



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. E359 OF 2020

ASPIRE PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MARKEM MANAGEMENT LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT

KISINDE HOLDING AND INVESTMENT

COMPANY LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT

SOUTHERN OASIS DEVELOPMENT LIMITED....3<sup>RD</sup> DEFENDANT/RESPONDENT

RULING

1. Vide a Notice of Motion dated 15<sup>th</sup> March 2021, the Plaintiff prays for leave to amend its Plaint dated 9<sup>th</sup> September 2020 as set out in the draft amended Plaint annexed to the application. The Plaintiff prays that the draft amended plaint be deemed as duly filed subject to payment of court fees. It also prays that upon being served with the amended Plaint, the defendants be at liberty to amend their Statements of Defence within 7 days or as the court may deem fit. Further, the Plaintiff urges this court to grant such further and/or other orders as the circumstances of the case may permit. Lastly, the Plaintiff prays that the costs of this application be costs in the cause.

2. The grounds relied upon are that the Plaintiff was incorporated on 19<sup>th</sup> December 2016, but vide a letter dated 26<sup>th</sup> February 2021, the Registrar of Companies notified the Plaintiff to change its name within 30 days from the said date, in default the Registrar would invoke the provisions of Section 58 (5) (6) and (7) the Companies Act<sup>[1]</sup>and strike off its registration. Further, the Registrar explained that the registration was inadvertent and it was no longer tenable within the meaning of Section 58 (1) of the Companies Act. Lastly, the Registrar extended the time pursuant to section 58(2) of the Act.

3. The Plaintiff states that the name change will necessitate an amendment to the Plaint which can only be done after the Registrar of Companies approves a new name which has already been proposed by the Plaintiff. It also states that the double registration is an error on the part of the Registrar which cannot be blamed on the Plaintiff and that the amendment is necessary for the fair and just determination of the real questions in controversy between the parties in this suit, and, that the amendment will provide necessary clarifications.

#### **The 1<sup>st</sup> defendant's grounds of opposition**

4. The 1<sup>st</sup> defendant filed grounds of opposition dated 6<sup>th</sup> April 2021 stating that there is no proof that there is a new Plaintiff that ought to be joined in these proceedings; that the application is premature; that the intended amendment seeks to introduce a new cause of action and not cure a suit filed in the name of the wrong Plaintiff as contemplated under the law; that the intended amendment defies the company law principle of separate legal entities; that Aspire Properties Limited and Property Arena Limited are different entities; that the application is an afterthought to defeat the 1<sup>st</sup> defendant's application to strike out the suit; and, that the application seeks to defeat the defendants' defence.

#### **The 2<sup>nd</sup> and 3<sup>rd</sup> defendant's Replying affidavits**

5. Mr. Michael Kyende Ndeti and Mr. Mkwama Kivuto Muli Ndeti, directors of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively swore separate identical Replying affidavits both dated 6<sup>th</sup> April 2021 in opposition to the application. The crux of their averments is that the proposed amendments seek to substitute the Plaintiff with Property Arena Limited, hence, the alleged double registration is irrelevant. They also state that applicant has not demonstrated any legal relationship between Aspire Properties Limited and Property Arena Limited which are two

separate legal entities. Additionally, they stated that the Plaintiff has not demonstrated that the suit was instituted in the name of the wrong party and that the application seeks to defeat the 2<sup>nd</sup> defendant's application to strike out the suit, and, that the application is an abuse of court process.

### **Plaintiffs advocates submissions**

6. The applicant's counsel cited Order 8 Rule 3 (3) and Order 1 Rule 9 and 10 (1) (2) of the Civil Procedure Rules, 2010 and argued that the overriding consideration in an application for leave to amend is whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application is likely to prejudice the opposite party beyond compensation by way of costs. Counsel argued that where the amendment sought is necessary to enable justice to be done between the parties, it should be allowed. Counsel relied on the Court of Appeal decision in *Central Kenya Limited v Trust Bank Limited*[2] which held that the guiding principle is that an amendment will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. The court also held that there will normally be no injustice if the other party can be compensated by an appropriate award of costs because it is in the interests of justice that the real question in controversy between the parties be determined.

7. Additionally, the Plaintiff's counsel cited *Wanyiri Kihoro & Others v Attorney General & Another*[3] which held that the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Counsel also relied on *Ochieng & Others v First National Bank of Chicago*[4] cited in *St Patrick's Hill School Limited v Bank of Africa Kenya Limited*[5] in the Court of Appeal set out the following principles governing the amendment of pleadings.

8. Counsel submitted that the Plaintiff merely seeks to amend its Plaintiff to reflect its change of name, provide clarity on the 1<sup>st</sup> defendant's description and to have Property Arena Limited included as the 2<sup>nd</sup> Plaintiff so as to clarify and bring into clearer focus the issues in contention between the parties in order that the court may reach a conclusive and balanced determination on the issues in dispute.

9. Additionally, counsel submitted that the Plaintiff has neither sought to introduce a new cause of action nor attempted to defeat the defendants' applications to strike out the suit as alleged. He argued that the defendants have not identified the new cause of action they allege is being introduced nor have they demonstrated injustice which may be occasioned to them if the amendment are allowed. Counsel submitted that the case is yet to be heard and that the defendants will be at liberty to amend their defence(s) before trial.

### **The 1<sup>st</sup> defendant's advocates submissions**

10. The 1<sup>st</sup> defendant's advocate submitted that an amendment can be declined if it is an abuse of court process, or it is sought in bad faith or if it is meant to deny a party its defence, or where the amendment is useless. He referred to the description of the Plaintiff in the Plaintiff and argued that the 1<sup>st</sup> defendant in its defence denied dealing with the Plaintiff and that it filed an application to strike out the Plaintiff. Citing Lord Diplock's enumeration of what constitutes abuse of court process in *Hunter v Chief Constable of the West Midlands Police*,[6] he argued that courts ought to prevent abuse of court procedures. Additionally, counsel submitted that under Order 1 Rule 10 (1), the court has jurisdiction to add a party where there is a *bona fide* mistake or where it was instituted in the name of the wrong persons, or where it is doubtful whether it has been instituted in the name of the right plaintiff. He submitted that under Order 1 Rule 10 (2), the court can order the name of any party which has been improperly joined to be struck out and submitted that there was no *bona fide* mistake when the suit was filed in the name of Aspire Properties Limited because the two companies were known to the Plaintiff's director.

11. Counsel argued that the proposed amendments seek to introduce a new cause of action and reframe the Plaintiff's case and urged the court to decline the application. He submitted that an amendment ought to be declined if it seeks reframe the case and deny a defence which has accrued. It was his submission that the proposed amendment seeks defeat the 1<sup>st</sup> defendant's defence as pleaded in its defence. He argued that the foregoing is a ground to decline the application for being prejudicial to the defendant which cannot be compensated by way of costs. He argued that the Plaintiff is litigating in a piecemeal manner contrary the principle that a party must bring out its whole case. He took issue with the fact that the application was filed after the 1<sup>st</sup> defendant applied to strike out the suit.

### **The 2<sup>nd</sup> and 3<sup>rd</sup> defendant's advocates submissions**

12. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants' counsel submitted that the application seeks to substitute the Plaintiff from Aspire Properties Management to Property Arena Limited without explaining the legal nexus between the two companies. Counsel cited Order 1 Rule 10 1 of the Civil Procedure Rules and argued that for substitution of parties to be granted it must be demonstrated that there was a *bona fide* mistake on the part of the party making the application. He argued that the Plaintiff did not demonstrate the existence of a *bona fide* mistake in instituting the suit. He argued that the two companies are separate legal entities hence the Plaintiff seeks to introduce a new claimant without any explanation for the anomaly. Counsel argued that it has not been shown that the Plaintiff changed its name to as directed by the Registrar of Companies. He argued that *Central Bank of Kenya Limited v Trust Bank Limited*,[7] *Wanyiri Kihoro & Others v Attorney General & Another*[8] and *St. Patrick's Hill School Limited*[9] are distinguishable as they address the general power to amend pleadings under Order 8 of the Civil Procedure Rules, yet before this court is an application to substitute a party pursuant to Order 1 Rule 10 of the Civil Procedure Rules.

### **Determination**

13. A convenient starting point is to underscore that the primary object of allowing amendment of pleadings is "to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The foregoing should be contrasted with the court's inclination to disallow the amendment if it is not made in good faith or it is done with the sole purpose of prejudicing the defendant or in cases where obvious injustice to the other party would result if the amendment is allowed.

14. The court's approach in dealing with amendment of pleadings has always been that an application for amendment should be allowed unless the application to amend is *mala fides* or it will prejudice the other party. The practical rule adopted by the courts seems to be that amendments will always be allowed unless the application to amend is *mala fides* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed. The court is inclined to grant the amendment where it is made in good faith and no prejudice will be caused to the other party.

15. The decision whether to grant or refuse an application to amend a pleading rests in the discretion of the court. The attainment of justice between the parties is not to be obstructed by a too rigid consideration. The object of pleadings is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the court has a wide discretion. The court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties.

16. The primary principle appears to be that an amendment will be allowed in order to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done. The traditional approach in relation to applications for amendment of pleadings was summarized in *Cobbold v Greenwich LBC*<sup>[10]</sup> as follows:

“[a]mendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient management of justice is not significantly harmed.”

17. In *Abdul Karim Khan v Mohamed Roshan*<sup>[11]</sup> the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaintiff. In *Ochieng and Others v First National Bank of Chicago*<sup>[12]</sup> the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings 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 plaintiff 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.

18. The above-mentioned parameters are not exhaustive. In exercising its discretion, a court must be guided by the underlying purpose of the overriding objective of the Civil Procedure Act and the Rules under sections **1A, 1B, 3 & 3A** of the Civil Procedure Act and Article **159** of the Constitution which is essentially to facilitate decision of cases on the merits rather than on the pleadings or technicalities. This approach was appreciated in *Savings and Investment Bank Ltd (in Liquidation) v Fincken*<sup>[13]</sup> which held that: -

“...the older view that amendments should be allowed as of right if they could be compensated in costs without injustice **had made way for a view which paid greater regard to all of the circumstances as summed up in the overriding objective.**”

19. A litigant must be given leave to amend his or her pleading unless it is absolutely clear that the deficiencies of the pleading cannot be cured by the amendment. Determining whether to grant an amendment requires an exercise of discretion by the court. The exercise of that discretion is of course not unfettered. However, decisional law is in agreement that leave shall be freely given when justice so requires. The primary consideration is whether the amendment will have caused the other party prejudice which cannot be compensated by an order for costs or by some other suitable order. It is of course necessary to bear in mind that a further important object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties. Our courts have also increasingly recognized that court rules and pleadings are not there for their own sake but to advance the good order, and the administration of justice. It is accepted law that a court will not allow amendments where their effect would render such a pleading excipiable or where it does not cure an excipiable pleading. If the pleading would appear to be possibly open to exception or even if the court is of opinion that the question of whether or not the pleading is excipiable is arguable, it would seem to be the more correct course to allow the amendment.

20. I have carefully considered the application and the submissions by the parties. Guided by the principles laid down in the jurisprudence discussed above, and the overriding objective of the Civil Procedure Act and the Rules, I find that there is nothing prejudicial to the defendants in the particulars sought to be introduced. In fact, Order **8 Rule (5)** permits an amendment to be introduced 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.

21. Similarly, Order **8 Rule (3)** provides that an amendment to correct the name of a party may be allowed ...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. I find no bad faith on the part of the Plaintiff nor is there any reasonable doubt as to the identity of the company being introduced in these proceedings.

22. The argument that the intended amendment is prejudicial or pre-mature is not supported by any tangible evidence. The submission that the Plaintiff is introducing a new claim is unsustainable bearing in mind the provisions of Order 8 Rule 5. The test is whether the amendment will enable the court to determine the issues in controversy effectually. I have no doubt that the application fits this hallowed test. The fear raised by the defendants is unfounded because they have the liberty to amend their defense and bring out their case. I must mention that the defendants jumped to plead their defenses in their opposition to the application long before the amendment.

23. The upshot is that the application dated 15<sup>th</sup> March 2021 is merited. I allow the said application and grant the Plaintiff leave to amend its Plaintiff in the manner shown in the proposed draft Plaintiff. The Plaintiff is directed to file and serve the amended Plaintiff within 15 days from the date of this order. Leave is granted to the defendants to amend their defence (if they so desire) within 15 days from the date of service. The parties are directed to finalize pre-trial processes and fix the main suit for hearing within 90 days from the date of this order. No order as to costs.

Orders accordingly

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF JUNE, 2021**

**JOHN M. MATIVO**

**JUDGE**

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[1] Act No. 17 of 2015.

[2] {2000} EALR 365.

[3] {2016} e KLR.

[4] Civil Appeal No. 147 of 1991.

[5] {2018} e KLR.

[6] HL 19 Nov 1981.

[7] {2000} EALR 365.

[8] {2016} e KLR.

[9] {2018} e KLR.

[10] {1999} EWCA Civ 2074.

[11] (1965) EA.289 (C.A),.

[12] Civil Appeal Number 147 of 1991.

[13] ([2003] EWCA Civ 1630.