



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC CIVIL APPLICATION NO. 160 OF 2018

N K BROTHERS LIMITED.....APPLICANT

VERSUS

JOMA INVESTMENTS LIMITED.....RESPONDENT

RULING

1. In the Notice of Motion dated 19th March, 2018, the applicant *Joma Investments Limited* principally seeks leave to amend its originating summons (the summons) dated 5th March 2018; that the amended summons be deemed as duly filed and that the court be pleased to make such further or other orders as it may deem fit.
2. The application is supported by grounds stated on its face and the depositions in the affidavit sworn by *Mr Justus Oboya*, an Advocate of the High Court practicing in the firm of *Ochieng, Onyango, Kibet and Ohaga Advocates*.
3. It is the applicant's contention that there was an inadvertent error in the drafting of the summons in so far as the characterization of the parties was concerned; that the applicant was the claimant in the arbitral proceedings and it is the party that filed the summons after it was dissatisfied with the ruling of the arbitral tribunal on the question of jurisdiction; that by sheer inadvertence, the applicant's counsel swooped the description of the parties in the summons so that the applicant was named as the respondent while the respondent was wrongly described as the applicant.
4. It is the applicant's case that grant of leave to amend the summons is extremely crucial as the summons seek to set aside the arbitrator's ruling on jurisdiction dated 5th February, 2018 and under *section 17 (6) of the Arbitration Act*, such proceedings must be instituted within a period of 30 days which have now lapsed; that in the circumstances, if the application is not allowed, the applicant will suffer great prejudice since it cannot withdraw the summons and file a fresh one; that the amendment is necessary in order to enable the applicant fully advance its case and to enable the court determine all the issues arising from the pleadings. The applicant further asserts that if the application is allowed, *N K Brothers Limited* (hereinafter the respondent) is not likely to suffer any prejudice.
5. The application is opposed through an affidavit sworn on 13th April, 2018 by *Mr Pravichandra Mavji Khoda*, the Managing Director of the respondent. The main thrust of the respondent's opposition to the motion is that the instant application is supported by an advocate in the name of *Justus Oboya* who claims to have made a mistake in describing the parties in the summons yet *Mr James Ochieng Oduol*, the advocate who prepared and signed the certificate of urgency through which the summons was filed has not sworn an affidavit to confirm the deponent's averment or explain how the alleged error came about; that it would be futile to allow the application for the following reasons: that the draft originating summons as drawn offends the provisions of *order 37 rules 15 and 75 of the Civil Procedure Rules, 2010 (the Rules)* ; that apart from seeking to correct the description of the parties, the intended amendment does not seek to correct the defects in the proposed amended originating summons and the affidavit of *Morrison Wayaya* which is patently defective cannot provide an evidential basis for the proposed amended originating summons. In the respondent's view, the application is frivolous, vexatious and an abuse of the court process and should be struck out.
6. The application was canvassed by way of written submissions. The applicant filed its submissions on 4th May, 2018 while 6. those of the respondent were filed on 14th May, 2018.
7. I have carefully considered the application, affidavits on record, the rival submissions alongside the authorities cited. Having done so, I take the following view of the matter.
8. Under *Section 100 of the Civil Procedure Act (the Act)*, this court has general power to amend pleadings to correct any defect or error in a suit at any stage of the proceedings on terms as to costs or otherwise as it may deem just and all amendments should be made for the purpose of determining the real question or issues raised by or depending on the proceedings. This provision is replicated by *order 8 rules 3 and 5 of*

the *Civil Procedure Rules* (the Rules).

9. *Order 8 rule 3 (3)* specifically allows amendments to correct the name of a party even if the amendment will have the effect of substituting a new party if the court is satisfied that the mistake sought to be corrected was genuine and would not cause any reasonable doubt as to the identity of the person intending to sue or be sued. In the same vein, *order 8 rule 4* empowers the court to allow amendments aimed at altering the capacity in which a party sues if the capacity sought to be introduced by the amendment is one which would have entitled the applicant to sue at the time of filing of the plaint or counterclaim.

10. It is clear from the foregoing that the court has wide and unfettered discretion to allow amendment of pleadings at any stage of the proceedings before judgment in order to correct any defect or error in the proceedings in order to allow the determination of the real question in controversy between the parties. In exercising its aforesaid discretion, the court must consider whether the proposed amendment will occasion prejudice or injustice to the other party which cannot be compensated by an award of costs.

11. There is a plethora of authorities both in the High Court and in the Court of Appeal which outline the principles which should guide a court in the exercise of its discretion in applications such as the one before the court. It will be sufficient for purposes of this application to cite just one of them. In *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others, CA No. 94 of 2003 [2014] eKLR*, the Court of Appeal adopted the principles stated in *Mulla, The Code of Civil Procedure, 18th Ed, Vol.2* at pages 1751-1752 and listed those principles as follows:

i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;

i. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;

ii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

iii. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

iv. Amendment of a claim or relief barred by time should not be allowed;

v. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;

vi. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

vii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

viii. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

12. In addition to the above principles, the Court of Appeal also held that in such applications, the court should not consider the merits of the proposed amendment in allowing or rejecting an amendment since such issues should be considered at the hearing of the suit.

13. It is important to note at this juncture that by virtue of *order 8 rule 4* of the Rules, the rules governing the grant of leave to amend pleadings in civil suits as espoused in *order 8 rule 3* applies in equal measure to originating summons.

14. Applying the above principles to the instant application, I find that the proposed amendment only seeks to correct the misdescription of the parties in the summons which occurred as a result of an inadvertent mistake on the part of the applicant's counsel when drafting the same. As stated earlier, the summons was a reference challenging the ruling of the arbitral tribunal to the effect that it had jurisdiction to open the dispute between the parties beyond the initial declared dispute. Both the applicant and the respondent were parties to the arbitral proceedings and there is therefore no possibility of any confusion on the identity of the parties to the dispute if the application is allowed.

15. In opposing the motion, the respondent advanced the view that the application ought to be disallowed because granting it would be an exercise in futility as in its view, the proposed amended originating summons is fatally defective and cannot be sustained. My brief response to this submission is that the validity or otherwise of the proposed amended originating summons cannot be a matter for consideration of the court in this application since as held by the Court of appeal in the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others, [supra]*, these are issues for consideration during the hearing of the originating summons as amended if leave sought is granted.

16. In deciding this application, I have to bear in mind the possible prejudice each of the parties may face if the application is either rejected or allowed.

If the application is rejected, the applicant will be highly prejudiced since the time limited by *section 17 (6)* of the *Arbitration Act* for challenging an arbitrator's ruling on jurisdiction has already expired and rejecting the application will be tantamount to shutting the door of justice on the applicant since it will be prevented from fully ventilating its grievance on the issue of jurisdiction before the High Court which is its only avenue for redress in such matters.

17. Rejecting the application would thus fly in the face of the spirit of *Article 50 (1)* of the *Constitution* which guarantees to all persons the right to have any dispute that can be resolved by the application of the law decided in a fair manner before a court or an independent and impartial tribunal.

18. Conversely, if the application is allowed, the respondent is not likely to suffer any prejudice which cannot be compensated by an award of damages.

19. For all the foregoing reasons, I am satisfied that the application is merited and it is accordingly allowed in terms of prayer 1. The amended originating summons shall be deemed to be duly filed and served on the respondent upon payment of the requisite court fees.

20. The respondent is awarded costs of the application.

It is so ordered.

DATED, DELIVERED and SIGNED at NAIROBI this 14th day of June, 2018.

C. W. GITHUA

JUDGE

In the presence of:

Miss Kisa h/b for Mr Kamau: for the Respondent

N/A: for the Applicant

Mr Fidel Salach: Court Clerk