REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 8 OF 2016

HASSAN BABAKAR OSMAN.....1ST APPLICANT/1ST PLAINTIFF

ARAFCO AGRICULTURAL

INTEGRATED LTD.....2ND APPLICANT/2ND PLAINTIFF

VERSUS

NUH ABDULWAHAB MOHAMED.....1ST RESPONDENT/1ST DEFENDANT

MILESTONE DEVELOPERS LTD.....2ND RESPONDENT/2ND DEFENDANT

REGISTRAR OF COMPANIES.....3RD RESPONDENT/3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH RESPONDENT/4TH DEFENDANT

RULING

[PLAINTIFFS' NOTICE OF MOTION DATED 9TH JULY, 2018]

1. Hassan Babakar Osman, the 1st Plaintiff/1st Applicant and Arafco Agricultural Integrated Ltd, the 2nd Plaintiff/2nd Applicant have brought their notice of motion dated 9th July, 2018 under Order 1 rules 3 and 9 and Order 8 rules 1 and 3 of the Civil Procedure Rules, 2010 (CPR); sections 1A, 3A and 100 of the Civil Procedure Act, Cap. 21 (CPA); and Article 50 of the Constitution. They seek orders as follows:

> **"1. That the plaintiffs/applicants be allowed leave to amend the plaint dated 15th April 2016 out of time.**
>
> **2. That the amended draft plaint and affidavit of Hassan Babakar Osman annexed herein be deemed as properly filed and on record as the amended plaint upon payment of the requisite filing fees.**
>
> **3. The costs of the Application be in the cause."**

2. The application is supported by the grounds on its face as follows**:**

> **"1. That a new law firm, George Gilbert Advocates has been appointed to proceed with this matter and feels they need to amend the pleadings.**
>
> **2. That the new law firm on record has noticed there is need to add more information/amend the plaint to ensure clarification and particularization of issues and to better protect the rights of the plaintiffs.**
>
> **3. That the pleadings have closed and the application is brought without unreasonable delay.**
>
> **4. That the amendment is necessary for determining the real question and issues which have been raised by the parties.**

5. The proposed amendments were made in good faith and allowing the same will assist the court to conclusively deal with all matters in controversy or so related.

6. That the defendants will suffer no prejudice if this application is allowed."

3. The application is supported by the affidavit of the 1st Plaintiff who identifies himself as a director of the 2nd Plaintiff. The 1st Plaintiff also swore a further affidavit on 23rd August, 2018 in support of the application.

4. Nuh Abdulwahab, the 1st Defendant/1st Respondent, and Milestones Developers Limited, the 2nd Defendant/2nd Respondent, opposed the application through a replying affidavit sworn on 18th August, 2018 by their counsel Robinson Kigen and a replying affidavit sworn on 19th September, 2018 by the 1st Respondent.

5. Counsel for the Registrar of Companies, the 3rd Defendant/3rd Respondent, and the Attorney General, the 4th Defendant/4th Respondent, indicated to the court when the matter came up for hearing on 16th October, 2018 that the 3rd and 4th respondents would leave the determination of the application to the discretion of the court.

6. When this application came up for hearing, counsel for the applicants urged this court to ignore or expunge from the record the replying affidavits of the 1st and 2nd respondents.

7. On why the replying affidavit of Robinson Kigen should be struck out, counsel for the applicants submitted that an affidavit sworn by an advocate on record for a party is not a proper affidavit.

8. As for the replying affidavit sworn by the 1st Respondent, counsel for the applicants submitted that the same was filed without the leave of the court.

9. Replying to the issue, counsel for the 1st and 2nd respondents submitted that he swore the replying affidavit with the authority of the 1st Respondent who was out of the country at that time and that he had annexed the authority to his replying affidavit. He asserted that the applicants would not suffer any prejudice if the affidavit is allowed to stand. As for the 1st Respondent's replying affidavit, counsel submitted that the same makes extensive reference to his affidavit and does not introduce any new issues. His position was that the law does not deny an advocate the opportunity to swear an affidavit on behalf of his client. He concluded by urging this court to note that Article 159(2)(d) of the Constitution enjoins it to do substantive justice. He stated that he filed the affidavit of the 1st Respondent because he had arrived in the country by that time. He urged the court to consider and take into account the replying affidavit when making its decision.

10. In a brief rejoinder counsel for the applicants submitted that nowhere in his affidavit has the 1st Respondent averred that he was out of the country and he gave authority to his counsel to swear an affidavit on his behalf.

11. Should the 1st and 2nd respondents' affidavits be expunged from the record? The authority relied on by counsel for the applicants in support of his proposition that an affidavit sworn by an advocate on record is not a proper affidavit is the decision of the Court of Appeal in the case of **Gerphas Alphonse Odhiambo v Felix Adiego [2006] eKLR; Civil Appeal No. 352 of 2005 (Kisumu)** wherein P.N. Waki, J.A. stated that:

"An affidavit, by definition, is evidence given on oath and is subject to the provisions of the Evidence Act, Cap. 80 – see section 2(2). Admissibility of hearsay evidence must therefore be shown to comply with the provisions of that Act. Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client or clerk when those persons are available to swear and prove the facts of their own knowledge. In appropriate cases such affidavits may be struck out or given little or no weight at all. Even where exception is made to section 2(2) of the Evidence Act, as it is in interlocutory proceedings under the Civil Procedure Rules, Order 18 rule 3(1), the need to ensure that facts are proved by a person or persons who have personal knowledge of such facts is closely guarded….

I see no reason, as none is stated, why the court clerk who had personal knowledge of the disappearance of the court file could not swear the supporting affidavit as required under our rules. I will disregard the affidavit in that regard."

12. In response, Mr. Kigen referred this court to paragraph 37 of the decision of J. Kamau, J in **Global Petroleum Products Kenya Limited v Sonal Holdings (K) Limited & another [2013] eKLR** where the learned Judge stated that:

"I concur with the Plaintiff's counsel's submissions that he was quite in order when he swore the Supporting Affidavit. This is because he could depone to the facts himself from his own knowledge and observations gained at the time of preparing the Plaintiff's case."

13. My understanding of the law from the two cited decisions is that an advocate should not swear an affidavit on behalf of his client touching on matters he/she has no personal knowledge of. When it comes to the swearing of an affidavit the person with the primary knowledge of the facts should swear the affidavit otherwise the affidavit will fall prey to the hearsay rule. In order to determine whether or not to place reliance on an affidavit sworn by an advocate, the court will have to look at the affidavit in order to confirm whether it conforms to the rules for making affidavits.

14. I have perused the replying affidavit of Robinson Kigen and find that his averments are confined to the facts that were already on record

either by way of pleadings or supporting documents. These are fact that were therefore within his knowledge. He could aver to the same as he was not averring to information passed to him by another person. The application to expunge the replying affidavit of Robinson Kigen is therefore without merit.

15. As for the replying affidavit of the 1st Respondent, the same was indeed filed without the leave of the court. The same is said to be a response to the further affidavit sworn by the 1st Applicant on 23rd August, 2018. Whereas the 1st Respondent's audacity of filing a document without the leave of the court should be frowned upon, the bigger picture requires that parties be allowed to articulate their positions to the fullest. I note that when the application came up for hearing on 16th October, 2018 the 1st and 2nd respondents' counsel quickly pointed out to the court the fact that an affidavit had been filed without the leave of the court. He then sought to have the affidavit admitted as duly filed. The applicants have not shown what prejudice they will suffer if the affidavit is formally admitted into the record. I therefore admit the 1st Respondent's affidavit sworn on 19th September, 2018 and the same is deemed as duly filed.

16. Now to the core subject of this application. There is no dispute as to the parameters governing the grant of leave for the amendment of pleadings. Counsel for the applicants cited several decisions in support of the application.

17. The reason why parties seek to amend their pleadings was stated by this Court (Lenaola, J (as he then was), Mumbi & Majanja, JJ) in **Institute for Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR; Nairobi High Court Petition No. 71 of 2013** as follows:

> **"The object of amendment of pleadings is to enable the parties alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court most effective in determining the substantive merits of the case rather than holding it captive to form of the actions or proceedings."**

18. The power to allow amendment of pleadings is therefore a tool bestowed upon the courts by the rules in order to allow parties to fine-tune their pleadings so that the real question in dispute can be identified and determined. It is therefore a tool for achieving justice and once a party satisfies the conditions for granting leave to amend pleadings such request should be allowed.

19. In **Global Petroleum Products Kenya Limited** (supra), the Court allowed an amendment of the plaint noting that the plaintiff's new advocate had upon coming on record immediately filed the application.

20. The Court of Appeal in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd [2013] eKLR; Civil Appeal No. 81 of 2004 (Nairobi)** restated the law applicable to amendment of pleadings as stated in **Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition** and captured in the Court of Appeal decision of **Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991** thus:

> **"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."**

21. A perusal of the decided cases shows that an application for amendment of pleadings will be allowed in order to enable the parties to fully articulate their issues before the court.

22. In the case at hand, the 1st and 2nd respondents oppose the application for amendment of the plaint as it seeks to bring on board more parties. It is the 1st and 2nd respondents' case that some of the parties sought to be enjoined have already recorded statements. They therefore assert that even without enjoining them the issues in controversy will still be determined by this court. Further, the 1st and 2nd respondents contend that no particulars of fraud have been laid against the proposed 8th Defendant.

23. It is the 1st and 2nd respondents' case that the first four prayers in the proposed amended plaint allude to transfer of shares. According to them, the applicants have not laid a proper legal basis to enable this court exercise its discretion in their favour.

24. Finally, counsel for the 1st and 2nd respondents submit that this matter has been litigated before the Environment and Land Court as the dispute is over land.

25. On his part counsel for the applicants retorted that the dispute here is about the directorship of the 2nd Applicant and this court is properly seized of the matter.

26. On why the application for amendment of the plaint should be allowed, counsel for the applicants submitted that when they came on record for the plaintiffs they noticed that the plaint needed to be amended and they immediately filed the application. His view therefore is that the application has been brought without undue delay. Further, that the application for amendment, if allowed, will result in avoidance of a multiplicity of suits as necessary parties are being brought on board. He asserted that the proposed amendments will not prejudice the

respondents in any manner.

27. A look at the annexed amended plaint shows that the plaintiffs intend to bring four more defendants on board. The claim against each defendant is specified. The plaintiffs then introduce particulars of fraud which were not found in the plaint they seek to amend. Finally the plaintiffs amend the orders they want from the court. The general picture one gets from perusing the current plaint and the one intended to be introduced is that the dispute relates to transactions relating to the shares of the 2nd Plaintiff. The cause of action has not been altered by the proposed amendments.

28. It is true that some of the proposed defendants have recorded statements on behalf of the 1st and 2nd respondents but if the case against the defendants succeeds, the proposed defendants will be prejudiced as they will not have been heard before an adverse decision is made against them. In that case, the proposed defendants are entitled to sit on the table reserved for the parties to this case so that they can articulate their interests. It is not enough that they have recorded statements as witnesses.

29. In my view, the applicants have met the requirements for grant of leave to amend their plaint. Their application succeeds. The application is allowed in the following terms:

(a) The amended plaint to be filed and served within 14 days from the date of this ruling. This includes service of summons on the new defendants;

(b) The current defendants shall have 14 days from the date of service of the amended plaint to file and serve their amended statements of defence, if need be. The new defendants will have 14 days from the date of service with summons and amended plaint within which to file and serve their statements of defence.

(c) The applicants shall pay the cost of the application to the 1st and 2nd respondents.

Dated, signed and delivered at Malindi this 17th day of December, 2018.

W. KORIR,

JUDGE OF THE HIGH COURT