



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 775 OF 2017

HALIMA MAHMOOD ALI

(Suing in her capacity as Legal Representative of the

Estate of HAWA HASSAN MOHAMUD).....PLAINTIFF

=VERSUS=

AMAL PLAZA LIMITED.....DEFENDANT

CENTER STAR LIMITED.....PROPOSED 2ND DEFENDANT

NUH ABDILLE HASSAN.....PROPOSED 3RD DEFENDANT

HUSSEIN HASSAN BOOD.....PROPOSED 4TH DEFENDANT

RULING

What is before the court is an amended Notice of Motion application dated 20th February, 2020 brought by the plaintiff seeking the following orders;

1. This Application be certified as urgent and heard ex parte in the first instance.
2. Pending the hearing and determination of this application, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from selling the goodwill of the, leasing, letting, licencing or in any manner whatsoever alienating the plaintiff's shops erected on the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
3. Pending the hearing and determination of this application, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from interfering with the plaintiff's tenants occupying the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
4. Pending the hearing and determination of this application, a mandatory injunctive order be made against the defendant and the intended defendants by themselves, their agents, servants or otherwise howsoever compelling them to vacate the suit property to wit property known as L.R No. 36/460/VII situated at Eastleigh area in Nairobi.
5. Pending the hearing and determination of this application, an injunction be issued against the defendant and the intended defendants by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the plaintiff's possession of suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
6. Pending the hearing and determination of this application, this Honourable Court does in exercise of its supervisory jurisdiction, call for the record of the proceedings in Nairobi Chief Magistrate's Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali and make such orders and give such directions as it may consider appropriate.
7. Pending the hearing and determination of this application this Honourable Court does quash, lift, review or set aside the orders made in Nairobi Chief Magistrates Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali issued on 15th February, 2018 by Honourable G. A. Mmasi, (Mrs), Senior Principal Magistrate and/or the proceedings in their entirety.
8. Directions be given for the earliest date possible for the inter partes hearing of the Orders set out herein below, which ought to be

argued together with the application dated 17th December, 2017.

9. The plaintiff be granted leave to join, Center Star Limited, Nuh Abdille Hassan and Hussein Hassan Bood as the 2nd, 3rd and 4th defendants respectively.
10. The plaintiff be granted leave to amend its plaint filed herein dated 22nd December, 2017 to include the stated proposed defendants, and to accordingly articulate its claim in the terms contained in the draft annexed hereto.
11. The draft amended plaint annexed hereto be treated as the plaintiff's amended plaint and that the same be deemed as having been duly filed and served after payment of the requisite fees.
12. Pending the hearing and determination of this suit, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from selling the goodwill of the, leasing, letting, licencing or in any manner whatsoever alienating the plaintiff's shops erected on the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
13. Pending the hearing and determination of this suit, a temporary injunction be issued against the defendant and the intended defendants restraining them by themselves, their agents, servants or otherwise howsoever from interfering with the plaintiff's tenants occupying the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
14. Pending the hearing and determination of this suit, a mandatory injunctive order be made against the defendant and the intended defendants by themselves, their agents, servants or otherwise however compelling them to vacate the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi.
15. IN THE ALTERNATIVE to prayer No. 14 above, pending the hearing and determination of this suit, the proposed 3rd defendant, his servants, employees or agents be barred from collecting rents or goodwill in the suit property, to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi, and that these rental proceeds be deposited in a joint interest earning account held in the names of the advocates for the plaintiff and for the proposed 3rd defendant, Nuh Abdille Hassan.
16. The proposed 3rd defendant, Nuh Abdille Hassan be ordered to furnish up to date accounts of all rental proceeds and goodwill received from the suit property to wit property known as L.R No. 36/460/VII situated in Eastleigh area in Nairobi, from the date when he came into possession of the suit property to date.
17. Pending the hearing and determination of this suit, an injunction be issued against the defendant and the intended defendants by themselves, their agents, servants or otherwise howsoever restraining them from interfering with the plaintiff's possession of suit property to wit property known as L. R. No. 36/460/VII situated in Eastleigh area in Nairobi.
18. This Honourable Court does in exercise of its supervisory jurisdiction and call for the record of the proceedings of Nairobi Chief Magistrate's Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali and make such orders and give such directions as it may consider appropriate.
19. That this Honourable Court does quash, lift, review or set aside the orders made in Nairobi Chief Magistrate Court Civil Case No. 800 of 2018, Nuh Abdille Hassan v. Halima Mohamood Ali issued on 15th of February, 2018 by Honourable G. A. Mmasi, (Mrs) Senior Principal Magistrate and/or the proceedings in their entirety.
20. The costs of this Application be in the cause.

The application was brought on the grounds set out on the face thereof and on two affidavits sworn by the plaintiff on 5th March, 2018 and 20th February, 2020. In summary, the application was brought on the following grounds: The plaintiff was at all material times the administrator of the estate of Hawa Hassan Mohamud who was the owner of all that property known as L.R No. 36/460/VII situated in Eastleigh, Nairobi ("the suit property"). In 2014/2015, the proposed 3rd defendant and the plaintiff entered in a joint venture agreement under which the proposed 3rd defendant was to finance the construction of a seven storey business complex on the suit property after demolishing an old structure that was standing thereon.

The rights and obligations of the parties were set out in the said joint venture agreement dated 10th November, 2014. The proposed 3rd defendant was unable to finance the construction of the said business complex on the suit property. That failure resulted in the plaintiff putting in a sum of Kshs. 9,000,000/= to finance the construction of the said building. The plaintiff was thereafter approached by the proposed 2nd defendant which sought a contract to construct the said building that was being put up on the suit property. The proposed 2nd defendant and another company known as Amal Group of Companies informed the plaintiff that they would grant to the plaintiff access to the suit property through a building adjacent to the suit property known as Amal Shopping Centre if the plaintiff gave the proposed 2nd defendant the said contract.

The proposed 2nd defendant assured the plaintiff that it had authority from the owners of Amal Shopping Centre to deal with the plaintiff. The plaintiff was also approached on the same issue and given similar assurance by two people who carried themselves out as directors of the defendant which to the plaintiff's knowledge was the owner of Amal Shopping Centre. As at the time the proposed 2nd defendant was approaching the plaintiff to be given the construction work, work had already commenced on the suit property through another contractor with the proposed 3rd defendant as the financier of the project.

The proposed 2nd defendant assured the plaintiff that the contractor who was already on site would be paid for the work done and the proposed 3rd defendant would also recover his investment on the project. The proposed 3rd defendant was present in the negotiations that the plaintiff held with the proposed 2nd defendant and agreed to the new arrangement. The proposed 2nd defendant thereafter gave a projection of the income that was to be realised from the project and how it would be apportioned among the various parties that were involved in the project. The proposed 2nd defendant thereafter introduced the plaintiff to the proposed 4th defendant as the person who was to undertake the sale of the units on the suit property on a commission basis. Towards this end, the plaintiff entered into a commission agreement with the proposed 4th defendant.

On the basis of the said representations, the plaintiff entered into another agreement with the proposed 2nd defendant on 14th November, 2016 for the provision of access to the suit property through Amal Plaza and marketing and sale of shops at the basement of the said shopping complex on the suit property. The rights and obligations of the parties under this new agreement were set out therein. Following the execution of this new agreement, the joint venture agreement between the plaintiff and the proposed 3rd defendant stood rescinded. It was agreed between the plaintiff and the proposed 2nd defendant that in the event that the proposed 2nd defendant was unable to realise the income that it had projected, the plaintiff would hand over to the proposed 2nd defendant the basement shops aforesaid in satisfaction of the plaintiff's obligation under the said agreement between them.

As at the time the plaintiff entered into the said agreement with the proposed 2nd defendant, the construction of the shopping complex on the suit property known as "G-Centre" had already been concluded and a number of shops had already been sold. Approximately US\$ 2,000,000/= had been realised from the sale of some of the shops. The proposed 3rd defendant and the proposed 4th defendant who had been appointed to carry out the sale of the units on the suit property collected rent during the period 2016/2017 from the shops that had not been sold. The proposed 2nd, 3rd and 4th defendants failed to account for US\$ 2,000,000/= in good will and the rents collected despite demand upon them to render accounts.

The plaintiff had in the meantime executed 49 leases in favour of the proposed 2nd defendant in respect of 49 shops pursuant to the agreement between them. Due to the proposed 2nd and 3rd defendants' failure to account for the monies received as aforesaid, the plaintiff demanded the said leases back. The proposed 2nd defendant refused to surrender the leases arguing that it had already committed the same. Among the commitments mentioned by the proposed 2nd defendant was the payment of US\$ 260,000/= to Amal Money Transfer Express Ltd. as part payment of the agreed sum of US\$ 2,000,000/= that was to be one off payment for access through Amal Shopping Centre. Amal Group of Companies later on changed their position on the fees for the said access and demanded payment of US \$ 20,000/= per month instead of one off payment of US\$ 2,000,000/= as had been agreed and in respect of which it had been paid US\$ 600,000/=. This change of the terms for granting the plaintiff access through Amal Shopping Centre was contrary to the agreement the plaintiff had entered with Amal Group of Companies through the proposed 3rd defendant which was its agent which agreement also stood rescinded.

The plaintiff took possession of the suit property in December, 2006. The proposed 2nd defendant however continued to have rent that was being realised from the suit property paid to him directly. The proposed 2nd defendant made a false report of theft to the police against the plaintiff in an attempt to intimidate the plaintiff and seize control of the suit property from her. At this time, there were also threats being given to the tenants on the suit property that access to the suit property through Amal Shopping Centre would be closed which threat was executed in May, 2007 when the access to the suit property was closed.

The dispute between the plaintiff and the proposed 2nd defendant was taken to Eastleigh Business District Association for arbitration. The association after hearing the parties made certain recommendations which were not acceptable to the plaintiff. The access to the suit property through Amal Shopping Centre remained shut. The plaintiff then decided to file this suit. The filing of this suit prompted the filing of another suit by the proposed 3rd defendant in the Chief Magistrate's court against the plaintiff namely, Nairobi CMCC No. 800 of 2018 ("lower court suit") in which the proposed 3rd defendant obtained ex parte orders for the eviction of the plaintiff from the suit property which eviction was carried out on 23rd February, 2018.

The orders that were obtained in the lower court were fraudulent and were a conspiracy between the defendant and the proposed defendants to forcefully take possession of the suit property from the plaintiff and thereafter open the access that they had blocked so as to defeat the contempt of court proceedings that had been instituted herein against the defendant. The said access through Amal Shopping Centre was subsequently opened.

The said lower court orders were irregular and should be set aside *ex debito justitiae*. The plaintiff had moved to the lower court to have the same set aside. After obtaining the said orders from the lower court, the proposed 2nd defendant evicted over 100 tenants from the suit property and offered their shops to new tenants whom he was charging good will of up to US\$100,000/= per shop.

The plaintiff averred that it was in the interest of justice that the proposed defendants be added to this suit to enable the court to effectually and completely adjudicate and settle all questions involved in the suit. The plaintiff averred further that it was also necessary to grant the injunction sought to prevent the proposed 3rd defendant from interfering with the plaintiff's possession of the suit property. The plaintiff also urged the court to exercise its supervisory power over the lower court and grant the orders sought in respect of the lower court suit.

The plaintiff averred further that the suit property did not belong to the proposed 3rd defendant and that his interest in the property if any was subject to accounts and was in any event 25% only of the rent collected. The plaintiff averred that the proposed 3rd defendant had been collecting rent without rendering accounts to the plaintiff. The plaintiff averred that it was only fair in the circumstances for the proposed 3rd defendant to be prevented from further collection of rent from the suit property and be ordered to account for the rent so far collected together with the good will. The plaintiff averred that in the alternative, all the rent collected from the suit property should be deposited in a joint bank account in the names of the advocates for the plaintiff and the proposed 3rd defendant. The plaintiff averred that the issue of the validity of the various agreements that the parties had entered into was before the court for determination and as such there was no basis for

the proposed 3rd defendant's continued collection of rent from the suit property.

Response to the application.

The plaintiff's application was opposed by the defendant and proposed defendants. The defendant filed a replying affidavit sworn by Yusuf Ahmed Dahir on 13th July, 2020 in opposition to the application. The defendant averred that it was incorporated in 2004 and that since then, it had neither owned nor run any business in Kenya. The defendant averred that it had remained dormant since incorporation. The defendant averred that the issues raised in the plaintiff's application and the prayers sought concern the plaintiff and the other parties to the application and had nothing to do with the defendant. The defendant averred that it had no interest in the suit property and did not own or let any shop therein. The defendant averred that it was not a party to the lower court suit and as such orders sought against it in respect of that suit could not issue.

The defendant averred that the plaintiff had not demonstrated that any of the reliefs sought in the application should be granted as against the defendant. The defendant averred that it could not have made a promise to the plaintiff that it would grant the plaintiff access to the suit property through Amal Plaza since it did not own the building. The defendant averred further that it was not involved in any of the negotiations regarding the said access and that no payment was made to it in relation thereto. The defendant averred that it was not a party to the agreement that the plaintiff entered with the proposed 2nd defendant and as such the same could not be enforced against it. The defendant averred further that it was different and distinct from Amal Group of Companies and that any communication the plaintiff may have had with the said company did not concern it. The defendant averred further that it had never appointed the proposed 2nd defendant as its agent neither had it received any payment in relation to the grant of access to the suit property through Amal Plaza. The defendant denied that it had a director by the name Jama. The defendant averred that it was not a necessary party to this suit since the issues raised in the suit and the application before the court did not concern it. The defendant urged the court to dismiss the application with costs.

The 2nd and 4th proposed defendants opposed the plaintiff's application through a joint grounds of opposition dated 10th July, 2020 in which the 2nd and 4th proposed defendants contended that the court lacked jurisdiction to hear and determine the application because the issues raised therein had been determined by the Court of Appeal in Civil Appeal No. 298 of 2018 and Civil Appeal No. 312 of 2018. The 2nd and 4th proposed defendants contended that there was no leave granted by the Court of Appeal for the amendment of the application and that the Court of Appeal had ordered that the application be heard as it was. The 2nd and 4th proposed defendants contended further that the application did not contain a draft amended plaint and that the same was muddled up. The proposed 2nd and 4th defendants contended that the application was incomplete as it sought to be heard together with another application dated 17th December, 2017 that had not been served upon the parties. The proposed 2nd and 4th defendants averred further that the orders sought could not be granted because the injunctive orders sought could not be granted against the proposed 2nd and 4th defendants before they were made parties to the suit. The proposed 2nd and 4th defendants contended that the orders sought if granted would offend Order 40 rule 1 of the Civil Procedure Rules. The 2nd and 4th proposed defendants averred further that this court had no jurisdiction to exercise its supervisory powers in respect of a suit that had been concluded in the subordinate court. The proposed 2nd and 4th defendants averred that the pleadings by the plaintiff disclosed multiplicity of causes of action that could not be heard in a single suit. The 2nd and 4th proposed defendants contended that the plaintiff's application was an abuse of the process of the court.

The proposed 3rd defendant filed a replying affidavit sworn on 20th July, 2020 in opposition to the application. The proposed 3rd defendant reiterated the contents of his replying affidavit sworn on 20th March, 2018. The proposed 3rd defendant averred that the plaintiff's application was bad in law and a candidate for striking out in that; the application sought orders against non-parties to the suit, the applicant had not complied with the provisions of Order 8 of the Civil Procedure Rules, the court lacked jurisdiction to grant the orders sought and that the orders sought could not be granted. The proposed 3rd defendant averred that the plaintiff was guilty of nondisclosure of material facts and as such she was not deserving of the exercise of the court's discretion. The proposed 3rd defendant averred that having entered into a contract with the plaintiff for the construction of a seven storey commercial building on the suit property, he had an interest in the suit property. The proposed 3rd defendant averred that he took a bank loan to put up the said building on the suit property and as such he was opposed to the plaintiff's proposal for rent to be deposited in an escrow account. The proposed 3rd defendant averred that he could not be able to service the loan if the rent was deposited in an escrow account. The proposed 3rd defendant averred that no basis had been laid by the plaintiff for the orders sought. The proposed 3rd defendant urged the court to dismiss the application as an abuse of the process of the court.

The plaintiff's application was heard by way of written submissions. The plaintiff filed submissions and further submissions dated 2nd July, 2020 and 4th September, 2020. The defendant, the proposed 2nd and 4th defendants, and the 3rd proposed defendant filed their submissions on 10th August, 2020, 17th July, 2020 and 6th August, 2020 respectively.

Determination.

I have considered the plaintiff's application together with the grounds of opposition and replying affidavits filed in opposition thereof. I have also considered the written submissions by the advocates for the parties and the various authorities cited therein in support thereof. The respondents have raised several technical objections to the plaintiff's application which I will consider first before delving into the merit of the application should it become necessary. The first issue that has been raised by the respondents that touches on the competency of the application is the failure by the plaintiff to amend the original application within the 14 days that was given by the court when allowing the amendment.

It is not disputed that the plaintiff sought leave of the court on 3rd February, 2020 to amend her Notice of Motion application dated 5th March, 2018. The respondents did not object to the leave sought and the court granted the plaintiff 14 days from the date of the order to amend the said application. It is not disputed that the plaintiff did not amend the said application within 14 days. The application before the court was not filed until 28th February, 2020; some 25 days from the date of the order granting leave to amend the application. This means

that the plaintiff's application was filed 11 days out of time. It is not disputed that the plaintiff did not seek extension of time within which to file the amended application. The court has been asked to strike out the plaintiff's application on account this failure to seek extension of time. The plaintiff has argued that the delay in filing the amended Notice of Motion application was not inordinate and that the respondents were not prejudiced by the delay. The plaintiff has urged the court to extend the time and deem the application to have been filed within time and to proceed to consider it on merit.

Order 8 rule 6 of the Civil Procedure Rules provides that where a party fails to amend a document after leave has been granted within the period given by the court or if no period is specified within 14 days, the order granting leave shall cease to have effect but without prejudice to the power of the court to extend the period. In the case before me, I am in agreement with the plaintiff that no prejudice has been suffered by the respondents by the plaintiff's delay in filing the amended Notice of Motion application. The respondents raised the issue of delayed service of the application in court and the court granted them more time to respond to the application. This court is enjoined under Article 159 (2) (b) and (d) of the Constitution to dispense justice without undue delay and undue regard to procedural technicalities. I am of the view that I would not be observing the said constitutional imperative if I am to strike out the application before me so that the parties can start all over again to argue the original Notice of Motion application dated 5th March, 2018. In exercise of the power given to the court under Order 8 rules 6 and 8 of the Civil Procedure Rules, I will extend the time within which the plaintiff would have amended the Notice of Motion dated 5th March, 2018 up to and including 28th February, 2020 and shall deem the amended Notice of Motion dated 20th February, 2020 to have been filed within time. If I am wrong in admitting the amended Notice of Motion dated 20th February, 2020 under Order 8 rules 6 and 8 of the Civil Procedure Rules, I will still allow the application by overlooking the objection by the respondents which is procedural in nature pursuant to Article 159(2)(d) of the Constitution for the sake of doing substantive justice in the matter. As I have already mentioned, the respondents have not satisfied me that they have suffered any prejudice or injustice by the plaintiff's failure to file the amended application within time.

The other objection that was raised by the respondents was that the application did not comply with order 8 rule 7 of the Civil Procedure Rules which requires an amended document to be endorsed with rules under which the amendment has been carried out or the date of the order granting leave to amend. Again, it is not disputed that the plaintiff's application did not comply with that rule. This in my view is another procedural lapse which the court is allowed to overlook for the purpose of doing substantive justice. In any event, the respondents have not demonstrated that they suffered any prejudice by the failure of the plaintiff to endorse the amended Notice of Motion with the date of the order which granted her leave to amend the application. I therefore find no merit in the objection.

The other objection that was raised by the respondents was that the plaintiff was not permitted by the Court of Appeal to amend the Notice of Motion dated 5th March, 2018 and as such the amended application was incompetent. I did not at all appreciate this objection. The plaintiff applied for leave to amend the Notice of Motion dated 5th March, 2018. The respondents did not object to the application. The leave was accordingly granted by the court. When the court granted the plaintiff leave to amend the application, the court was seized of this suit. The proceedings that the parties had before the Court of Appeal had already been concluded and a determination made. I am unable to follow the argument by the proposed 2nd and 4th defendants that leave to amend the Notice of Motion dated 5th March, 2018 should have been sought in the Court of Appeal. I find no merit in this objection.

Having disposed of the preliminary issues, I will now consider the application on merit. In her application, the plaintiff sought a total of 20 orders 8 of which are now spent. The outstanding orders are numbers 8 to 20. The plaintiff has sought an order to join the proposed 2nd, 3rd and 4th defendants to the suit and to amend the plaint to effect that joinder. The plaintiff has annexed to her affidavit sworn on 5th March, 2018 a draft amended plaint. The law on joinder of parties and amendment of pleadings is now settled. Order 1 rule 3 of the Civil Procedure Rules provides as follows:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

Order 1 rule 10 (1) to (4) of the Civil Procedure Rules on the other hand provides as follows:

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

Order 1 rule 3 of the Civil Procedure Rules provides for the persons who may be joined as defendants in a suit while Order 1 rule 10 empowers the court to substitute and add parties to an existing suit like in the present case. In my view, under Order 1 rule 10(2) of the Civil Procedure Rules, the court can only join a person as defendant to an existing suit in two instances, first, where such person ought to have

been joined as a defendant under Order 1 rule 3 of the Civil Procedure Rules aforesaid and was not so joined and secondly, where the presence of such person before the court may be necessary in order to enable the court to adjudicate and settle all questions involved in the suit. The onus was upon the plaintiff to bring herself within the provisions of Order 1 rule 10 of the Civil Procedure Rules. After considering the issues raised in the affidavits in support of the application and the draft amended plaint, I am satisfied that the plaintiff has met the threshold for joinder set out in Order 1 rule 10 of the Civil Procedure Rules. The plaintiff has demonstrated that she has arguable claims against the proposed defendants. In Werrot and Company Ltd. and others v Andrew Douglas Gregory and others, Nairobi(Milimani) HCCC No. 2363 of 1998(1998) LLR2848(CCK), the court stated that:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.

With regard to amendment of pleadings, the law is that applications for leave to amend should be allowed freely at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs. See, Central Kenya Ltd. v Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998 and Robert Ombaso Nyareru & another v Beldina Mokaya, Court of Appeal at Kisumu, Civil Appeal No.200 of 2011. The law as set out in these cases is that, parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid multiplicity of suits, provided, no inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

It is only the defendant who is a party to this suit. The other respondents to the application are not yet parties to the suit. The defendant has not convinced me that it will suffer any prejudice or injustice if the plaintiff is granted leave to amend the plaint. The proposed defendants have also not shown any prejudice or injustice that they will suffer if joined as parties to the suit. The issues raised in their replying affidavits go to the merit of the defences that they will have against the plaintiff's intended claims against them. I am satisfied that the plaintiff has established valid grounds for the joinder of the proposed 2nd, 3rd and 4th defendants to the suit and for leave to amend the plaint to effect the said joinder.

Apart from the joinder of parties and amendment of the plaint, the plaintiff had also sought injunctive orders against the defendant and the proposed defendants. As was stated in the case of Giella v Cassman Brown & Co. Ltd [1973] EA 358, an applicant for interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

From the totality of the evidence before me, I am not satisfied that the plaintiff has established a prima facie case against the defendant and the proposed defendants. The plaintiff appears to have entered into two (2) separate joint venture agreements with the proposed 2nd and 3rd defendants. The plaintiff has claimed that the joint venture agreement with the proposed 3rd defendant had been rescinded before she entered into another agreement with the proposed 2nd defendant. The plaintiff has claimed further that even the second joint venture agreement with the proposed 2nd defendant was also rescinded. There is no evidence that the joint venture agreement between the plaintiff and the proposed 3rd defendant was terminated in accordance with its terms. I have also noted that the plaintiff and the proposed 3rd defendant entered into a lease agreement which is still in force. The plaintiff has not denied this lease. There is also no clear evidence as to how the second agreement with the proposed 2nd defendant was rescinded. All the agreements that the plaintiff entered into with the proposed 2nd and 3rd defendants including the lease had arbitration clauses. Apart from her claim against the proposed 2nd and 3rd defendants which are based on written agreements, the claims against the defendant and the proposed 4th defendant are based majorly on discussions and oral agreements the existence of which are contested and can only be determined at the trial. It is difficult in the absence of oral evidence to determine the rights of the parties under the various written and oral agreements that the plaintiff claims to have entered into with the defendant and the proposed defendants. I am unable to determine the nexus between the joint venture agreement and the lease agreement that the plaintiff entered into with the proposed 3rd defendant in respect of the suit property and the rights that accrued to the parties under each. In the absence of a prima facie evidence that the defendant and/or the proposed defendants have breached the agreements they are alleged to have entered into with the plaintiff, a prima facie case has not been established. The terms of the various agreements that the parties entered into are highly contested. In Ougo and Another v Otieno [1997] KLR 364, it was held that:

“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”

I am of the view that in a case of this nature, the best that the court can do for the parties is to maintain the status quo pending the determination of the contentious issues at the trial. It is not disputed that the proposed 3rd defendant is the one in possession of the suit property. According to the lease and the joint venture agreement that he entered into with the plaintiff, he is supposed to pay to the plaintiff rent monthly. The plaintiff and the proposed 3rd defendant were also supposed to share good will through an agreed formula. It is this

arrangement that this court can protect pending the hearing of the suit. In the circumstances, the court is not inclined to grant the prohibitory and mandatory injunctive reliefs sought by the plaintiff. To secure the plaintiff's interest in the property and the income that she was to receive in the arrangement that she entered into with the proposed 3rd defendant, the court will order the proposed 3rd defendant to continue paying the rent that was payable to the plaintiff under the joint venture agreement. The court will also direct that all good will received from the suit property from the date hereof shall be deposited in a joint bank account in the names of the advocates for the plaintiff and the proposed 3rd defendant pending the hearing of the suit. With regard to the prayer for this court to exercise its supervisory jurisdiction over the lower court in respect of Milimani Chief Magistrate's Court Civil Suit No. 800 of 2018, I am of the view that it would not be appropriate for this court to intervene at this stage despite the serious reservations that the court has with regard to the orders that were issued in that suit by the lower court. Since the order that this court had made staying the lower court suit was set aside by the Court of Appeal, the plaintiff is at liberty to prosecute her application pending before the lower court for the setting aside of the orders of that court. It is clear from the evidence placed before this court by both parties that the lower court had no pecuniary jurisdiction to entertain the proposed 3rd defendant's suit. Let that court discharge its orders that had been made without jurisdiction. I do not wish to say more on that suit.

In conclusion, the plaintiff's application succeeds in part. The same is allowed on the following terms;

1. Center Star Limited, Nuh Abdille Hassan and Hussein Hassan Bood are added to this suit as 2nd, 3rd and 4th defendants respectively.
2. The plaintiff shall amend the plaint in terms of the draft amended plaint annexed to the plaintiff's affidavit sworn on 5th March, 2018 to effect the joinder.
3. Pending the hearing and determination of the suit, the 3rd defendant, Nuh Abdille Hassan shall pay to the plaintiff as and when it falls due the rent that was agreed upon by the parties in the Joint Venture Agreement dated 10th November, 2014 and the lease dated 1st January, 2015 in respect of L.R No. 36/460/VII (the suit property).
4. Pending the hearing and determination of the suit, the 3rd defendant, Nuh Abdille Hassan shall from 1st February, 2021 render to the plaintiff a true account on a quarterly basis of the monies collected or received from the suit property as rent and goodwill.
5. Pending the hearing and determination of the suit, the monies collected or received from the suit property as goodwill shall with effect from 1st February, 2021 be deposited in a joint bank account in a reputable bank in Nairobi in the names of the advocates on record for the plaintiff and the 3rd defendant, Nuh Abdille Hassan as and when the same is received by the 3rd defendant, Nuh Abdille Hassan.
6. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 28th Day of January, 2021

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Kamau h/b for Wandabwa for the Plaintiff

Mr. Masai h/b Mr. Anzala for the 1st Defendant

Mr. Nyangau for the 2nd and 4th defendant

Ms. Wambugu for the 3rd defendant

Ms. C. Nyokabi-Court Assistant