



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**CIVIL SUIT NO. 93 OF 2012**

**COMFORT GARDEN LTD.....PLAINTIFF**

**VS**

**GLADHOME (1977) LTD .....1ST DEFENDANT**

**TYSONS LTD.....2ND DEFENDANT**

**RULING**

On the 18.4.2013 this court dismissed the applicant's application for injunction after finding that the Plaintiff's claim is liquidated and therefore can be compensated in monetary terms. The Plaintiff being satisfied with the ruling did not appeal but filed a Notice of Motion on 3.12.2013 praying for leave to amend the amended plaintiff. The application is made on allegations that there is no inordinate delay in bringing this application and that the suit against Tysons Limited who were the 2nd Defendant has been withdrawn hence there is need to amend the plaintiff to incorporate changes that have come about as a result of the ruling delivered on 18th April 2013. The applicant believes that the Defendant/Respondent will not be prejudiced in any way if the Amended Plaintiff is Amended. That it is in the interest of justice that the Orders sought herein are granted. That the applicant undertakes to pledge any security and undertaking of damages as a requisite for grant of the sought order. That the intended appeal has merit with high chances of success.

The application is supported by the affidavit of Charles Rukwaro Gitahi a Director of the Applicant who states that he has the authority on behalf of his co-director to make and swear this Affidavit. He was informed by the company's Advocates on record that that this honourable court delivered a ruling on 18th April 2013 regarding the an injunction application whereby the court declined to grant as an injunction holding that an award of damages in this case would suffice as adequate compensation. He has been informed by the Advocates that in view of the above ruling, there is need to amend the amended plaintiff in this case to include a claim for damages and that they have a reasonable claim against the Defendant/Respondents herein that raises triable issues hence it is in the interest of Justice that the orders sought herein are granted.

The same is opposed by the replying affidavit of Agrey Wahome who states that he is one of the Managing Directors of Gladhome (1977) Limited and Defendant in this suit. He believes that the amendment is fatally defective and has no merit and has been advised that the application for amendment Plaintiff is based on the original Plaintiff filed on 24th April 2012 and purportedly supported by the Affidavit of one Charles Rukwaro Gitahi made on 24th April 2012 in non-compliance with Order 4 Rule (1) (4) of the Civil Procedure Act 2010.

Further that the first amended plaintiff was filed on 19th July 2012 removing the 2nd defendant TYSONS LIMITED and in the amended plaintiff the prayers were only one I.e “ *Specific performance of*

***the sale of NYERI MUNICIPALITY BLOCK 1/ 623 and 624 from the Defendant to Plaintiff.”***

All other reliefs that is to say

***(d) in the alternative, a refund of Kshs 22,000,000/= from 2nd defendant.***

***(e) Special damages of Kshs 3,150,000/= as at 23rd April 2012.***

***(f) Lost income of Kshs 200,000,000/=***

***(g) Costs of this suit together with interest***

***(h) Interest on (d) and (e) above at the Bank rate of 27% per annum from the date of filing this suit till payment in full,***

were canceled and the Plaintiff relinquished all his claims against the Defendant which he is now again a re-instatement of the original Plaintiff in face of amendment.

**The** defendant believes that the prayer for injunction as contained in (a) and (b) is Resjudicata as contained in the Ruling of this Honourable court delivered on 18th April 2013. That Particulars of special damages of Kshs 600,000/= and paying bank loan of Kshs 850,000/= per month and all other special damages in (c) are untenable as contravention of Order 3 Rule (2) and the Applicant cannot be allowed to amend his plaint the 2nd times as there is no cause of act on against the Defendant as there was no contract of the suit property in the first place. That the amended plaint on the opinion of the Ruling and the falsity of the Plaintiff that the court has prejudged that Plaintiff would be entitled to some sort of damages is a fallacy and as there was never any contract and the deposit was refunded to the Plaintiff by the 2nd Defendant who was conveniently removed by the Plaintiff as he 2nd Defendant who was conveniently removed by the Plaintiff as he received his deposit of Kshs 22,000,000/= what was there left in this botched negotiation.

The gravamen of the applicant's submission is that the amendments desired by the applicant are necessary for determining the real question in controversy in this case. The applicant believes that no cause of action is being introduced. He relies on Bullen and Leake & Jacob's Precedent of pleading, 12th Edition and on **Eastern Bakery -vs- Castelino (1958) E.A 461 Civil Appeal No. 30 of 1958**. He also refers to the case of **Molu & Another -Vs- Kenya Railways & Another (2002) 2 KLR 551**. Lastly , he refers to the case of **Registered Trustees Church of God in E.A (K) -Vs- Fredrick Maengwe & 8 Others (2013) eKLR**.

The Respondent on his part submitted that the application is belated having been made more than 7 months after the ruling of the court was delivered on 18.4.2013. He submits that 7 month amounts to inordinate delay. He further submits that the original plaint is defective and must be struck out as the verifying affidavit does not meet the requirement of law and that this element prejudices the fair administration of justice in accordance with the law. He has referred to ***AFFORDABLE HOMES AFRICAN LTD (524 OF 2004)*** and argues that the suit cannot be cured at all and that the applicant is taking advantage of the ruling by this court.

Lastly the respondent argues that there is no contract between the Plaintiff and the defendant. With due respect to Mr. Mahan for the Defendant, this court finds that he missed the point when he submitted that the suit is fatally defective and must be struck out due to a defective verifying affidavit as the issue before this court is amendment of the plaint to introduce a claim on the liquidated damages. The defendant should make a formal application for the striking out of the plaint. Secondly, it cannot be said that the plaintiff relinquished his rights in the 2nd amendment as the right to amend cannot be relinquished unless if the ammendment is allowed the same would be prejudicial to the other party.

Moreover, by going into the merit of the Plaintiff's claim, the defendant's submission became irrelevant. Whether there was a contract or not was an issue to be determined after conclusively hearing

the parties in the suit, their witnesses and entertaining submission of the counsel, but not at the stage of amendment of amended plaint.

Mr. Mahan rightly submitted that Order 8 rule 3 grants the court the discretion to allow a party to amend pleadings at any stage of proceedings on such terms as to costs or otherwise as may be fit and in such manner as it may direct. That argument that the application to amend was made with delay is valid, however this court finds that the same is not inordinate as the law provides that an amendment can be made at any stage of the proceedings. It can be after close of pleadings, after pre-trial directions and conferences, after commencement of trial but before close of defence case. The discretion is left with the court, however, this discretion should be applied judiciously and not whimsically.

I agree with this submission of Mr. Wainaina and as referred to **Bullen and Leake and Jacobs precedents of pleadings the 12th Edition on page 127 titled "amendment with leave -time to amend"** that the power of the court to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated for by costs or otherwise.

The Respondent has not demonstrated in his replying affidavit that he will suffer any injury or prejudice if the applicant is allowed to amend his plaint and therefor this court does not wish to wonder in darkness and guess which prejudices the defendant is likely to suffer.

The upshot of the above is that I exercise my discretion and allow the application for amendment of amended Plaint as the defendant will have leave to file a reply to the amended amended plaint or in the alternative to file amended defence. Finally the grant to order sought will amount to denying the Plaintiff to ventilate his case fully before the seat of justice.

The application is allowed. The plaintiff to re-amend his plaint and file the same within the next 7 days. In the alternative, the annexed amended plaint to be deemed as duly filed upon payment of filing fees. Costs of the application to the defendant in any event.

**DATED AND SIGNED AT ELDORET THIS .....DAY OF..... 2015**

**ANTONY OMBWAYO**

**JUDGE**

**DELIVERED AND SIGNED AT NYERI THIS .....DAY OF.....2015**

**LUCY WAITHAKA**

**JUDGE**

**DATED AND SIGNED AT ELDORET THIS .....DAY OF..... 2015**

**ANTONY OMBWAYO**

**JUDGE**

**DELIVERED AND SIGNED AT NYERI THIS 27<sup>TH</sup> DAY OF JANUARY, 2015**

**LUCY WAITHAKA**

**JUDGE**

**In the presence of:**