

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 508 OF 2015

NDUNDE INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

JACKSON MUTUGI MWANGI.....1ST DEFENDANT

FRANCIS GATHAMBO WAMBURI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

RULING

Through the application dated 18/02/2020, the 1st and 2nd Defendants sought leave to amend their defence in line with the annexed amended draft and to have that draft deemed duly filed upon payment of the requisite filing fees. They also sought to have the costs of the application be in the cause. The application was based on the ground that the Defendants had brought out all the issues in the proposed amended defence and that the amendments were necessary for the court to make an informed decision in the interest of justice.

The application was supported by the 1st Defendant's affidavit sworn with the 2nd Defendant's authority on 18/02/2020 where he deponed that the Defendants intend to add more details in the proposed amended defence which their former advocate did not include in their initial defence but which were necessary because it sets out all the issues for the court's determination. He annexed a copy of the draft amended defence and prayed that the court allows the amendments as they would not prejudice the Plaintiff.

The Plaintiff opposed the application vide the grounds of opposition dated 21/02/2020 and urged that the application was frivolous and an abuse of the court process and that there was no legal basis to allow the amendments. The application was also opposed vide the replying affidavit sworn by Isaac Gichia Mbugua on 22/02/2020. Mr. Mbugua, who is the Plaintiff's director, deponed that he was not a party to these proceedings but there were allegations made against him in the intended amended defence, and therefore if there was any counterclaim it should be against him and not the Plaintiff. He also deponed that in their initial defence, the 1st and 2nd Defendants admitted that they did not have any dealings with the Plaintiff while in the proposed amended defence, they allege that they dealt with the Plaintiff's directors, a line of defence that is contrary to their initial defence. He annexed the agreement for the sale of the suit property dated 09/11/2010 which the Defendants relied which gives his name as the vendor of the suit property and the Defendants as the purchasers. He also deponed that the court had made a ruling on 02/12/2016 based on the 1st and 2nd Defendants' averments in their initial defence and their submissions in which they alleged that Isaac Gichia Mbugua was an imposter as he was neither a director nor a shareholder of the Plaintiff but they now allege that they dealt with him as the director of the Plaintiff.

The court has considered the pleadings. The question for determination is whether the Defendants' application is merited and whether the amendments sought will prejudice the Plaintiff. In **J.C. Patel v D. Joshi 1952 19 EACA 12** cited in **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** the court stated on the question of amendments was that however negligent or careless the first omission may have been and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. Applying those principles to this case, if the proposed amendment was allowed as it is, the procedure would be to grant the Plaintiff corresponding leave to file a further reply to the Defendant's amended defence. However, the peculiar circumstances in the proposed amended defence are that the Defendant has made allegations not against the Plaintiff but largely against Isaac Gichia Mbugua and Christine Mbugua who are the Plaintiff's directors. Isaac Gichia Mbugua is indicated as the vendor in the sale agreement dated 09/11/2010 which is the subject matter of this suit and which the 1st and 2nd Defendants rely on.

Considering that a company is a separate legal entity from its directors and the Plaintiff's directors are not parties to this suit, it would prejudice them largely if they were denied an opportunity to participate in the proceedings. The proposed amendments cannot form the basis of a separate suit and clearly belong to this suit. Persons against whom allegations are made should be joined to the suit so that they can participate in the proceedings in the interest of justice.

Under Order 1 Rule 10 of the Civil Procedure Rules, the court has the discretion to order any party whose presence before the court is necessary to be joined to the suit. Considering that the purpose of amending pleadings is to bring before the court all the relevant material to enable the court arrive at a just decision, the court grants the Defendants leave to amend their statement of defence to join Isaac Gichia Mbugua and Christine Mbugua as parties to this suit.

The Defendants are directed to file and serve their amended defence within seven days of today.

Delivered virtually at Nairobi this 15th day of February 2021.

K.BOR

JUDGE

In the presence of:-

Mr. O. Gichana holding brief for Mr. Kelvin Mogeni for the Plaintiff

No appearance for the Defendants

Mr. V. Owuor- Court Assistant