

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO. 233 OF 2011

(FAST TRACK)

**MUMWANJESYI DEVELOPMENT
LIMITED.....PLAINTIFF**

V E S U S

DAVID MUTUA MULII.....DEFENDANT

RULING

An application seeking leave to amend a Notice of Motion to correct the name of one of the parties should ordinarily not generate much controversy. The plaintiff has sought the leave of this court to amend the Notice of Motion dated 9th August 2011 to correct the name of the plaintiff which is said to have been erroneously stated as MUMWANJESYI INVESTMENTS LIMITED instead of MUMWANJESYI DEVELOPMENT LIMITEED. The Defendant opposes the application.

Some brief background is necessary. By a plaint dated 9th August 2011 MUMWANJESYI INVESTMENTS LIMITED brought this action against the Defendant. Simultaneously, the plaintiff filed a Motion for temporary injunction and on the same day obtained restraining orders exparte pending the hearing of the Motion interpartes. On 4th October 2011, and before the close of pleadings, the plaintiff filed an Amended Plaint deleting from its name the word '*Investments*' and replacing it with the word '*Development*' so that the plaintiff would read MUMWANJESYI DEVELOPMENT LIMITED. This may have had the effect of substituting parties but Order 8 Rule 3(3) of the Civil Procedure Rules 2010 allows it. It became necessary that a similar correction be made in the Notice of Motion and hence this application.

The Defendant opposes the application on two fronts. One, that the effect of correcting the Motion would be to automatically transpose interim orders enjoyed by the previous plaintiff to a new party. Two that amended plaint is fatally defective as it was not accompanied by a verifying affidavit.

I will start by considering the latter objection. I have looked at the amended plaint. The effect of the amendment is to replace the previous plaintiff with a new party. This is conceded by the Director of Mumwanjesyi Development Ltd one Joseph Wainaina Muraya when in paragraph 10 of his affidavit sworn on 11th November 2011 he deposes-

"I entirely agree that 'MUMWANYESYI DEVELOPMENT LIMITED' and 'MUMWNYESYI DEVELOPMENT LTD' are different corporate entitles."

It being so, the amended plaint ought to have been accompanied by a verifying affidavit sworn by an officer of the incoming company duly authorized under the seal of the company to do so (see Order 4 Rule 1 (2) and Order 4 Rule 1 (4) of The Civil Procedure Rules 2010). It is true that there is a verifying affidavit sworn by one Joseph Wainaina Muraya on 4th October 2011 accompanying the amended plaint. Annexed to the affidavit is a copy of a Board Resolution of the Directors of MUMWANYESYI INVESTMENTS LTD of 30th July 2011. This is a copy of the Board resolution which accompanied the

original plaint and is not a board resolution of incoming company. Although I do not think that Order 4 Rule 1(4) requires a plaintiff to annex the authority of the company to a verifying affidavit, a plaintiff who has chosen to do so must annex a valid authority. As things stand the authority annexed to the verifying affidavit is not an authority duly granted by MUMWANJESYI DEVELOPMENT LTD and to that extent the verifying affidavit falls short of the requirement of Order 4 Rule 1(4) of The Civil Procedure Rules 2010.

I have to find that the defect on the verifying affidavit infects the Amended plaint. This is, no doubt, a curable defect but for now MUMWANJESYI DEVELOPMENT LTD is not properly before court. The result is that this court will not allow an application by a party not properly before it.

I would, as I hereby do dismiss the application with costs.

Dated and delivered at Mombasa this 19th day of December, 2011.

F. TUIYOTT
JUDGE