



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

**ELC CIVIL SUIT NO. 326 OF 2008**

**MAPENDO INTERNATIONAL ..... PLAINTIFF**

**VERSUS**

**METRA INVESTMENT LTD & 4 OTHERS ..... RESPONDENT**

**R U L I N G**

1. The application before this court is a Chamber Summons dated 9<sup>th</sup> November 2012 brought pursuant to Section 1A, AB and 3A of the Civil Procedure Act and Order 1 rule 10 and Order 8 rule 3 of the Civil Procedure Rules, 2010.

The applicant seeks the following orders;

- i. That the plaintiff be granted leave to amend its plaint dated 10<sup>th</sup> July 2012 as per the annexed draft;
- ii. That costs for this application be provided for.

2. The application is based on the following grounds;

- i. That the amendments sought are necessary to enable the Honourable Court properly adjudicate upon the rights of respective parties.
- ii. That the plaintiff will not be prejudiced by the proposed amendments.

3. The application is supported by the sworn affidavit of David Johnson dated 9<sup>th</sup> October, 2012. The application was opposed and the respondent has filed grounds of opposition dated 17<sup>th</sup> October, 2012.

4. The applicant in the supporting affidavit deponed that he was the County Director of the plaintiff a corporate duly established and registered in Kenya under Section 10 of the Non Governmental Organisation and Co-ordination Act; that the registration of the plaintiff in Kenya was in promotion and application that was made by Mapendo International Inc. now known as Refuge Point Inc. the sole member of the plaintiff and has complete control of the plaintiff; that the plaintiff acts in exclusive benefit of and on behalf of the Mapendo International Inc. and that the controversy in this suit is rival claims over the suit property in which both the plaintiff and defendant claim to have title. He further deponed that the title shows that it was transferred to Mapendo International Inc. and indicated that for there to be proper adjudication of who has legal right over the suit property this matter.

5. The respondent opposed the application and stated its grounds of opposition as follows; that it is

grossly incompetent to amend a plaint long after the pleadings have closed; that the plaintiff's application will not serve any purpose as the records relied on at the lands registry if any, still remain in the name of the plaintiff and that what the applicant seeks to do is to reopen the case whose evidence has already been tendered therefore prejudicing the defendant. He urged the court to dismiss the application.

6. Parties filed written submissions.
7. Mr. Ogunde for the applicant reiterated the contents of the applicant's affidavit and further submitted that the law on amendment and added that the amendments are to be allowed freely at all stages of the proceedings if they are necessary for the determination of the issues in controversy and will only be refused if it will cause injustice to the opposing party that cannot be compensated by way of costs. That the substantive question is which one denotes/valid the rightful owner if the pleadings remain as they are that there was a false start in the description of the parties as it stands today the plaintiff is an NGO incorporated in the Non-Governmental Organisation and Co-ordination Act in Kenya. That the title was issued to Mapendo International Inc. and has changed it to Refuge Point Inc; that the amendment will ensure they deal with the real issues in contention on which of the 2 title's is valid. He contended defendant's argument that this will require opening of the case and added that recalling the writers will only relate to expense which can be redeemed by way of costs should the application be allowed. That the power to amend is so powerful that it can be done after judgment. On this she relied on the case of **Amalo Co. Limited – Vs – Investment & Mortgages Bank Limited (2005) eKLR** and **Pearlman (veneers SA PTY – Vs- Bartels (1954) ALLER 659** and **Mecer Alloys Corp. – Vs – Rolls Royce Limited (1971) ALLER 1520**. He urged the Court to allow the application.
8. Mr. Nyagah submitted that the plaintiff is not entitled to enjoy the Court's discretion to amend the pleadings as the situation is their own making and have withheld material information prolonging the proceedings. He submitted that what the plaintiff seeks is not amendment of the plain but substitution of the parties after close of pleadings.; that there was no mention of this plaintiff and Mapendo had not changed its name and only did so on 23<sup>rd</sup> June 2011and denies any knowledge of any change made to amend the title this he submit should be enough to dismiss the application with costs. He argues that the amendment will force the parties to start the matter afresh and urged the Court to dismiss the suit with costs; that the plaintiffs have made various amendments initially including 3 more defendants who were later removed by consent and added that the plaintiff were meddling up the matter. He submitted that the amendment will greatly prejudice the defendant.
9. Mr. Ogunde in reply submitted that to make a finding that if an entity changes its name ceases to exist and losses its property rights and the Court should allow an application for amendment however negligent or late.
10. I have read and considered the parties affidavits oral and written submissions. Granting of leave to amend pleadings is discretionary. However the same should be exercised judiciously. The Civil Procedure Rules under Order 1 rule 10 provides:

*“10. (2) 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.”* (emphasis mine)

I have perused the annexed amended plaint and note that the amendments seeks to change the plaintiff from Mapendo International Inc. to Refuge Point Inc. and also seeks to change the names of advocates on record. Order 8 rule 3 provides that;

“3.(2) Where an application to the court for leave to make any amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any subrule if it thinks just so to do.

(3) 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.”

11. The plaintiff relied on various cases; in the case of **Kenya Oil Company – Vs – Fluer Investments (2005) Eklr, Ugma Engineering Corp. Limited – Vs – Transami (2005) Eklr** which is similar to the instant case the applicants sought an amendment to have the correct information – the number of the vehicle. The learned judge held that no prejudice would be occasioned on the defendant despite him having given evidence. The case of **Amalo Co. Limited – Vs – Investment & Mortgages Bank Limited (2005) eKLR** and **Pearlman (veneers SA PTY – Vs- Bartels (1954) ALLER 659** and **Mecer Alloys Corp. – Vs – Rolls Royce Limited (1971) ALLER 1520**, where it was held that;

“The power to amend, particularly, where a party is not a properly described and substitution is necessary to meet the ends of justice, is powerful that the Court has power to do this even after judgment.”

12. The defendant relied on the case of **Evans M. Gakuu & 66 Others – Vs – National Bank of Kenya Ltd (2013) eKLR** which is distinguished with the current case in that it bears no relevance to the instant case as the same pertains to taxation of bill of costs and only refers to when the bills start accruing the case of a filing a defence.

13. The main issue in contention is that both the defendant claim to hold title to suit property. I note that the said plaintiff is now operating and carrying on under a different name of Refuge Park Inc. as per the copy of Articles of amendments dated 23rd June, 2011 and wish and wish to proceed with this matter as such. The respondent in opposition has claimed that there will be no prejudiced by the amendment though the application was filed way after closure of plaintiff’s claim and after the close of the defendant’s case. I’ll allow the application parties are at liberty to recall any of the witnesses to clarify any issue that has arisen after the amendment. I therefore allow the plaintiff’s application and order that the plaintiff file and serve the amended plaint within 14 days from the date of this ruling. The defendant shall be at liberty to file an amended defence within 14 days from the date of service. Parties shall be given a mention date for directions on further hearing if at all. Costs to be in the cause.

Orders accordingly

Dated, signed and delivered this 22<sup>nd</sup> Day of May 2014

**R.E. OUGO**

**JUDGE**

**In the Presence of:-**

.....For the Plaintiff/Applicant

.....For the Defendant/Respondent

.....Court Clerk