



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 241 OF 2012**

**1. TASTE OF KENYA LIMITED**

**2. ANISHA BEGUM THOBANI.....PLAINTIFF**

**VERSUS**

**1. KIRAN C. JETHWA**

**2. CLARE M. JETHWA**

**3. TOSAK INVESTMENTS COMPANY.....DEFENDANT**

**RULING**

1. The Plaintiff filed this suit against the Defendants seeking, among others, an order allowing them to sell the Restaurant Business situated on L.R. No. 209/4354, Valji Building, ground floor to a willing buyer forthwith.
2. By their Notice of Motion dated 5<sup>th</sup> December, 2013 the Plaintiffs seek leave to amend the Plaint as per the annexed draft plaint and that the said be deemed to have been duly filed upon payment of the requisite fee. Secondly, the Plaintiffs pray that this suit be consolidated with High Court Civil Suit No. 193 of 2008., **Lucy Gacheru and Anisha Thobani v. Kiran C. Jethwa and Clare M. Jethwa**. The motion is expressed to be brought under Order 50 Rule 1, Order 8 Rule 3 (1), (2) & (5) and Order 3 Rule 5 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act.
3. The application is premised on the grounds on the face of the application and the supporting affidavit of the 2<sup>nd</sup> Plaintiff sworn on 5<sup>th</sup> December, 2013. It was the 2<sup>nd</sup> Plaintiff's position that; due to economic hardships and business loss, they stopped their business operations and sought the consent of the Defendants to sell it off as a going concern; that the said consent was denied and by the time an application challenging the validity of this suit was heard and determined, the prospective buyers of the business had lost interest and moved on rendering part of the suit to be overtaken by events. It was contended that whereas the sale of the business as a going concern would have assisted the Plaintiffs recoup some of their expenses and move on, the said sale was frustrated by the Respondents and it has become necessary to amend the Plaint to make a claim on the same. It was stated that the joinder of this suit with High Court Civil Suit No. 193 of 2008 which is a claim for breach of quiet possession will assist the parties herein to litigate and conclude all the tenancy matters between them at once.
4. The Plaintiffs submissions were that the application had not been brought late in the day having been brought a few months after the ruling of 12<sup>th</sup> August, 2013. That prayers (i) and (ii) in the

- draft amended Plaintiff have not been overtaken by events since the Plaintiffs still maintain that the Defendants unduly denied them consent to change of user occasioning them loss and damages. They argued that the issue of change of user alleged to have been settled in the ruling of 12<sup>th</sup> August, 2013 was declared not res judicata since the ELC No. 193 of 2008 had not been heard and determined. It was the Plaintiff's submissions that amendment of pleadings should be freely allowed if no prejudice will be suffered by the other party and that the essence of amendment is to ensure that all relevant facts are brought on board and adjudicated upon. The Plaintiffs relied on **Leroka v. Middle Africa Finance Company Limited (1990) KLR** and **Harit Sheth and Richard Kariuki t/a Harit Sheth Advocates v. NIC Bank Limited (2014) eKLR** respectively.
5. The application was opposed through the Replying Affidavit of Wanjiru Nduati sworn on 25<sup>th</sup> June, 2014. She contended that there has been undue delay in filing this application; that prayers (i) and (ii) in the amended plaintiff have been overtaken by events as the Plaintiffs abandoned the premises and the said premises is already leased out to a new tenant; that the court had not been informed on 7<sup>th</sup> March, 2013 that the Plaintiffs had abandoned the premises and that the issue of change of user as requested by the Plaintiff was a matter already settled in the ruling of 19<sup>th</sup> July, 2011 in HC ELC No. 193 of 2008 where it was stated that change of user was a material breach to the agreement and that an injunction is an equitable remedy which cannot be granted to a party obviously in breach of their obligation under an agreement.
  6. It was contended that the amendment will cause injustice to the Defendants that cannot be adequately compensated in costs for the reasons that the lease was for a period of six (6) years and three (3) months running from 1<sup>st</sup> December, 2007 to 28<sup>th</sup> February, 2014; the Plaintiffs without reasonable notice abandoned the premises in March, 2012; that at the time of the termination, the Plaintiffs had rent arrears payable to the Respondent; that by the Plaintiffs failing to disclose the amount owed to the Defendants the Plaintiffs are trying to mislead the court and that the Plaintiff seeking damages for loss of opportunity and income without due regard to the said facts have acted in bad faith.
  7. The Defendants submitted that the power to order amendment was discretionary and must be exercised upon defined legal principles which are whether the amendment sought embodies a valid claim or defence and whether such amendment would cause delay or disruption of judicial administration. It was submitted that the Plaintiff first approached the court in the year 2008 and since then, the Defendants have been in and out of court countless times on account of the Plaintiffs' many applications without any hope of concluding this matter. Counsel urged that the application be dismissed.
  8. I have considered the depositions by the parties herein, the question that arises is whether or not the Plaintiffs have satisfied the requirement for grant of an order for amendment of a Plaintiff and consideration of the named suits. Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice cannot be compensated by an award of costs. This was the **Kenya Commercial Bank v. Kenyatta National Hospital & Another (2003) 2 EA.**
  9. The objects of amendments were discussed in the case of **The Institute for Social Accountability and Another v. Parliament of Kenya and 3 Others (2014) eKLR** as follows:-
 

***“The object of amendments is to enable the parties to 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 more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.” (Emphasies own).***
  10. The Defendants contended that first that this application has been brought late in the day. The ruling on the application challenging the validity of the suit was delivered on 22<sup>nd</sup> August, 2013 and this application was filed on 11<sup>th</sup> December, 2013 that is about four (4) months after the delivery of the ruling. Would the period of four months be considered inordinate delay. In **Mehta -vs- Shah (1965) EA 321**, it was observed that an application for amendment should be brought

- without undue delay and that applications for amendments should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. In my considered view, inordinate delay is one that causes prejudice to the other party which prejudice cannot be compensated in costs. Such delay should also be explained.
11. While the Defendants contend that the Plaintiffs were issued with a notice of delivery of ruling, it cannot be ascertained from the annexed notice that it was indeed served upon the Plaintiffs. It does not bear a stamp from the Plaintiffs' advocates firm. On the other hand the Plaintiff's have annexed a letter by the Deputy Registrar dated 16<sup>th</sup> September, 2013 which refers to a letter written on behalf of the Plaintiff dated 2<sup>nd</sup> September, 2013. I therefore take it that the Plaintiffs got to know of the ruling on 2<sup>nd</sup> October, 2013. It is further worth noting that the Defendants have not demonstrated how the delay in filing this application will occasion them prejudice. In any event, parties have not undertaken pre trials so as to hold that there is any delay in bringing the application. That argument therefore fails.
  12. The Second issue that has been raised is that prayers (i) and (ii) in the amended plaint have been overtaken by events as the Plaintiffs abandoned the premises and the said premises is already leased out to a new tenant. From the Plaintiff's depositions, they intend to make claims on breach of duty as at the time they were in occupancy of the premises. It is therefore neither here nor there whether they have abandoned the premises or not. Further to this, such are the issues that need to be adjudicated between the parties.
  13. Thirdly, the Defendants contended that the issue of change of user as requested by the Plaintiff was a matter already settled in the ruling of 19<sup>th</sup> July, 2011 in HC ELC No. 193 of 2008 where it was stated that change of user was a material breach to the agreement and that an injunction is an equitable remedy which cannot be granted to a party obviously in breach of their obligation under an agreement. The Respondents have not annexed the said ruling. This court has not therefore had the benefit of ascertaining whether the issue of change of user has already been settled as alleged or not.
  14. I would not have been inclined to grant the prayer for consolidation because, this court cannot tell from the record whether such a suit No. HC ELC No. 193 of 2008 exists. No pleading touching on that suit was exhibited. I think in such an application, it is imperative that a copy of the Plaint should be exhibited to enable the Court assess who the parties are, the cause of action therein, and the issues for determination therein, to be able to conclude whether it is a proper case to order consolidation. However, since the deponent of the Replying Affidavit at Paragraph 11 thereof prayed that the suits be consolidated, I will grudgingly allow that prayer.
  15. In the circumstances, I am satisfied that the amendments are necessary and will aid in adjudicating the matters in controversy between the parties once and for all and that consideration is necessary. The Amended Plaint is to be filed and served within 14 days. The Defendant be at liberty to file and serve an amended Defence within 14 days of service. Costs in the cause.

**Dated, Signed and Delivered at Nairobi this 26<sup>th</sup> day of March, 2015**

.....

**A MABEYA**

**JUDGE**