



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL SUIT NO. 220 OF 2012

PETER KIPYEGON LAGAT PLAINTIFF/ APPLICANT

VERSUS

KENYA POWER & LIGHTING CO. LTD..... DEFENDANT/ RESPONDENT

RULING

1. The Applicant, **Peter Kipyegon Lagat**, filed a Notice of Motion dated 9th July, 2013 seeking the following orders:-
 - 1) **An order be made substituting the Plaintiff in this case with Lawina Company Limited by striking out of the Plaintiff's name from all proceedings herein and substituting thereof the name of the new Plaintiff.**
 - 2) **The court do make any other appropriate orders regarding the amendment and service of the pleadings filed in this case to incorporate the substitution of the Plaintiff**
 - 2) **Costs of this application be in the cause.**
2. The application is premised on the grounds on the face of it and the supporting affidavit sworn by the Applicant on 10th July 2013. He avers that he is the director of Lawina Company Limited, the registered owner of the suit property; that he mistakenly gave a copy of title to his advocates showing the suit property was registered in his name; consequently the advocates instituted a suit in his name and only realized the property was transferred to Lawina Company Limited after conducting an Official Search.
3. The applicant avers that it was a bona fide mistake on his part and further deponed on advice of his counsel that the envisaged substitution will not cause any prejudice to the defendant and that it will be necessary for the just determination of the proceedings.
4. The application is opposed by the filing of both Grounds of Opposition and a Replying Affidavit sworn by **Collette Achieng Nyaidho**, an Advocate of the High Court and whose firm has the conduct of this matter. The Grounds of Opposition are namely that the application is bad in law and fatally defective; that applicant did not particularize the proposed amendments; that the application if allowed contravenes the mandatory requirements of Order 4 Rule 4 of the Civil Procedure Rules.
5. In her Replying Affidavit, Ms. Achieng deponed that the applicant has no *locus standi* to institute the suit because he is not the registered proprietor of the suit land; that the applicant's omission in failing to produce the correct title document of the suit property is a negligent act on his part and

- as such the prayers sought for in the application herein ought not to be allowed.
6. She further avers that the applicant seeks to be substituted with a company but did not annex a board resolution authorizing the deposition of the averments in the verifying affidavit which is a mandatory requirement. She also contends that the Respondent will suffer prejudice and injustice as the proposed amendments have not been specifically set out.
 7. The application was canvassed before this court on 11th February 2014. Both Counsels made oral submissions which are an elaboration on the grounds of the application and affidavits filed.
 8. **Mr. Mwaura**, learned counsel for the Applicant, submitted that filing the suit in the name of the applicant was a bona fide mistake. That the applicant had forgotten that he had transferred the suit property to a company in which he is the director together with his spouse. It was Counsel's submission that substitution of the applicant would not be prejudicial to the Respondent as the cause of action and the prayers sought remained the same. According to counsel, the court has power under Order 1 Rule 10 of the Civil Procedure Rules to substitute a party to proceedings if it satisfies itself there is a bona fide mistake and such an order can be made at any stage of the proceedings. Counsel further submitted that unlike substituting the defendants, in the case of a plaintiff there is no provision for amendment of the plaint. He relied on the decision in **Jackson Kibor V. Barclays Bank Limited**, Civil Case No. 148 of 2000.
 9. **Ms. Akongo**, learned counsel for the respondent opposed the application. She begun by stating that the Applicant was not the registered owner of the suit land and therefore has no have locus standi to make the application. Consequently, the application by the applicant is an abuse of the court process. The company has capacity to sue and therefore the suit ought to have been instituted by a person authorized by the company. Further, it was her submission that the authorized person must file a resolution of the company as evidence of his or her authority to sue on behalf of the same.
 10. In response, **Mr. Mwaura** submitted that it was not proper procedure to file a resolution before the court determines the issue of substitution. Further he submitted the applicant has locus standi and that he had demonstrated to court the connection between himself and the proposed substituted company.

ISSUE FOR DETERMINATION

- (i) Whether to grant leave to amend to the applicant to amend the title of the Plaintiff?

ANALYSIS

11. Upon perusal of the applicant's Notice of Motion, the Supporting Affidavit and the annexures, the first omission that is noted by this court is the applicant's failure to annex a copy of the proposed draft Amended Plaint with the intended amendments. Common practice requires that an applicant should formulate, particularize and annex a draft of the proposed amended plaint to the supporting affidavit so that the court and the respondent(s) are privy to and have knowledge of the proposed amendment(s).
12. Be that as it may it is apparent from the submissions made that the crucial amendment is to the Title and not in respect to the text of the pleadings.
13. The applicant seeks to strike out his name from the proceedings and substitute it with that of a limited liability company which company is the actual registered proprietor of the suit property. This the applicant attributes to a bona-fide mistake on his part as he did not disclose the details of the transfer of the suit property from himself to the Company to his Counsel.
14. The applicant seeks to correct the mistake and further avers that there is a relationship between him and the company as he and his wife are the directors therein.
15. It is trite law that where the plaintiff is a company, before commencement of legal proceedings, written consent in the form of a resolution must first be passed by the company. Reference is made to the case of **Bugerere Coffee Growers Ltd. V. Sebaduka & Another**, 1970 E.A. Pg.147. This is the second omission noted by this court that the applicant did not annex any resolution to the application.
16. The above notwithstanding, before this court considers whether to grant leave to amend the plaint it is incumbent upon this court to determine whether the nature of the intended amendment will

occasion any prejudice to the respondent. In that the amendment may lead to confusion as to the identity of the plaintiff or it will introduce a new cause of action or it will alter the nature of the defence or it is calculated or intended to delay the determination of the main suit.

17. Having carefully considered the contents of the affidavits and annexures this court is satisfied that the only issue in this instance relates to the identity of the registered proprietor. This court notes that failure to allow the amendment will cause doubt as to the identity of the true owner of the suit property. This court makes reference to **Order 8 rule 3 (3)** of the **Civil Procedure Rules** which allows amendments to correct names of parties. It reads as follows;

“An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”

18. This court opines that the applicant’s advocates also failed to exercise due diligence by conducting a search on the property at the Lands Office before filing the suit. Nevertheless, this court is satisfied that from the reasons given by the applicant the mistake is found to be genuine, not misleading and does not in any way cause any doubt as to the identity of the person intending to sue nor does it alter the nature of the defence. This court is further satisfied that the amendment will not occasion any prejudice to the Respondent. It does not create a new cause of action, it remains the same and the suit property also remains the same.
19. This court finds that the omission to annex the written consent in the form of a resolution is not fatal to the application for leave to amend the plaint as this can still be obtained and filed together with the amended plaint.

FINDINGS

20. This court finds that the application is merited and that this is a suitable case for it to exercise its discretion to grant leave to amend the plaint.

CONCLUSION

21. The application to amend the plaint is hereby allowed.
22. The applicant shall file and serve the amended plaint within 14 days from the date hereof.
23. The respondent may amend its defence accordingly.
24. The Respondent shall have the costs of the application.

It is so ordered.

DATED, SIGNED and DELIVERED at NAKURU this 18th day of March, 2014.

A. MSHILA

JUDGE