



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

HIGH COURT CASE NO. 210 OF 2019

TRIPAT SINGH MANGAT (Suing on his behalf and

on behalf of MANGAT

I,B. PATEL (MIBP) LIMITED).....PLAINTIFF/APPLICANT

VERSUS

MANJEET SINGH BHACHU.....1ST DEFENDANT

RANJIT SINGH RUPRA.....2ND DEFENDANT

RATNA MANJI HIRANI.....3RD DEFENDANT

MANGAT I.B PATEL &

PATNERS (Sued as a firm).....4TH DEFENDANT

RULING

1. By way of a Notice of Motion dated 11th February, 2021, brought under Order 2 Rule 5 and Order 8 Rules 3, 5 and 8 of Procedure Act and All Enabling Provisions of the Law, the Plaintiff prays for Orders that:

- a) **THAT this Honourable Court be pleased to grant leave to the Plaintiff herein to amend his Plaintiff.**
- b) **THAT the Draft amended Plaintiff annexed to the application be deemed as duly filed upon payment of the requisite court fees.**
- c) **THAT costs of this application be in the cause.**

2. The application is premised on the grounds THAT:

- a) *That the Plaintiff filed suit herein on 27/08/2019 seeking a permanent injunction to be issued restraining the 1st and 2nd Defendants, from proceeding and or completing and or acquiring the Plaintiff's 1,000 Ordinary shares of the Company, Mangat I. B. Patel (MIBP) Limited, through compulsory transfer of the same for an alleged sum of Kshs. 6,939,000/ undertaken without concurrence or consent of the Plaintiff or approval, costs of the suit and interest therein;*
- b) *That at the time, the only remedy being sought against the Defendants were permanent injunctive orders therein;*
- c) *That in the circumstances, the Plaintiff has elected to seek amendment of his Plaintiff with respect to the difference between the share price which is being offered to the Plaintiff and the correct price per share which is in the region of Kshs. 25,000/ per share amounting to the sum of Ksh, 25,000,000/*
- d) *That it is permissible under the Civil Procedure Rules to apply to amend Plaintiff;*
- e) *That absolutely no prejudice shall be occasioned to the Defendants;*

f) *That the amendment is necessary as it shall bring to the fore all the real questions in issue.*

g) *That it is in the interests of justice to have the *Plaint* amended for the true and just dispensation of justice.*

4. The application is further supported by the affidavit of TRIPAT SINGH MANGAT, the Plaintiff herein sworn on 9th February, 2021.

5. He deposes that he has known both the 1st and 2nd Defendants since 1981, together with whom they have for over 35 years and conducted business together in good faith as engineers and business partners, during this time the firm grew in reputation to be a pre-eminent engineering firm in the Kenya.

6. THAT he signed a formation agreement in 2014 on the basis that he would set up and lead a team to address the market sector for projects in transportation.

7. He deposes that from 2013 the 1st and 2nd Defendants used his curriculum vitae with his permission to participate in international bidding to win work in projects in the water sector.

8. THAT subsequent to the proposals presented, over KShs 1.4 billion worth of consulting engineering work was won by the firm with a significant proportion presented to the clients that his input would lead the firm's efforts for their project.

9. The Applicant deposes that it was a contractual obligation to the clients through the firm based on his signature on the curriculum vitae presented to them and deemed contractual in the agreements signed between the firm and the various government and public agencies. That as such, he was wholly committed to the firm on the basis of his consent to the use of his curriculum vitae and the acceptance of that by the clients through the contracts signed.

10. The Applicant adds that there was no formal or informal notice given by the Defendants that he stood to forfeit the shares agreed to by dint of the change of fortune in the abundance of work in the water sector rather than the transport sector.

11. THAT under the circumstances outlined above, the Applicant did not consider it necessary to formally sign off on the formation letter given that his commitment was self-evident, the firm's resources were fully stretched to meet contractual obligations in the water sector and the fact that the Principals including himself had been working in good faith for over 35 years without an issue on the basis of verbal agreements.

12. THAT when he filed the suit on 27/08/2019 he was seeking to retain his shareholding and directorship in the company. That however, upon losing in the application date 27th August, 2019 in which he has sought injunctive reliefs, he deems it necessary to amend the *Plaint* and pursue a claim for damages.

13. It is deposed that such a claim arises from the fact that the Applicant has heard that from the Engineering Community/Industry that one of the main shareholders has sold his shareholding of Mangat I. B. Patel (MIBP) Limited at a much higher price per share than was offered to him in a letter dated 28th June, 2019 at Ksh. 6,939/ only. He has annexed as "TSM 2" being a copy of the CR 12 dated 7th November, 2019 exhibiting his 1,000 shares which were forfeited by the Company at the said price. He has also annexed as "TSM 1 (a) & (b)" copies of the letter and the Transfer Deed that was sent to him.

14. The Applicant further deposes that his removal as director and shareholder of the Company was intended to deny him the fruits of his contribution in growth of the company which he places at Ksh. 18, 061,000/.

15. He thus urges for leave to amend the *Plaint* to include a prayer for damages.

16. It is his view that no prejudice will be occasioned to the 1st and 2nd Defendants if he is allowed to amend the *Plaint*. To the contrary, he states that the amendment will be just, mete and proper.

17. In opposing the application, the Defendants filed Grounds of Opposition dated 24th February, 2021 which I duplicate as follows:

a) The Application as taken out is incompetent, misconceived, and is an abuse of the court process.

b) The exhibits annexed to the Application are in violation of Rule 9 of the Oaths and Statutory Declaration Rules and are therefore liable to be expunged from the record.

c) There has been undue delay in filing the Application herein.

d) The proposed amendments introduce a new and inconsistent cause of action which would change the action into one of a substantially different character that can only be subject to a fresh action by way of a Petition under section 780 of the Companies Act.

e) It is trite law that one cause of action cannot be substituted for another by way of amendment.

f) In any event, the proposed amendments are in violation of Order 8 Rule 7 of the Civil Procedure Rules 2010.

18. It is thus urged that the application is devoid of any merit and should be dismissed with costs.

Submissions

19. The Application was canvassed by way of written submissions.

Plaintiff/ Applicant's Submissions

20. The Applicant's submissions are dated 6th April, 2021 and are filed on his behalf by Macharia-Mwangi & Njeru Advocates. It is submitted that the basis of the proposed amendment was one of the findings in a Ruling delivered on 2nd October, 2020 by Hon. Nzioka, J (although the Applicant erroneously states that the ruling was delivered by M. Kasango, J) where she rendered herself thus:

"17. I am in this case inclined to concur with the defendants' submissions that the plaintiff seeks by this action to pursue personal grievances and private interest which have nothing to do with the company. In seeking leave to proceed with this action as derivative action the plaintiff is only seeking to bolster his personal claim. Accordingly, in respect to the second issue I find that the plaintiff has not made a case for leave to be granted to proceed with derivative suit. Accordingly, the prayer seeking leave to proceed with derivative action is dismissed with costs."

21. It is submitted the ruling declined the Applicant's request to pursue corporate grievances. That therefore, in making the current application, the Applicant is seeking to pursue his claims which are monetary in nature.

22. Consequently, the Plaintiff has elected to seek amendment of his Complaint with respect to the difference between the share price which is being offered to the Plaintiff and the correct price per share which is in the region of Kshs.25,000,000/

23. The Applicant has in the circumstances set out the issue for determination as: Whether the Plaintiff's/Applicant's Notice of Motion for amendment has merit and ought to be entertained.

24. As regards to whether the amendment should be allowed, counsel for the Applicant whilst citing Order 8 Rule 3 of the Civil Procedure Rules submits that leave to amend pleadings should be granted freely unless there is evidence that the same is inordinately delayed or that the same is an abuse of the court process.

25. As regards delay, counsel submits that the issue has not at all been raised by the Respondents and more importantly, no prejudice has been alleged will be occasioned to the Respondents by the amendments. Counsel cited the case of **Ochieno and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991** in which the Court of Appeal set out the principles under which leave to amend the pleadings should be allowed. It was the view of the counsel, that the Applicant has met the criterion thereof, consequent which the application should be allowed.

26. In response to the Respondents' grounds of opposition that the annexures to the Supporting Affidavit were not notarized, it is submitted that the contrary is the position; that the same was undertaken in the United States of America as shown on pages 1,9 and 11 of the Notice of Motion; and a Certificate from California dated 9th February, 2021 has been produced.

27. The case of **Qad Software South Africa (Pty) Ltd vs Rift Valley Railways Investments (Pty) Ltd [2013] e KLR**, by the High Court in which the Court dismissed objections as to the form of notarization was relied on. The court delivered itself thus:

"14. The court has carefully perused the Replying Affidavit herein and notes that the same was sworn by the deponent at Shrewsbury United Kingdom. The certificate to confirm the signature was the true signature of the deponent by a Notaries Public was contained on that page but it was not signed. The Notaries Public stamped and signed on a separate page which was annexed to the Replying Affidavit. The Notarial Certificate therein bore the following words: -

"Seen for legalization of the signature of Mr Peter Neil GEDDES by me, Marcel Dirk Pieter Anker, Civil Law Notary in Amsterdam, the Netherlands on this day of 25 April 2013."

15. The Verification Affidavit sworn by the said Peter Neil Geddes on 18th February 2013 also adopted the same format as that of the said Replying Affidavit. There is nothing to suggest that the Defendant was objecting to the said format of attestation of the Verification Affidavit. It cannot be that the Defendant is not objecting to the validity of the said Verification Affidavit, which is the leg on which a suit stands, but is objecting to the Replying Affidavit sworn on 30th April 2013. In other words, a party that acquiesces that a Verification Affidavit is properly drawn cannot in the same vein object to subsequent affidavit that were notarised in the same manner as being irregular and of no consequence.

16. In the circumstances, in the absence of any proof by the Defendant that the said Replying Affidavit would not have been admissible in a court in the United Kingdom and the Netherlands where it was notarised, the court finds that the irregularity was more on form and not substance which would not go to the substance of the matter herein. Indeed, the Replying Affidavit herein has raised very substantial issues which the court finds would cause great injustice to the Plaintiff if the same were not considered. The court finds that the Defendant has not demonstrated what prejudice it would suffer if the said Replying Affidavit was held to be valid for the purposes of the determination of its application."

28. The court was called to apply the provisions of Section 159(2)(d) which provide that ***"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"***

29. The Applicant also denied that the amendment is intended to introduce a new cause of action under Section 780 of the Companies Act in which case a Petition ought to substitute the Plaintiff. Reference was made to paragraph 16 of the Supporting affidavit and the letter dated 28th June, 2019, wherein the Plaintiff's shares were forfeited at the price of Kshs. 1,000/.

30. It is submitted that the Plaintiff is only seeking a fair price from the Company for his shares, the beneficiary of the shares forfeited to the Company being the Defendants.

31. Further that by dint of the afore stated letter dated 28th June, 2019 it is clear that the Plaintiff is no longer a member/shareholder of the Company. Thus, Section 780 of the Companies Act would apply only to a "member" of the Company. Therefore, it is permissible for the Plaintiff to pursue the claim for the loss he suffered once the Defendants mistreated him by taking away his shares and denying him allocations.

32. It is thus argued that the assertion that Applicant should invoke Section 780 of the Companies Act and file a fresh suit amounts to approbating and reprobating his position is not true. That in any case, Order 8 Rule 3 (5) of the Civil Procedure Rules specifically permits amendment of the pleadings to plead a new cause of action. It is accordingly pleaded that the application be allowed with costs in the cause.

Defendants'/Respondents' Submissions

33. The Respondents' submissions dated 23rd April, 2021 were filed by A.F. Gross, Advocate. From the outset, counsel underpinned that it was not in doubt that following the Court's Ruling of 2nd October, 2021, the Applicant's shares in the company have since been forfeited but the Applicant is still pushing for a higher value for his forfeited shares contrary to the provisions of the Company Articles of Association to which he was a voluntary subscriber.

34. In the Respondents' views, there is only one issue for determination namely whether the Plaintiff's Application is merited or not, to which they submit is not for the understated reasons.

35. Firstly, the Respondents maintain that there has been inordinate delay of over six months since the delivery of the Court's Ruling. The delay has not been explained by the Plaintiff.

36. Secondly, it is submitted that the proposed amendments, if allowed, will inevitably introduce a new and inconsistent cause of action which lies squarely within Section 780 of the Companies Act where a minority member of the company alleging oppression and/ or being treated unfairly is required to file a Petition and not a Plaintiff.

37. Secondly, the allegations of oppression of a minority member of a company may only be brought by way of a fresh Petition under Section 780 of the companies Act and not by way of amendment of Plaintiff which was essentially pegged on a derivative claim under part XI of the Companies Act. Indeed, it is on that basis that the Plaintiff sought leave to continue with the suit as a derivative claim which was nevertheless rejected by the Court. In this regard, it is submitted that a derivative claim is quite distinct from a personal claim under the provisions of the companies Act and the two causes of action cannot be substituted by way of amendments.

38. It is therefore submitted that the Plaintiff is turning its case into a gamble at the Defendants' expense. If allowed, the proposed amendments will fundamentally depart from the original pleadings and will inevitably introduce a totally new and inconsistent claim which will defeat the Defence filed herewith and shall highly be prejudicial to the Defendants.

39. It is clear from the draft amended Plaintiff that the Plaintiff's principal grievances are allegations of being treated oppressively and/or unfairly as a member of the company. Indeed, the Plaintiff has maintained the particulars of oppression and malice in its proposed amended Plaintiff.

40. It is therefore submitted that the Plaintiff is turning its case into a gamble at the Defendants' expense. If allowed, the proposed amendments will fundamentally depart from the original pleadings and will inevitably introduce a totally new and inconsistent claim which will defeat the Defence filed herewith and shall highly be prejudicial to the Defendants.

41. Reliance was placed in the case of **Eastern Bakery v Castelino [1958] EA 462 (CAU)** in which it was held at page 462 that:-

"The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character"

42. Also cited was the case of **Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365** where the court held that:-

"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

43. The Respondents also relied on the case of **Kassam v Bank of Baroda (2002) eKLR** in which the court stated; "the power of amendment is to be jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense." Such a scenario, the Court found, amounted to an abuse of the process of the court.

44. Further, in **Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2013] eKLR**, the Court held that:-

“The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 Others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

.....that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action:....”

45. It was thus submitted that the Applicant’s recourse is to file a Petition under the provisions of Sections 780 of the companies Act and not to substitute a suit which strictly speaking was filed as a derivative claim. The Respondents submit that two causes of action are of different character as can easily be deciphered from the relevant provisions of the Companies Act.

46. The Respondents too, urge that, whilst the Applicant submits that he is no longer a member/shareholder of the company, in the proposed amendments, he simultaneously and disingenuously continues to agitate as a member/shareholder which is clear he has maintained the particulars of being oppressed and/ or treated unfairly as a member/shareholder of the company.

47. It is also submitted that some of the proposed amendments contravene Order 8 Rule 7(2) of the Civil Procedure Rules which states that; ***“All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.”***

48. To this end, the Respondents state the Draft Amended Plaintiff has substituted a new party namely **ISHWAR B. PATEL & PARTNERS** (sued as a firm). That the addition of a new party and removal of the former 4th Defendant is in clear violation of the above rule.

49. Further, that the Applicant has totally removed (not striking through) a sizeable proportion of information contained in the original Plaintiff (**paragraphs 13, 14, 16 and 17**). The said paragraphs do not feature in the Draft Amended Plaintiff by way of a strike through as required by the law.

50. Also submitted is that, the Plaintiff has added new information to the draft amended Plaintiff which is not shown by way of underlining in red as required by the law against mandatory provisions of Order 8 Rule 7(2). In this regard, the case of ***In Co-operative Insurance Company of Kenya Limited v Paem Agencies Company Limited [2014] Eklr*** was cited to buttress the submission.

51. The Respondents therefore urged the court to dismiss the application with costs.

Analysis and Determination

52. The Application herein is majorly brought under Order 2 Rule 5 and Order 8 Rules 3,5 and 8 of the Civil Procedure Rules. For purposes of the ruling, it is important to duplicate the relevant rules of Order 8. Rule 3 provides as follows:

(1) Subject to Order 1, Rules 9 and 10, Order 24, rules 3, 4, 5, and 6 and the following provisions of this rule, the court may at any state of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3)(4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

53. Rule 5 on the other hand reads:

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of 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.

(2) This rule shall not have effect in relation to a judgement or order.

And Rule 8 as follows;

“The court may hear and determine an oral application made under this Order.”

54. In the case of **Central Kenya Limited v Trust Bank Limited & 5 Others [200]e KLR** the Court of Appeal (Gicheru, Bosire & Owuor, JJA) whilst referring to commentaries on the Indian Civil Procedure Code by Chittaley and Rao stated as follows with regards to the settled rule to amendment of pleadings:

“... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

Their Lordships went on to state that:

“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).”

55. In the case of **City Clock Limited v County Clock Kenya Limited & Another [2020] eKLR** the court referred to a Court of Appeal decision in the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 149 of 1991 [1995] eKLR which was cited with approval in St. Patrick’s Hill School v Bank of Africa LTD [2018]e KLR where** the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings. They were enunciated as follows:

a) The power of the court to allow amendments is intended to determine the true substantive merits of the case:

b) The amendments should be timeously applied for;

c) Power to amend can be exercised by the court at any stage of the proceedings;

d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side:

e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

56. It is clear from the above case law that leave to amend pleadings should be granted freely so long as the amendment will not occasion injustice to the other side, and that there is no injustice if the other side can be compensated by way of costs. Further, the Party coming to court should make the application without undue delay.

57. As regards filing this application timeously, there is no doubt that the Applicant has failed the test. The genesis of the application is the Ruling that was delivered on 2nd October, 2020 and the application was filed on 11th February, 2021, five months down the line. The Applicant was well aware of the implications of that Ruling and hence ought to have approached the court within a reasonable time.

58. Be that as it may, the power to allow amendment of pleadings is within the discretion of the court and where a court is convinced that there exists justifiable cause to amend, may nevertheless allow the amendment notwithstanding that the application was not filed timeously. In that regard, the court must address itself to the need for the proposed amendment.

59. According to the Applicant, the Court in the Ruling of 2nd October, 2020 noted that whereas the Claim in the suit was in the form of a derivative suit, the Applicant was advancing his personal grievances and private interest which had nothing to do with the company. For this reason, the court declined leave to allow him to proceed with a derivative suit. It is the case of the Applicant therefore, that the amendment is intended to include prayers for damages, more so to claim the correct price per share at current offer price of Ksh. 25,000/ per share. And that since he held 1000 shares, he would claim a total of Ksh. 25,000,000/.

60. The twist in this claim is that, by his own admission, the Applicant’s shares were forfeited at Ksh. 6,939/ as shown in the CR12 dated 7th November, 2019 and annexed to the Supporting Affidavit. In fact, he admits that, by virtue of that forfeiture he is no longer a member of the company. This obviously implies that he is no longer a shareholder of the company. According to the Respondents, the Applicant in the amendments continues to agitate as a member/shareholder in so far as he continues to be oppressed in that capacity.

61. Section 780 of the Companies Act falls under PART XXIX which deals with protection of members against oppressive conduct and

unfair prejudice. Sub section (2) defines a “**member**” in relation to a company to include a person who is not a member of the company but is a person to whom shares of the company – (a) have been transferred; or (b) have been transmitted by the operation of law. What this implies is that despite the fact that the Applicant’s shares were forfeited he has a right to pursue his interest under the title of the provision. That is to say that, he could pursue relief for alleged mistreatment of other members.

62. Having settled that issue, it now behooves the court to determine whether the amendments are prejudicial to the Respondents. According to the Respondents, they would suffer prejudice because the amendments would change the character of the suit. The reasoning behind this is that the Applicant can only now file a Petition under Section 780 and not substitute a suit which strictly speaking was filed as a derivative suit as the two causes of action are of different character.

63. Order 8 Rule 3(5) of the Civil Procedure Rules provides that an amendment can be allowed even if its effect is to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the Party applying for leave to make the amendment.

64. In the present case, there is no doubt that the prayers sought in the amendments arise from the claim by the Plaintiff that he was unfairly removed from the company and that his forfeited shares were so forfeited at an under value. To that extent, I find that the new cause of action arises from the same facts of which relief has already been claimed. As such, the new cause of action in principle, would not be prejudicial to the Defendants.

65. It is however notable that the Applicant was denied leave to pursue a derivative suit. However, in the title of the Draft Amended Plaintiff, he still indicates that he is suing on his behalf and on behalf of Mangat I.B. Patel(MIBP) Limited, the company he no longer is a shareholder or a director.

66. Also glaring from the Draft Amended Plaintiff is the removal of the 4th Defendant, **Mangat I.B. Patel & Partners (sued as a firm)** and replaced by **Ishwar B.Patel & Partners(sued as a firm)**. The Applicant in doing so doing has blatantly failed to indicate the change in red pen by crossing the name of the 4th Defendant and underlining in red pen the name of the proposed new 4th Defendant. This clearly contravenes Order 8 Rule 7(2) which provides that “**All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.**” (emphasis added).

67. Further, and as correctly submitted by the Respondents, the Applicant has completely removed some of the paragraphs in the original Plaintiff, and more specifically paragraphs 13, 14, 16 and 17 which do not feature in the Draft Amended Plaintiff. Again, and as an example, paragraphs 14 and 15 of the Draft Amended Plaintiff are not in the original Plaintiff, yet they are not underlined in red ink.

68. Order 8 Rule 7(2) is couched in mandatory terms so that its violation goes into the root of the amendment. The rationale to this underpinning is that the amendments must be properly understood so as to enable a Respondent to respond curtly to the changes in a pleading. It must be understood that whilst an amendment will not unnecessarily be declined, the court must grant it within the threshold set by the law. In that regard, a contravention of the Rule cannot be salvaged by Article 159(2)(d) of the Constitution that requires courts to ignore procedural technicalities for the sake of doing justice.

69. Ignoring the mandatory provision obviously means that the Respondents cannot point out what has been added or deducted from the Amended Plaintiff, consequent which their right to mount a formidable and concise Statement of Defence is fettered, yet it is trite that a pleading forms largely the basis of a determination by the court. In fact, a pleading is the genesis of the course the suit takes.

70. That is why I entirely concur with the holding in the case of **Co-operative Insurance Company of Kenya Limited v Paem Agencies Company Limited [2014] eKLR**, where the court held that:-

“Any pleadings and or documents relied upon by the parties should be self-explanatory. The court finds that the issue of the underlining of the amended parts in red and the heading of the draft pleading is not a procedural technicality that could be saved by the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010. Rather it is a fundamental error that goes into the root of the Plaintiff’s application as it sought that the Amended Plaintiff be filed and served in terms of the draft Amended Plaintiff...

The court does not look kindly at parties who do not adhere and follow the laid down procedures and rules. For the reason that the Plaintiff failed to comply with the provisions of Order 8 Rule 7 (2) of the Civil Procedure Rules, 2010, its application would not succeed.”

71. On this ground, the application would also not definitely succeed.

72. As regards the Ground of Opposition that the exhibits annexed to the Application are in violation of Rule 9 of the Oaths and Statutory Declaration Rules and are therefore liable to be expunged from the record, the Respondents did not submit on it. The Applicant however responded to it by submitting that notarization of the annexures to the Notice of Motion was done in the United States of America and a Certificate from California was duly attached, the same is dated 9th February, 2021.

73. Rules 9 and 10 of the Oaths and Statutory and Declarations Rules require that exhibits annexed to an affidavit bear the mark or seal of a Commissioner for Oaths. In this case, the only document with such mark or seal is the Supporting Affidavit. The exhibits accompanying the affidavit are, a letter dated 28th June, 2019 showing the shares transacted marked TCM 1(a) and (b), a copy of CR12 dated 7th November, 2019 marked TSM2, Company’s income projection marked TSM 3 and a copy of the Draft Amended Plaintiff marked TSM4, none of which has a mark or seal of Notary Public.

74. I agree there is an accompanying Certificate from California from one Girish H. Patel, a Commissioner and Notary Public. The same

only allude to attached documents relating to the suit No.210 of 2019 and having original documents in his possession. However, Rule 9 of the Oaths and Statutory Declarations Rules provides that it is the exhibit document that should be sealed and not a separate document certifying as to the authenticity of the exhibits. This cures the mischief of a deponent attaching a document to an affidavit that was not seen by the Commissioner for Oaths or a Notary Public. The failure therefore, to comply with these rules means that the exhibits annexed to the Supporting Affidavit are not properly before the court and as such the court cannot rely on them to confirm the averments alluded to them.

75. From my analysis of the application and the foregoing observations, it is conclusive that the application cannot proceed. I accordingly dismiss with costs to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST MAY, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. Mr.Kimani h/b for Mr.Mwangi for the Plaintiff/Applicant.
2. Mr.Njuguna for the Defendants /Respondents.