

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.262 OF 2002

NEWTON LIYAYI & 76 OTHERS PLAINTIFFS

VERSUS

BIRCH INVESTMENTS EPZ LTD. DEFENDANTS

RULING

This application is seeking two orders i.e. an order that the Plaintiff be granted leave to amend the plaint as per annexed draft amended plaint and that the same draft amended plaint be deemed as duly filed and served upon payment of requisite fees. It is also seeking costs to be in the cause. It is brought on grounds that the amendment is necessary to include and reflect the names of all the 77 Plaintiffs; that the amendment will enable the court to determine all matters in question between all parties interested in the subject suit and that the proposed amendment will not cause prejudice to the Defendant. There is also an affidavit in support of the application.

The Respondent opposed the application and filed Grounds of opposition but did not attend court to urge the same grounds. However the grounds of opposition are on record and I cannot ignore them. The grounds are that the plaint is incurably incompetent and no amount of amendment can cure the defect. The first Plaintiff herein did not have leave to represent the other 76 person; that the amendment seeks to join the other 76 persons to the suit irregularly by implication without their seeking to be so joined; that the Plaintiff herein still does not have leave of court to prosecute this application for unjoined others and the amendment is therefore an abuse of the court process.

The original plaint which is sought to be amended did mention that the Plaintiff was suing together with 76 others. Only the names of the same 76 were not mentioned in that plaint. Indeed a list has been provided showing that the same 76 plaintiffs gave authority and instructions to the counsel to proceed and take action on their instructions. I do not see any merit in the objection that the plaintiff Newton Liyayi needed leave of the court to commence the proceedings on behalf of the 76 others as this is not a representative to suit.

I do feel that this application is merited. I do not see any prejudice that the Defendant would suffer as the original plaint had made it aware that the Plaintiffs were 77 and not one. I do allow the application in terms of prayer 1. However as to prayer 2, I do feel and I order that the amended plaint be filed and served within ten days of the date hereof. The Defendant is at liberty to file amended Defence within 10 days of the service of the amended plaint upon it. As the Defendant did not attend court on the hearing day, I will make no order as to costs for it. I will also not order costs in the cause. There shall be no order as to costs. Orders accordingly.

Dated and delivered this 26th Day of February 2003.

J.W. ONYANGO OTIENO

JUDGE