



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 86 OF 2013

GODFREY OTIENO ONYANGO

(Suing on behalf of RONALD ONYANGO) ::::::::::: 1ST PLAINTIFF

DONALD RABALA ::::::::::: 2ND PLAINTIFF

HARVEY AGUMBAH ::::::::::: 3RD PLAINTIFF

VERSUS

CRISPIN ODUOR OBUDO :::::::::::1ST DEFENDANT

GEORGE OMONDI KAGUMBA :::::::::::2ND DEFENDANT

GRIFFIN LEGAL KENYA LIMITED :::::::::::3RD DEFENDANT

GRIFFIN CLAIMS MANAGEMENT LTD. :::::::::::4TH DEFENDANT

GRIFFIN LEGAL UK :::::::::::5TH DEFENDANT

M/s TANDEM LAW t/a XJA LIMITED ::::::::::: 6TH DEFENDANT

GRIFFIN LEGAL CLAIMS LIMITED ::::::::::: 7TH DEFENDANT

CRIS BOYD LIMITED :::::::::::;:::::::::8TH DEFENDANT

FASHION HEAVEN LIMITED :::::::::::;:::::::::9TH DEFENDANT

RULING

1. The application for consideration is the Notice of Motion dated **3rd July 2014** and filed on **4th July 2014**. It is expressed to be brought under **Order 51 Rule 1 & Order 8 Rule 3** of the **Civil Procedure Rules** as well as **Section 63 (e)** of the **Civil Procedure Act**.
2. The application seeks to amend the Plaintiff as per the draft amended 1st Plaintiff's Plaintiff attached to the application.

3. The application is premised on the grounds stated in the application and is supported by the affidavit of GODFREY O. ONYANGO sworn on **3rd July 2014**.
4. The 1st Plaintiff avers that the proposed amendments are necessary in this litigation as they go to the core of the 1st Plaintiff obtaining justice by having his claim realised. He avers that since the filing of this suit the 6th Defendant who is the core litigant has undergone fundamental metamorphosis as it is now in self liquidation. A fact that was only disclosed after the Court made its ruling of 28th March 2014, in which the Court in effect countermanded any payments as may be received by the 6th Defendant.
5. It is the assertion of the 1st Plaintiff that the parties to be added in the Course of the amendments have assumed legal, factual and financial obligations ordinarily of the 6th Defendant. To this end the 1st Plaintiff has attached a bundle of communication (marked as **GOO/3**) to relate the proposed Defendants to the 6th Defendant in liquidation. It is the 1st Plaintiff's case that the amendment sought is not prejudicial to the Defendant.
6. The application is opposed. The 1st and 2nd Defendants filed Grounds of Opposition dated 15th July 2014 on the same day. It is the 1st and 2nd Defendants' case that this Court has no jurisdiction to entertain the same. Their argument is that the purported deed of assignment on the strength of which the amendment and suit is brought, expressly ousts the jurisdiction of this Honourable Court. It is further the 1st and 2nd Defendant's case that the Plaintiffs have not laid a clear basis on which they intend to join a key ministry of a foreign and sovereign government to these proceedings.
7. The 2nd Plaintiff also filed a Supporting affidavit, I suppose in support to the current application. The 2nd Plaintiff avers that he has no objection to the intended joinder of the 10th to 13th Defendants. However, it is the 2nd Plaintiff's assertion that the intended changes to the prayers sought in the Plaintiff will prejudice him in so far as its effects will be to eliminate his entitlement to 25% of the back end profits he is entitled to under the Agreement he had with the Defendants. The 2nd Plaintiff is therefore seeking leave to further amend the Plaintiff.
8. At this juncture, I would wish to note that the issue of how the Plaintiff should be ultimately drafted lies with the Plaintiffs. The parties decided to come up with a joint Plaintiff for their claim and therefore it is up to them to co-operate in sufficiently pleading their claim. In that case, it is not expected that one Plaintiff will choose to amend the Plaintiff without the knowledge and approval of the other Plaintiffs.
9. I now turn to the main application for amendment. The application was orally canvassed before this Court on **28th July 2014**.
10. Counsel for the 1st Plaintiff submitted that all the parties they proposed to bring to the suit were in one way or another connected to the liquidation of the 6th Defendant. It was Counsel's submission that the 6th Defendant owed to the Plaintiffs certain contractual obligations hence the need to bring them on board. He further submitted that there was no prejudice to be suffered by the Defendants. In the event of any prejudice, he argued that the same would be remedied by damages.
11. In opposition to the application, Mr. Kamau, Counsel for the 1st and 2nd Defendants submitted that his clients would suffer prejudice. Firstly, the amendment to the Plaintiff would prolong the suit unnecessarily considering that the suit was ready for hearing and all parties had filed their documents.
12. Secondly, it was submitted by Counsel that there was the issue of practicality of the orders sought by the 1st Plaintiff seeking to injunct the Foreign and Commonwealth Office (FCO) of the United Kingdom from paying any moneys not only to the 1st and 2nd Defendants but to any other party

- except as directed by this Court. It is Counsel's submissions that this matter is not only between advocates but that it also involves around 40,000 Kenyans. For that reason, any orders granted by this Court seeking to injunct FCO from making any payments will highly prejudice them.
13. Thirdly, it is Counsel's submissions that, it is difficult to see how this Court will injunct the High Court in the United Kingdom, which is expected to order, if this case is won, through their office of FCO payments to the 40,000 Kenyans. According to Counsel, bringing in the FCO amounts to joining the British Government in these proceedings which orders, he argues, the Court cannot make.
 14. Mr. Wena for the 3rd, 4th and 5th Defendants submitted that there was no demonstration to the effect that the proposed Defendants were involved in the liquidation of the 6th Defendant. According to Counsel, there is no way the FCO can be involved in the liquidation of a Private Company. He further submits that the draft amended Plaintiff does not explain the involvement of the proposed Defendants in this matter.
 15. In reply, Mr. Onyango submitted that he had attached documents to show the connection between the 6th Defendant and the Parties the Plaintiff seeks to add to the suit. It was Counsel's submission that since the filing of the suit there has been constant mutation of the 6th Defendant and the addition of the Parties herein seeks to stop the said mischief. He further submitted that the FCO was the ultimate player in this matter and that even if there was mutation once the FCO was joined there would be no prejudice.
 16. I have considered the application herein, the affidavits on record as well as oral submissions by Counsel for the respective parties. Having done so, it is my view that the main issue for determination is whether or not this Court should grant the Orders of amendment as sought by the 1st Plaintiff.
 17. It is now common ground that the Court has wide discretionary powers to order amendment. The guiding principle for amendments is to be found under **Order 8 rule 5 (1)** of the **Civil Procedure Rules**. The purpose of amendments is to determine the real question in controversy between the parties, or of correcting any defect or error in any proceedings.
 18. It is the 1st Plaintiff's case that the proposed amendments are necessary in this litigation as they go to the core of the 1st Plaintiff obtaining justice by having his claim realised. I suppose the 1st Plaintiff's argument is based on the fact that the 6th Defendant is under liquidation and therefore by adding the proposed Defendants they are seeking to ensure their claim is not squandered.
 19. However, the practicality of having to serve the proposed Defendants and ensuring they are amenable to the jurisdiction of this Court is obviously in question. The Plaintiffs have not in any way addressed this issue. It is known to all parties that the 6th Defendant is now not represented by any Advocate in Kenya. In addition, the 1st Plaintiff has also not given sufficient reasons as to why they seek to join the Foreign & Commonwealth Office, a department of the United Kingdom Government. As I have earlier stated this will raise new issues of jurisdiction.
 20. In the draft further amended Plaintiff, it is the 1st Plaintiff's averments that the 13th Defendant is liable to compensate the 6th, 10th, 11th and 12th Defendants for the Mau Mau claims that the 6th Defendants lodged against the United Kingdom Government. In that case, it is for the Defendants already sued, and especially the entities in the United Kingdom to pursue the said payments from their Government in the event that the Plaintiffs' claim is successful.
 21. This matter has already been set down for hearing and it is important that the matter is heard and determined in the earliest time possible. It is foreseeable that the orders sought for by the 1st Plaintiff to add the proposed Defendants may end up delaying the matter. However, in the interest of justice, and to ensure the parties are on equal footing, the Plaintiffs should be given a chance to

ensure their claim is sufficiently pleaded. Both parties had complied with Order 11 of the Civil Procedure Rules and I believe it is in the interest of both parties that this matter be heard and determined in a timely manner.

22. Therefore, since it is not in dispute that the 6th Defendant is in liquidation and given the fact that the said Defendant had already submitted itself to the jurisdiction of this Court, I am inclined to allow the 1st Plaintiff's amendment only to the extent that it incorporates the liquidators of the 6th Defendant. To be clear, the amendment should not include the Foreign and Commonwealth Office which is the proposed 13th Defendant as well as the proposed 11th Defendant, who has not been shown to be a liquidator of the 6th Defendant.

23. In the upshot, the Notice of Motion dated **3rd July 2014** and filed on **4th July 2014** is allowed only to the extent that it adds the liquidators of the 6th Defendant. I further order the 1st Plaintiff to effect service against the proposed Defendants/liquidators within 30 days from the date of this Ruling. Thereafter, this matter should be fixed for hearing within 90 days. There shall be no order as to costs.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Omino holding brief for Haege for 1st and 2nd Plaintiffs

Omino for 3rd Plaintiff

No appearance for Defendants

Irene – Court Clerk