



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL, ADMIRALTY AND TAX DIVISION

PETITION NO. 57 OF 2018

IN THE MATTER OF: ATLANTIS GARDENS LIMITED “THE COMPANY”

IN THE MATTER OF: THE COMPANY ACT NO. 17 OF 2015

IN THE MATTER OF: SECTIONS 148 (1), 238(1), (2), (3), (4), 780, 782(1),(2), (3),(4), 786 & 789 OF THE COMPANIES ACT 2015

IN THE MATTER OF: AN APPLICATION FOR ORDERS OF APPOINTMENT

OF RECEIVER MANAGER, INSPECTION AND INVESTIGATION

KEN KAUGA & ROSE KARUGA (suing as Administrators of the Estate

of The LATE DEDAN ICHINGA).....PETITIONERS

-VERSUS-

ATLANTIS GARDENS LIMITED.....1ST RESPONDENT

CHARLES WAWERU KANYUIRA.....2ND RESPONDENT

PAUL THUITA KIIRU.....3RD RESPONDENT

ATLAS GARDENS LIMITED.....4TH RESPONDENT

RULING

1. This Ruling relates to a Notice of Motion Application dated 14th May 2018, brought under the provisions of Article 159 of the Constitution of Kenya 2010, Section 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 8 Rule 3 and 5 of the Civil procedure Rules 2010, and all other enabling laws.

2. The Petitioner are seeking for orders:-

a) That the Honourable Court be pleased to allow the Petitioners herein to amend their Petition and Application both dated 8th February 2018 and filed in Court on the 8th February 2018, in terms of the Draft Petition Application herewith annexed;

b) That the Honourable Court be pleased to make such further or other orders that it may deem fit;

c) That the costs of this application be provided for.

3. The Application is supported by an Affidavit dated 14th May 2018, sworn by Kenneth Karuga, one the Petitioners herein. He deposed that, subsequent to the filing of the Petition herein, it come to the Petitioners knowledge that, on 15th March 2017, the 2nd and 3rd Respondents

incorporated a Company known as; Atlas Gardens Limited and on which they serve as Directors and Shareholders. That they irregularly transferred the 1st Respondent's assets and business to that Company, with the goal of defeating any claim by the Petitioners against them. At the time the Petition was filed, these facts were not reflected therein. Therefore it is necessary to amend the Petition to enable the Honourable Court satisfactorily determine the dispute between the parties. If the amendment is not allowed then the orders sought for in the Petition Application will be defeated. It is therefore, in the interest of justice that Application be allowed as prayed.

4. However, the Application was opposed based on the grounds of opposition filed by the 4th Respondent which states that:-

- a) *The Application as drawn is fatally defective and an abuse of the Court process, as the Petitioners/Applicants have not met the threshold of Order 1 Rule 3 of Civil Procedure Rules, in order to justify an application to join the 4th Respondent to this suit;*
- b) *The grounds upon which the Application and entire suit are premised fail to disclose any cause of action against the 4th Respondent, as the 4th Respondent is a separate legal entity from its Shareholders and Directors with Corporate legal identify and bears no legal connection to these proceedings.*
- c) *The Application is lacking in merit as no sufficient evidence has been availed to link the 4th Respondent to the allegations in the Petition besides the fact that the 2nd and 3rd Respondents are Directors and Shareholders of the 4th Respondent.*
- d) *The grounds upon which the Application is premised is based of falsities, lies and fantasies with no shred of evidence whatsoever adduced linking the allegations in the Petition to the 4th Respondent and therefore does not warrant the joinder of the 4th Respondent to the suit accordingly.*
- e) *The Application is frivolous, vexatious and hopelessly defective that the orders sought do not lie.*

5. The Parties agreed to dispose of the Application by filing submissions. The Petitioners referred the Court to the provisions of Order 8 (3) of the Civil Procedure Rules, 2010, which provides that:-

“(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”.

6. Further reference was made to Order 1 Rule 10(2) of the Civil Procedure Rules, which allows the joinder of Parties to proceedings, if their presence is necessary in order for the Court to effectually and completely adjudicate upon and settle all questions arising in the suit. The Petitioners also referred to the case of; Central Kenya Limited –vs- Trust Bank Ltd [2002] 2EA 365, where the Court of Appeal allowed an application to amend pleadings to include additional parties. Also quoted was the Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, Volume 2 at 2245 in which the Authors states that:-

“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 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.”

7. It was submitted that the same position was restated by the Honourable Court in Martin Wesula Machyo –vs- Housing Finance Company of Kenya Limited & Another [2015]eKLR, where it was stated that:-

“Thus, the overriding consideration in application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the Application for amendment is likely to prejudice the opposite party beyond compensation in costs.”

8. The Petitioners reiterated that, the assets and business of the 1st Respondent which constitute the subject of the Petition, have been irregularly transferred to the 4th Respondent Atlas Gardens Limited, which is a rival company and therefore the 4th Respondent has a substantial interest, in the outcome of the Petition, hence a necessary party to the present suit. It should be enjoined so that clarity can be obtained on the circumstances under which the assets and business of the 1st Respondent was transferred to it.

9. It was argued that the Respondents will not suffer any prejudice if the amendment sought is allowed in that upon filing the amended Petition and Application, the Respondents will have an opportunity to file their response, cross-examine the Petitioners' witnesses and even call their own witnesses to testify on the issues in the amended Petition. Therefore, at this stage, it is only fair and in the interest of justice that the Petitioners be allowed to bring their entire claim through the proposed amendment. In the light of the foregoing the Application should be allowed as prayed.

10. However, the Respondents in their submissions argued that, the main issue for determination is whether; the proposed 4th Respondent should be enjoined to the Petition. That, it is clear under Civil Procedure Rules that, the Court may at any stage of the proceedings, allow amendment of pleadings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, pursuant to the provisions of; Order 8 Rule 3 of the Civil Procedure Rules.

11. The 4th Respondent reiterated that, in the instant case, the Petitioners intention is to join a party who has no interest in these proceedings without adducing any thread of evidence to warrant the necessity of the same. That, Order 1 Rule 3 of Civil Procedure Rules, clearly

stipulates who can be joined to proceedings and the threshold to consider. That, persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

12. The Respondent referred to the case of; Lucy Nungari Ngigi & Others –vs- National Bank of Kenya Limited & Another, HCCC No. 517 of 2014, and Charles Wambugu & Others 127, where the Court held that;

“ joinder of parties is governed by Order 1 of the Civil Procedure Rules. In law, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally; or in the alternative, where if such persons brought separate suits, any common question of law of fact would arise. The Court may even in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder of parties is permitted by law and it can be done at any stage of the proceedings.

But, joinder of parties may be refused where such joinder; will lead into practical problems of handling the existing cause of action together with the one of the party being joined: is necessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.”

13. The 4th Respondent further reiterated that the Petitioners have not adduced any evidence to show that they have any right or relief in respect or arising out of the same act or transaction or series of acts or transactions as alleged to exist, whether jointly, severally or in the alternative or that even where, if separate suits were brought against the Respondents or proposed 4th Respondent, any common question of law or fact would arise. That the only common link between the proposed 4th Respondent, Atlas Gardens Ltd and the claim in this Petition is that, the Directors are the same. This is not sufficient for the proposed 4th Respondent to be joined to the suit and if at all it was to be considered and accepted by this Court, then it would imply that any Company in which the 2nd and 3rd Respondents are directors would be liable to be joined to the Petition and hence be subject to these allegations and indeed these proceedings.

14. The 4th Respondent further submitted that the joinder is totally and absolutely unnecessary and the Court should be alive to wanton and uncalled for litigation against innocent parties for the sake of feuds and fishing expeditions. That, it is a waste of the precious time of the Honourable Court and is only meant to inflict unnecessary burden and physiological torture on the 2nd and 3rd Defendants as a means to rid them of all peace.

15. Further that notwithstanding all this, the Cardinal principle of Company law is fully espoused in the case of; Salomon vs Salomon and Co. Ltd (1987) AC where Lord Macnag then held that;

“the Company is at law a different person altogether from the subscribers...., and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not at law the agent of the subscribers, or trustee for them. Nor are the subscribers as members liable, in any shape or form except to the extent and in the manner provided by the Act.”

16. Thus the allegations against the 1st to 3rd Respondent should not be attributed to the proposed 4th Respondent, which is a separate legal entity with corporate legal responsibility, perpetual succession and limited liability. In conclusion the 4th Respondent submitted that all that the Respondents desire is an end to litigation and the unwarranted accusation against them, which is a fishing expedition. Therefore the Application should be dismissed with costs accordingly.

17. I have considered the rival submissions by the parties and find that the issue to determine is whether the Petitioners have satisfied the criteria for grant of the orders sought. Basically, the Petitioners seek to be allowed to amend the Petition herein in terms of the annexed draft. The statutory provisions that gives the Court the general power to allow amendment of pleadings are provided for under Section 100 of the Civil Procedure Act which 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. Similarly, **Order 8 Rule 5 of the Civil Procedure Rules, empowers the Court to allow amendments of pleadings and provides that:-**

“5. (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.” (emphasis added).

19. The rationale behind amendments of pleadings is that, a party to a suit is bound by its pleadings and therefore should be allowed to amend the same subject to the provisions of the applicable law and whenever necessary. Thus the object of amendment is to ensure that litigation between parties is conducted on the basis of the true facts before the Court.

20. In the case of; Baker vs. Medway Building Ltd (1958) 3 ACR 540 the Court observed as follows;-

“the proposed amendment raised a vital point and unless it was adjudicated upon, the real matter in issue between the parties would not be decided. -----that if the amendment was not allowed the case would proceed on an assumed state of facts which would be completely at variance with the remedies that they were seeking---- the court allowed the amendments for that purpose”.

21. In the same vein, in the case of; Cropper vs Smith, 1884 26 CHD 700 the Court stated that:-

“I think that it is a well-established principle that the object of the courts is to decide the rights of the parties and not to punish them for mistakes which they make in the conduct of their case. The courts do not exist for the sake of discipline but for the sake of deciding matters in controversy. I do not regard such amendment as a favour or grace”.

22. The provisions referred to above therefore expressly grants the Court the discretionary power to allow amendment of pleadings at any stage before judgment for purposes of determining the real question in issue which has been raised by parties. However, this discretionary power must be exercised judiciously and not whimsically. It should be exercised in the interest of justice to the parties and the case.

23. Indeed the law on amendment of pleadings is settled that, in the case of; Central Kenya Ltd vs Trust Bank Ltd (2002) 2 EA 365, the Court held that an amendment should be allowed, *inter alia*, to avoid multiplicity of suits provided there has been no undue delay. Further there should be no vested interest or accrued legal right affected by the amendment. It should not occasion prejudice or injustice to the other party which cannot be compensated for in costs.

24. Similarly, in the case of; AAT Holdings Limited vs Diamond Shields Limited (2014) eKLR the Court held that the amendment should be necessary for the purpose of determining the real question or issue raised by the parties.

25. In the instant case, the Applicants basically apply to amend the pleadings to introduce the 4th Respondent as a party to the case. The question of joinder of parties arises only when an act is done by two or more persons or it affects two or more persons. All persons may be joined in one suit as Plaintiffs according to the conditions required under Order 1 Rule 1 of the Civil Procedure Rules, or may be joined as a Defendant according to the provisions of Order 1 Rule 3 of the Civil Procedure Rules. The conditions to be satisfied in the case of defendant are *inter alia* that the right to relief alleged to exist against them arises out of the same act or transaction; and the case is of such a character that, if separate suits were brought against such person, any common question of law or fact would arise. (*see Benares Bank Ltd. vs Sri Prakasha Bhagwan Das and Benares Bank Ltd. V. bhagwandas*). Thus the party to be joined must a necessary party.

26. A necessary party is that in whose absence the Court cannot pass an effective decree. If the decree cannot be effective without the absent party, the suit is liable to be dismissed. However, where the joinder of a person is only a matter of convenience and he has not been joined as a party, he may be added at any stage or the suit may be tried without impleading him. The allowing of the amendment depends on whether a party who has not been joined is a necessary party or merely a proper party. As aforesaid when a person who is a necessary party to a suit has not been joined as a party to the suit, it is a case of non-joinder

27. The question that arises is whether the 4th Respondent herein is a necessary party. The link of the proposed 4th Respondent in this matter is that, it is a beneficiary of the assets of the 1st Respondent through oppressive and prejudicial conduct of the 2nd and 3rd Respondents and the common Shareholding and/or Directorship in the two Companies. The Petitioners have annexed a Certificate of search marked “KK/1” which show that the Directors of the Proposed 4th Respondent’s Company are:

- a. Jacinta Wachera Wanjiku;
- b. Paul Thuita Kiiru;
- c. Charles Waweru Kanyuira; and
- d. Muturi Ratemo Ronald.

28. Whereas the Directors of the 1st Respondent named under paragraph 4 of the Petition are as follows:

- a. Dedan Karuga Giching;
- b. Charles Waweru Kanyira; and
- c. Paul Thuita Thuiru.

29. Dedan Karuga Gichinga passed on 24th February 2016 and the Petitioners herein are as Administrators of his Estate. The comparison of these Directors and/or Shareholders reveals that Paul Thuita Kiiru and Charles Waweru Kanyuira are common Directors/Shareholders in both Companies.

30. The Respondent submitted that, there is no claim made against the Proposed 4th Respondent. However, I have gone through the annexed amended Petition and I note that at paragraph 3A, it is pleaded that the 4th Respondent is a Limited Liability Company incorporated on 15th March 2017, and at Paragraph 1, the 1st Respondent is stated to have been incorporated on 14th June 2014. It is therefore clear that the

Proposed 4th Respondent was incorporated after the 1st Respondent.

31. Be that as it were, I further note that under Paragraph 10 of the draft amended Petition, it is averred that, the business of the 1st Respondent has been diverted to the proposed 4th Respondent's Company, which is a rival Company to the 1st Respondent and in which the 2nd and 3rd Respondents serve as Directors and shareholders. These averments have been repeated under paragraph 11A. Finally, I note that prayers sought for under paragraphs (a) to (f), make reference to inter alia, against the Respondent. It also suffices to note that, the only difference in the names of the two Companies is their first name. Whereas the 1st Respondent's first name is: "Atlantis", the first name of the proposed 4th Respondent is "Atlas". It is thus argued that, in the given circumstance the proposed 4th Respondent should be subject to the jurisdiction and orders of the Court.

32. All in all I find that other than the allegation that the Directors/Shareholders of the 1st and the proposed 4th Respondent, it is pleaded that the assets of the 1st Respondent have been transferred to the 4th Respondent, it is in the interest of justice that the amendment be allowed so that the issues raised against the proposed 4th Respondent can canvassed alongside those raised against the other co-defendants.

33. In the given circumstances, I allow the Application as prayed with leave to 1st, 2nd and 3rd Respondents to file an amended statement of defence (if they so wish) and the proposed 4th Respondent to file a statement of defence and serve the Petitioners within the stipulated time in law. Similarly, the Petitioners have leave to file a reply to the statements filed.

34. The costs of this Application will abide the outcome of the matter.

35. It is so ordered.

Dated, delivered and signed on this 16th day of August 2018 in an open Court.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Simiyu for the..... Petitioners

Kwesinga for the.....Respondents

DennisCourt Assistant