



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E401 OF 2020

TAIB A TAIB ADVOCATES.....PLAINTIFF

VERSUS

FIROZ NURALI HIRJI.....1ST DEFENDANT

SHAROK KHER ALI HIRJI.....2ND DEFENDANT

RULING

1. The application for consideration is the Plaintiff's Notice of Motion dated 12th October, 2020, brought under **Sections 3, 3A & 100** of the **Civil Procedure Act** and **Order 8 Rules 3, 5(1) & (2), 7 and 8** of the **Civil Procedure Rules** and all other enabling provisions of the law. The application seeks the following orders:

- i. That the court be pleased to grant leave to the Plaintiff to amend his Notice of Motion dated 2nd October, 2020 in the manner shown in the proposed amended Notice of Motion annexed to the Affidavit in support of the application.*
- ii. That the proposed amended Notice of Motion be adopted as a properly filed Notice of Motion in this suit.*
- iii. That the Defendants do file their replies to the amended Notice of Motion, if any, within 14 days from the date of the court order granting the Plaintiffs leave to amend their Notice of Motion.*
- iv. That the costs of this application be provided for.*

2. The Application is predicated on the grounds on the face of it and further supported by an Affidavit sworn on even date by **TAIB ALI TAIB**, counsel for the Plaintiff herein. He avers that in view of the amended Plaintiff filed in this suit, it is necessary and vital for the Notice of Motion dated 2nd October, 2020 to be amended too, to reflect the reality of the averments therein. He deposed that the amendments are necessary for the purpose of determining the real question on controversy between the parties and the just determination of the same. He also stated that the amendments are necessary for purposes of correcting defects or errors in the proceedings.

3. In opposition to the application, the 2nd Defendant, **SHAROK KHER MOHAMED ALI HIRJI**, swore a Replying Affidavit on 11th November, 2020. She deposed that the application is an abuse of the court process given the circumstances of this matter. She averred that the Plaintiff filed the suit herein on 2nd October, 2020 seeking orders for specific performance of disclosed Retainer Agreements in the sum of Kshs. 65,157,670/=. She stated that the Plaintiff also filed an interlocutory application of even date under Certificate of Urgency seeking mandatory orders of injunction directed at the Defendants, their agents and other third parties to pay the Plaintiff a sum of Kshs. 65,157,670/=. It was deposed that upon consideration by the duty court, the application was fixed for mention for directions on 8th October, 2020.

4. She stated that she was served with the application on 7th October, 2020 and managed to file a Replying Affidavit in response thereto on the same day. She deposed that she was advised by her advocate on record that the Plaintiff insisted on being granted an interim order of injunction on the day of the mention despite opposition by her said advocates. She stated that the court issued an injunction to the effect that M/S Housing Finance Company Limited do withhold the sum of Kshs. 65,157,670/= out of a consent decretal sum of Kshs. 239,200,000/=. That the court also directed that the hearing of the application be expedited and directed her to file a Further Affidavit in response thereto within 14 days thereof and parties to file their respective written submissions thereafter. She deposed that in compliance with the court's said directions, she filed and served her Further Affidavit on 28th October, 2020.

5. She contended that instead of complying with the court's directions after obtaining the interim injunction, the Plaintiff embarked on

completely altering the cause of action herein and the architecture of his suit. That by an Amended Complaint amended on 13th October, 2020, the Plaintiff introduced a claim for a sum of Kshs. 216,600,000/= by deleting the claim of Kshs. 65,157,670/= and, has now filed the present application seeking an interlocutory mandatory order of injunction to be paid the sum of Kshs. 216,600,000/= instead of the earlier Kshs. 65,157,670/=.

6. Further, she contended that she has been advised that the basis upon which the court issued an ex-parte injunction has been rendered otiose by the amendments being sought. It was also her contention, that it is therefore an abuse of the court process for the Plaintiff to be allowed to keep changing his cause of action and the basis for the interlocutory application. Further, she averred that she will be prejudiced by the amendments being sought since she has already filed her responses and noted that she will now be constrained to change her Defence in the matter and look for other documents in furtherance of the same. Finally, she urged that if the court is inclined to allow the application then the interim orders issued on 8th October, 2020 should be discharged.

Submissions

7. The Application was canvassed by both oral and written submissions. In its written submissions dated 18th November, 2020, the Plaintiff submitted that the jurisdiction of this court to hear and determine the present application is derived from the Constitution, Statute, more specifically **Sections 3, 3A & 100** of the **Civil Procedure Act** and **Order 8 Rules 3, 5(1) & (2), 7 and 8** of the **Civil Procedure Rules** as well as the inherent jurisdiction of the court. The Plaintiff argued that the court has inherent jurisdiction to allow amendments even in the absence of specific provisions of statute or law. In this regard, reliance was placed on the case of **Republic v Land Disputes Tribunal Meru Central District [2009] eKLR**.

8. The Plaintiff further submitted that amendments should be allowed since it is necessary to ensure that the Notice of Motion dated 2nd October, 2020 tallies with main pleading being the Amended Complaint amended on 13th October, 2020. In this respect, the Plaintiff relied on the case of **Republic v Land Disputes Tribunal Meru Central District [supra]** where the court allowed the Applicant therein to amend his substantive Notice of Motion to tally with the Statement of Facts in a Judicial Review Application in order to preserve the subject matter for hearing on merit.

9. Further, the Plaintiff submitted that the defect in the Notice of Motion dated 2nd October, 2020 is curable by granting leave to amend and in support he cited the case of **Peter M. Echaria vs. Priscilla N. Echaria [1998] eKLR**.

10. It was also the Plaintiff's contention that the amendments sought are not prejudicial to the Defendants as they would have adequate time to respond to the same and that in any case, the same are only meant to ensure that the court determines all the matters in issue between the parties. The Plaintiff submitted that it is a well settled principle that courts will freely allow parties to amend their pleadings so as to allow the determination of all the issues between them.

11. Learned counsel, Mr. Muriuki for the 1st Defendant submitted that the 1st Defendant has no objection to the application.

12. On his part, learned counsel Mr. Mutua for the 2nd Defendant reiterated that the amendments being sought will prejudice the 2nd Defendant in two ways namely: that the Plaintiff enjoys and continues to enjoy the protection of this court based on the amended complaint and now by the proposed amendment to the application hence the current amendment is an abuse of the court process. He based this contention on the fact that the injunction was premised on different set of facts.

13. Further, Mr. Mutua noted that the two Affidavits filed by the 2nd Defendant pursuant to the court's directions will be rendered irrelevant by the amendment sought. Counsel urged that if leave is granted to effect the amendment sought, the interim injunction should be lifted since there will be no prayer to support the injunction.

14. In rebuttal, Learned Counsel for the Plaintiff Mr. Taib submitted that there is no jurisprudence to the effect that court will deny the amendment sought on grounds that previous orders have been granted. Counsel noted that none of the arguments advanced by the counsel for the 2nd Defendant can hold to deny the amendment and that in any case, the Plaintiff has no objection to the 2nd Defendant being allowed to file further affidavits. Further, Mr. Taib submitted that there are no changes to the facts of the case and the only change is in respect to the number of retainer agreements from 3 to 5 which does not change the interim injunction orders. He therefore urged the court to focus on doing justice.

Analysis and Determination

15. Upon considering the Notice of Motion, the affidavit in support and the annexures, the 2nd Defendant's Affidavit in response thereto and submissions by both counsel, I find that the issue for determination is whether the Application dated 12th October, 2020 is merited.

16. Notably, is that the Application has been brought under, *inter alia*, **Order 8 Rules 3, 5(1) & (2), 7 and 8** of the **Civil Procedure Rules**. However, **Order 8, Rule 3** is not applicable herein to the extent that it only provides for amendment of pleadings. A Notice of Motion, which is what the Plaintiff seeks leave to amend, is not a pleading under **Section 2** of the **Civil Procedure Act** which defines a pleading to include:

“A petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

17. Nevertheless, the amendment sought can be considered under **Section 100** of the **Civil Procedure Act** which provides for the general power to amend and **Order 8 Rule 5** of the **Civil Procedure Rules**. **Section 100** provides that:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

18. Order 8, Rule 5(1) & (2) of the Civil Procedure Rules on the other hand states:

“(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 judgment or order.”

19. It is well settled that amendments to pleadings should be freely allowed at any time in any proceedings before the court, so long as there is no prejudice or injustice caused to the other party. A rider is that, there is no injustice if the other party can be compensated by costs. Amendments will also not be allowed where an Applicant is acting *mala fides* or in bad faith. These principles were well set out in the case of *Eastern Bakery v Castelino 1958 E.A 461* where the Court of Appeal for Eastern Africa noted that:-

“It will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed. If they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs”

20. Indeed and as has been captured hereinabove, leave to amend will normally be granted so as to enable the real question in issue between the parties to be determined or to correct any defect in the proceedings. This is necessary so as to avoid a multiplicity of suits or even confusion to the cause of action.

21. The Plaintiff amended his Complaint on 13th October, 2020 and now seeks leave to amend his Notice of Motion dated 2nd October, 2020 to tally with the amended complaint filed herein. This cannot be regarded as an abuse of the court process since it is necessary for the determination of all the matters in issue between the parties herein. It will also ensure harmony of the substantive application with the pleadings, making it easy for determination of the issues at hand.

22. Further, since the application dated 2nd October, 2020, which the Plaintiff seeks to amend, is yet to be set down for hearing, I do not see how the 2nd Defendant will be prejudiced if the amendment sought is allowed or better yet, how the same will render her two Affidavits in response thereto, irrelevant. Indeed, if the application for amendment is allowed, both Defendants will have the opportunity to respond to the Amended application if they so wish, a redress that the court will address.

23. However, I note that interim orders entitled the Plaintiff to a lien in the sum of Kshs. 65,157,670.00 pending the hearing and determination of the Application dated 2nd October, 2020. The Plaintiff now seeks to amend the said application to include a lien over a total sum of Kshs. 216,600,000/= pending the hearing and determination of the Amended Notice of Motion.

24. According to learned counsel, Mr. Mutua the interim order for preservation of the about Ksh. 65 Million should be discharged as it is not supported by the prayers in the Amended Notice of Motion. Mr. Taib, SC on his part argued that he does not seek a change in the interim orders; which implies that the court continues to preserve the same amount.

25. In my view, if the court discharges the interim orders, it implies that the Plaintiff is likely to be prejudiced in the sense that the Defendants could easily move the monies out of the account, which money is the subject matter of the suit, the merit or otherwise of the substantive application notwithstanding. This means that the suit would be spent. For this reason, a balancing act tilts in the preservation of part of the claimed money to the tune ordered in the interim orders.

26. The upshot is that the Plaintiff's Notice of Motion dated 12th October, 2020 is merited and is hereby allowed in the following terms:

i. The Plaintiff is granted leave to amend its Notice of Motion dated 2nd October, 2020.

ii. The Amended Notice of Motion shall be filed and served within fourteen (14) days from the date of this Ruling.

iii. The Defendants shall file and serve their respective responses thereto within 14 days from the date of service of the amended Notice of Motion.

iv. Parties return to court on 20th April, 2020. for inter-partes hearing of the Amended Notice of Motion. The registry to serve respective Hearing Notices.

v. The interim orders issued on 8th October for the preservation of Ksh. 65,157,670.00 are extended to the date of the hearing of the application.

vi. The costs of the application are awarded to the Defendants.

DATED AND DELIVERED AT NAIROBI THIS 16th DAY OF DECEMBER, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *No appearance for Mr. Taib, SC for the Plaintiff/Applicant.*
2. *No appearance for the 1st Defendant/Respondent.*
3. *No appearance Mr. Muriuki for the 1st Defendant for the 2nd Defendant/Respondent.*

NOTE: The ruling is delivered, the absence of the respective counsel notwithstanding, because this date was given in their presence. Further, Mr. Taib, SC for the Plaintiff/ Applicant had logged into the Teams System earlier but left since the court did not start on time as it first attended to a three-judge bench matter.