



**Whitefield Restaurant Limited v Smart Wave Limited & 2 others (Environment & Land Case 048 of 2023) [2023] KEELC 22359 (KLR) (8 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22359 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 048 OF 2023  
MD MWANGI, J  
DECEMBER 8, 2023**

**BETWEEN**

**WHITEFIELD RESTAURANT LIMITED ..... PLAINTIFF**

**AND**

**SMART WAVE LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SIMON RWAMBA ..... 2<sup>ND</sup> DEFENDANT**

**JOSEPH WANJOHI RWAMBA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is coming up for determination is the 1st Defendant's application dated 22nd June, 2023, brought under the provisions of Order 8 rule 2 of the *Civil Procedure Rules*, seeking for orders that:
  - a. That the Honourable Court do strike out the Plaintiff's Amended Plaint dated 8th June, 2023.
  - b. That costs of the Application be provided for.
2. The application is premised on the grounds that the Plaintiff's Amended Plaint dated 8th June, 2023 offends the law on Amendment of pleadings as it seeks to join parties who are strangers to the suit. The Applicant further avers that the Amended Plaint is bad in law and an abuse of Court process and the same should be struck out with costs.
3. The application is further supported by an affidavit of Joseph Wanjohi Rwamba, a director of the Applicant Company, deponed on the 22nd June, 2023. The director reiterates that the amendment of the plaint seeks to add parties who are strangers to the suit herein.
4. He contends that the Amended Plaint offends the rules on amendment of pleadings and the same should be struck out. He therefore prays that the application be allowed as prayed.



## Replying Affidavit

5. The application is opposed by the Plaintiff vide the Replying Affidavit of Mahima Hedge, a director of the Plaintiff Company, sworn on the 5th July, 2023. The deponent avers that the application is entirely devoid of merit, misconceived and an abuse of court process. He avers that the 2nd and 3rd Defendants acted as directors and agents of the 1st Defendant. They signed the Lease and Side Agreements purporting to act for the 1st Defendant Company.
6. He further asserts that the 1st Defendant has in its Statement of Defence denied that there was any agreement to allow the application of any rent deposit towards rent obligations whereas the 2nd Defendant on his part had signed a side agreement on behalf of the 1st Defendant. The side agreement is a crucial and pertinent document on which the prayers in the Amended Plaint are hinged on hence the need to join the 2<sup>nd</sup> Defendant as a party in this case. The veracity of the said agreement cannot be established without the participation of the 2nd and 3rd Defendant. The 2nd Defendant shall be personally liable for the representations made in the agreement hence a necessary party to the proceedings. The 3rd Defendant on the other hand has been joined as a party because he signed the main Lease agreement.
7. The deponent asserts that the court should allow amendment of pleadings without leave of the Court. He argues that even if the joinder of the 2nd and Defendant was irregular, the same will be a technicality cured by Article 159 of the *Constitution*. The joinder will not occasion any prejudice upon the 2nd and 3rd Defendants as they will have a chance to file their statements of Defence and defend themselves accordingly. If any harm is occasioned, they will be compensated by damages.

## Further Affidavit

8. The Applicant filed a further Affidavit sworn by Joseph Rwamba deponed on the 25th July, 2023. He avers that he is a lawful director of the Defendant and all his actions were done on behalf of the Defendant Company. The deponent avers that the matter is yet to proceed to pre-trial and all documents will be subjected to admissibility test as provided for in the *Evidence Act*. He insists that the Plaintiff seeks to abuse the process of court in seeking to prove admissibility of a document through joinder of officers of a company who acted on behalf of the company.
9. He avers that there is no dispute that Simon Rwamba acted on behalf of the Defendant and his actions have been ratified by the Company. He asserts that the 1st Defendant acts through its officers and agents and there is no dispute about the identity of the officers and agents who participated in the present transaction.

## Court's directions

10. The Court directed that the application be canvassed by way of written submissions. Both parties complied. The 1st Defendant's Submissions are dated 14th August, 2023 whereas the Plaintiff's submissions are dated 13th September, 2023.

## Defendant/ Applicant's submissions

11. The Applicant submits that the first issue is whether joinder of the Defendants without leave of court is fatal and an abuse of court process. It states that it is not in dispute that the Plaintiff proceeded to file an Amended Plaint dated 8th June, 2023 without leave of court. Further, that it is evident that the Plaintiff purports to introduce two more Defendants in the suit seeking judgement jointly and severally against the 3 Defendants.



12. The Applicant submits that the amendment violates the mandatory provisions under Order 1 Rule 10 (2) of the *Civil Procedure Rules* and as such the two Defendants added to the suit without leave of court are complete strangers to the suit. The Plaintiff never sought leave but merely proceeded to add them to the proceedings on the false basis that pleadings had not closed, hence any amendment is permissible.
13. The second issue, according to the Applicant, is that the Plaintiff misconstrued the import of amendment of pleadings from that of substitution of parties. It is submitted that failure to obtain leave of court before joinder of a party is fatally defective. The Applicant cites the case of *Kencom Sacco Society Limited v David Machio & 4 Others* [2020] eKLR, where the suit was struck-out as the amendment violated the provisions of Order 1 Rule 10(2).
14. The Applicant further submits that leave to join necessary parties to a suit is important as it goes to the root of the Court' jurisdiction, for purposes of identifying proper parties to a suit.
15. The other issue for determination is whether the two Defendants are proper parties to the suit. The Applicant submits that indeed it is not disputed that Joseph Wanjohi Rwamba is a lawful director of the Defendant herein and Simon Rwamba was an agent of the 1st Defendant whose actions it has ratified.
16. Further, that the two Defendants sought to be added, have been sued in their capacity as agents of a known and disclosed principal. It is the Applicant's submission therefore that no suit can be maintained against the purported 2nd and 3rd Defendants by the Plaintiff herein who at all material times knew that the two parties were acting solely as agents of the company. Suing them in their personal capacity amounts to lifting the corporate veil without following the laid down procedures.
17. Finally, the Applicant submits that all agreements entered into solely between the Plaintiff and the 1st Defendant are only enforceable between the two parties. It cannot be enforced against a person who is not a party thereof. He urges the Court to strike-out the Plaintiff's amended Plaintiff and disallow the amendments as presented with costs to the Defendant.

#### **Plaintiff/Respondent's submissions**

18. The Plaintiff avers that the Applicant seeks for striking out of parties' names as opposed to disallowing an amendment. The Applicant can only seek striking-out of part of the amendment and not to striking-out the entire Plaintiff. For that reason, that the amendments are distinct from joinder of parties.
19. The Plaintiff further submits that the 1st Defendant has not adduced any document showing authority to act on behalf of the 2nd and 3rd Defendant. The Plaintiff asserts that the Applicant lacks the locus standi to act on their behalf. The application is therefore misconceived, a nullity in law and an abuse of the court process.
20. Distinction between amendment of pleadings and addition of parties. The Plaintiff maintains that under Order 8 Rule 1, a party is at liberty to amend pleadings in any manner, including adding any party or removing any party to the proceedings. The Plaintiff is at liberty to sue any party as it deems fit and the party who feels wrongly sued can raise the issue in its Defence. In the instant suit, no prejudice will be occasioned to the 2nd and 3rd Defendants and if any, then the prejudice can be compensated by way of damages.
21. The Plaintiff asserts that the 1st Defendant has denied the existence of the side agreement which was signed by the 2nd Defendant. The Applicant has merely stated that the acts of the 3rd Defendant have been ratified by the 1st Defendant. No evidence has been adduced evidence to prove the same. The Plaintiff submits that the 2nd and 3rd Defendants committed certain acts of fraud in their individual



capacities while falsely representing themselves as acting for the 1st Defendant. As such, the application should be dismissed with costs.

### Issues for Determination

22. Having considered the application, the response by the Plaintiff and the rival submissions by the parties herein, the sole issue for determination in this Court's opinion is whether the 2nd and 3rd Defendants were properly joined as necessary parties under Order 1 Rule 10 (2) of the *Civil Procedure Rules*.

### Analysis and Determination

23. The law on joinder of parties is entrenched under Order 1 Rule 10(2) of the *Civil Procedure Rules* which provides that:

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

24. The general power to amend pleadings draws from Section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court after the close of pleadings.

25. Order 8 rule 1 of the *Civil Procedure Rules* empowers the court, at any stage of the proceedings, on such terms as to costs or otherwise as may be just, and subject to the limitations stated therein to allow any party to amend his pleadings.

26. The clear and unambiguous import of the rule is that leave of the court is required for an amendment under Order 8 rule 1.

27. Order 8 rule 5 of the *Civil Procedure Rules* provides as follows: -

“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 documents to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

28. The Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd* [2002] 2 EA 365 held that amendments of pleadings and joinder of parties were aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. The Court was of the view that a party should be allowed to make such amendments as are necessary for determining the real issue in controversy and to avoid a multiplicity of suits provided that: -

- i. .... there has been no undue delay,
- ii. no new or inconsistent cause of action was introduced and
- iii. the amendment could be allowed without injustice to the other party(s) that could not properly be compensated in costs.

29. In this case, the Applicant contends that the Amended Plaint, in which the 2nd and 3rd Defendants were joined, is fatally defective for lack of leave from court for joinder of parties. The Applicant



contends that the 2nd and 3rd Defendant are agents of the 1st Defendant. It was submitted that the 2nd and 3rd Defendant are not privy to the transaction hence their names should be struck-out from the proceedings herein.

30. The Plaintiff on the other hand argues that the pleadings had not closed and a Plaintiff has the right to amend its pleadings and sue whoever it thinks is a necessary party to the proceedings. The Plaintiff submits that the 2nd Defendant, who is a Director of the 1st Defendant, signed a “side agreement”, purportedly on behalf of the 1st Defendant. The 1st Defendant has since denied executing such an agreement. The 3rd Defendant on the other hand has been joined as a party because he signed the main Lease Agreement.
31. I agree with the Plaintiff’s submissions that the pleadings had not closed at the time of the amendment. The Plaintiff was at liberty to amend the plaint as it did.
32. Secondly, Order 1 Rule 3 of the *Civil Procedure Rules* further provides that any person against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions may be joined as a defendant. From the affidavit evidence adduced by either side, it is my finding that the 2nd and 3rd Defendants are evidently necessary parties to these proceedings.
33. I am of the considered view that the major considerations whether an amendment or a joinder is to be allowed are whether the amendments or joinder were necessary for the determination of the matter in issue in the suit and whether the delay was likely to prejudice the other party(s) beyond compensation by way of costs.
34. Finally, and as I had pointed out at the beginning of this ruling, the application was brought under the provisions of Order 8 rule 2 of the *Civil Procedure Rules*. The rule does not provide for striking out of an amended pleading. It therefore does not provide the legal grounding for the 1<sup>st</sup> Defendant’s application herein.
35. Accordingly, the Application by the 1<sup>st</sup> Defendant is dismissed. The 2nd and 3rd Defendants are duly joined as Defendants. The costs of the application shall be in the cause.

It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF DECEMBER, 2023.**

**M.D. MWANGI**

**JUDGE**

**In the virtual presence of:**

**Mr. Muchiri for the Plaintiff/Respondent.**

**Ms. Obiero for the 1<sup>st</sup> Defendant/Applicant and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Court Assistant: Yvette**

**M.D. MWANGI**

**JUDGE**

