



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL & TAX DIVISION

AT NAIROBI

HIGH COURT 143 OF 2019

LYNA G. VENTURES LTD.....PLAINTIFF/RESPONDENT

VERSUS

NORTHERN CONSTRUCTION LTD.....DEFENDANT/APPLICANT

RULING (3)

The Defendant/Applicant filed Notice of Motion on 27th November 2020 and the Plaintiff/Applicant filed Replying Affidavit on 30th November 2020. Written Submissions were filed and exchanged by parties through respective Counsel. The Applicant begun oral highlights today, midstream Counsel made reference to pleadings filed and to be relied on. The Supporting Affidavit to the application is indicated that it is by Mohammed Nur but details of 15 paragraphs are sworn by Abdi Mohammed before Commissioner of Oaths George Wandati Advocate on 27th November 2020.

The Respondent's advocate objected to the application as incompetent as the Supporting Affidavit was contrary to **Section 4, 5 & 11 of Oaths & Statutory Act**. The said Mohammed Nur and Abdi Mohammed seemed to be one and the same person as deponed in the Supporting Affidavit.

Applicant's Counsel informed this Court that it was an inadvertent honest mistake and realized the same while on his feet submitting on the instant application. Counsel sought leave to amend the Supporting Affidavit and that it would not occasion any prejudice.

The Respondent's advocate opposed an amendment to the Supporting Affidavit as the deponent of the Affidavit is the one to amend the affidavit and not Counsel. Secondly, that the amendment would not cure the legal challenge. The Notice of Motion was/is fatally defective as it lacks a Supporting Affidavit and it ought to be dismissed. The Supporting Affidavit as sworn in the jurat has false content by claiming Mohammed Nur and Abdi Mohammed are one and the same person which is false.

The Applicant's Counsel reiterated submissions earlier made and added reliance on **Article 159 2 (d) COK 2010** and sought leave to amend the Supporting Affidavit.

DETERMINATION

Order 8 Rule 3 CPR 2010; Amendment of pleading with leave provides;

(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 stage 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.

In the case of ***Daniel Ouma Okuku Vs Kenya Plantation & Agricultural Workers Union Civil Appeal 85 Of 2017***; The Court of Appeal stated;

“Parties can amend their pleadings with leave of the Court at any time before judgment...in the case of SULEIMAN vs

KARASHA [1989] eKLR it did not matter whether the hearing had been concluded- the court had to consider such an application for leave to amend a pleading and give effect to such an application as it deemed fit. The Court has wide discretion to amend pleadings at any stage of the proceedings so as to bring out real issues in controversy between parties and on such terms as to costs as may be just.”

DISPOSITION

1. The application to amend the Supporting Affidavit to the application of 27th November 2020 by the Applicant with leave of the court is granted.
2. The Supporting Affidavit shall be amended and served within 21 days from today (as the Court shall close end of week for Christmas and end of year 2020 holidays)
3. The Respondent shall have corresponding leave to file Amended Replying Affidavit and serve within 21 days from service of amended Supporting Affidavit.
4. Once pleadings close parties/Counsel shall proceed to highlight written submissions filed with regard to the application of 27th November 2020 on 8th February 2021.

DELIVERED SIGNED & DATED IN OPEN COURT ON 15th DECEMBER 2020 (VIDEO CONFERENCE).

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. ONDIEKI FOR THE RESPONDENT

MR. LINTURI FOR THE APPLICANT

COURT ASSISTANT - TUPET