misjoinder. He referred the court to clause 4 of the contractual agreement dated 9th November, 2008 where the parties are described as registered as KMA and EPCO Builders Limited. He added that Clause 2.16 thereof which is the execution clause further shows that the execution on behalf of KMA was done by its chairman, secretary and treasurer all of whom appended a stamp of KMA meaning they were acting for KMA. Counsel reiterated that these officers are officers akin to those alluded to under Section 2 of the Societies Act. He added that contrary to the position taken by the Defendants that they were acting as directors or officials of a limited company, **Section 37** of the **Companies Act** recognizes signatories of a company.

19. Further, Mr. Okwach submitted that since the institution of this suit, the Defendants have unequivocally acknowledged their positions as officials of an association. He demonstrated this with various documents sworn on oath which had been annexed to the application. He also reiterated that KMA has always identified itself as an association and not a company. He faulted the Defendants for conveniently failing to describe the legal status of KMA but instead only describing that of Kenya Medical Investments Company Limited and Kenya Medical Properties Limited who are contractual strangers to the Plaintiff. In his view, this was a calculated ploy by the Defendants to mislead the Plaintiff only to now claim that KMA is a limited liability company. Further, counsel also took note of the averment by KMA's current CEO that she took over from the former chairperson.

20. Counsel therefore urged the court to exercise its discretion to allow the substitution by striking out the names of the officials of KMA and remaining with KMA as the sole Defendant.

Respondent's submissions

21. On her part, the Defendants' advocate Mrs. Ligunya maintained that the application as filed is incompetent as it is time barred by virtue of Section 4 of the Limitation of Actions Act, a fact which the Plaintiff admitted. She submitted that there was no evidence of malice on the part of the Defendants as alleged by the Plaintiff. He reiterated that the Defendants acted in their capacities as officials of KMA and not its directors. Further, she argued that it is not legally possible to merely strike out the names of the three Defendants and leave KMA as the sole Defendant since summons were served on the three as members in a non-existent association.

22. She contended that even if the court was to strike out the names of the three, summons would have to issue on KMA, the Company, but this would be unfair as it would deny KMA the defence of limitation which has accrued to it. Counsel reiterated that under **Sections 26, 27** and **28** of the **Limitations of Actions Act**, the court has no jurisdiction to extend time after the expiry of the limitation period in a cause that has arisen out of a contract.

Response by the Applicants

23. In rebuttal, Mr. Okwach submitted that the purpose of summons is for a party to be aware of the existence of a suit and the officials of KMA have not denied that they were made aware. He reiterated that the distinction that the court must make is that KMA as an association is the same entity as KMA the company.

24. Counsel submitted that **Section 27(1)** of the **Limitation of Actions Act** includes the application of the courts power to extend time arising from breach of duty whether by virtue of a contract as in the instant case or breach of law. He argued that limitation is not intended to stop a party from seeking justice but it ensures that a plaintiff does not sit on their right and caution a defendant from proceeding when evidence is no longer available.

Analysis and Determination

25. I have carefully considered the application and the affidavits of the respective parties. I have also considered the submissions tendered by the parties' advocates.

26. To begin with, the Plaintiff and the Defendants are now in agreement that KMA is a company limited by guarantee, registered under the Companies Act, Cap 486, Laws of Kenya and not an association under the Societies Act. It is therefore not in dispute that there exists a misjoinder of Defendants as a company which in law is a legal person capable of suing and being sued in that capacity. As such, the main issue for determination is whether the court should allow the substitution of the three named Defendants with the company which operates under the business name of KMA.

27. The law on substitution of defendants is espoused under **Order 1 Rule 10 (2) and (4)** of the **Civil Procedure Rules** which provide as follows:

“ (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.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”(emphasis added).

28. In *Zephir Holdings Ltd v Mimosa Plantations Ltd, Jeremiah Matagaro & Ezekiel Misango Mutisya* [2014] eKLR, the court held as follows:

“A proper party is one who is impleaded in the suit and qualifies the thresholds of a plaintiff or defendant under Order 1 rule 1 and 2 respectively, or as a third party or as an interested party and whose presence is necessary or relevant for the determination of the real matter in dispute or to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. And the court has a wide discretion to even order suo moto for a party to be impleaded whose presence may be necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Accordingly, a suit cannot be defeated for mis-joinder or non-joinder of parties.”

29. The Plaintiff’s main contention is that the institution of the suit as against the Defendants as the national officials of KMA was a *bona fide* mistake instigated by the malicious non-disclosure of the KMA’s real legal status by the company. Whereas I am in agreement with KMA that the Plaintiff failed to conduct due diligence on the company, I am also alive to the tenet that misjoinder or non-joinder of parties to a suit cannot be a ground to defeat a suit. (See *William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 Others* [2016] eKLR).

30. A perusal of the various documents filed in this suit so far by the Plaintiff and the Defendants reveal that KMA which entered into the subject contract with the Plaintiff has all along been aware of this suit. Additionally, and in any event, KMA itself through the Affidavit of its CEO confirms that the three named Defendants were indeed its representatives and had instructions under the Memorandum and Articles of Association to represent the company in any and all investments undertaken by doctors. To that end therefore, KMA cannot ride on the contention that enjoining it to this suit and/or substituting it as the Defendant in place of its former representatives will deny it the defence of limitation of action which has since accrued to it.

31. Furthermore, by virtue of **Article 159 (2) (d)** of the Constitution, the court is enjoined to administer substantive justice without undue regard to procedural technicalities. The said article provides thus:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles-

(d) Justice shall be administered without undue regard to procedural technicalities.”

32. In *Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR, the Supreme Court while considering the application of Article 159(2)(d) of the Constitution stated as follows:

“The essence of that provision is that a court of law should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast in stone and which suits all situations of dispute resolution. On the contrary, the court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and requirements of a particular case, and conscientiously determine the best outcome”.

33. Further, Section 3A of the Civil Procedure Act empowers this court to make such orders as will be necessary for the ends of justice to be met. If the court denies the Plaintiff the opportunity to substitute the Defendants with KMA which has all along been represented in the suit by its representatives, the Plaintiff will suffer a great injustice as it will be shut out from pursuing its claim against company and may also not be able to execute any decree that may eventually be issued. On the contrary, I do not see any injustice that will be occasioned to KMA which cannot be compensated by an award of costs. Further, I am also convinced that KMA’s presence in this suit will enable the court to effectually and completely determine the matter. That remains the crux of the institution of the suit herein.

34. Accordingly, the Plaintiffs application partly succeeds. I do allow the prayer to substitute the three Defendants with Kenya Medical Association. I direct the Plaintiff to file and serve on KMA an amended Plaint together with amended summons within 14 days of this ruling. Upon service, KMA shall have 14 days to file and serve on the Plaintiff an amended defence. The costs of this application shall be borne by the Plaintiff. It is so ordered.

DATED AND DELIVERED THIS 18TH DAY OF MARCH, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr. Okwach for the Plaintiff/ Applicant.

2. Mrs. Ligunya for the Defendants/Applicants.