



**Gift Kikwetu Dishes Limited v Samchi Telecommunications Limited & 2 others
(Environment & Land Case 27 of 2016) [2022] KEELC 2506 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2506 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 27 OF 2016**

OA ANGOTE, J

JULY 7, 2022

BETWEEN

GIFT KIKWETU DISHES LIMITED PLAINTIFF

AND

SAMCHI TELECOMMUNICATIONS LIMITED 1ST DEFENDANT

PARAGON PROPERTY CONSULTANTS 2ND DEFENDANT

GEOFFREY MBURU T/A HAKI TRADERS AUCTIONEERS .. 3RD DEFENDANT

RULING

1. Vide a Notice of Motion application dated 12th October, 2021 brought pursuant to the provisions of Sections 1A, 1B, 63(e) and 3A of the *Civil Procedure Act* and Order 1 Rule 10 (2) & 4 and Order 8 Rule 3 & Rule 5(1) of the *Civil Procedure Rules*, 2010, the 1st Defendant/ Applicant seeks the following orders;
 - a. That this Honourable Court be pleased to grant leave to enjoin the Plaintiffs' Directors/ Guarantors David Ndung'u Kamau and Rahab Karie Ndungi as necessary parties/Co-Defendants in the 1st Defendants' Counter-claim.
 - b. That upon grant of prayer (a) above, this Honourable Court be pleased to grant the 1st Defendant/Applicant leave to amend its Amended Defence and Counter-claim amended on the 24th April, 2019 in terms of the draft Further Amended Defence and Counter-Claim annexed hereto.
 - c. That the 1st Defendant/Applicant be and is hereby granted leave to file its Further Amended Defence and Counter-claim within fifteen (15) days of the date of the order granted herein upon payment of the requisite court fees.
 - d. That the costs of the Application be provided for.



2. The application is based on the grounds on the face of the Motion and is supported by the Affidavit of Faith Mutheu Mutie, the Deputy Property Manager of the 2nd Defendant duly authorized to swear the Affidavit by the Directors of the 1st and 2nd Defendants.
3. It was her deposition that the Plaintiff's Directors/Guarantors David Ndung'u Kamau and Rahab Karie Ndungi are necessary parties to this suit having jointly and severally executed personal guarantees in favour of the 1st Defendant guaranteeing the observance and performance of all the terms and obligations by the Plaintiff under the lease for the suit premises situate on the basement and 1st floor of the building known as EL Roi Towers, Tom Mboya Street, Land Reference Number 209/528 Nairobi.
4. According to the Deputy Property Manager of the 2nd Defendant, the Plaintiff's Directors guarantee included payment of rent and performance of the covenants in respect of which the Plaintiff is in default and to indemnify the 1st Defendant as the landlord all losses accruing from non-performance aforesaid and that the 1st Defendant has filed a counterclaim against the Plaintiff seeking to recover Kshs 5, 302,117/= and intends to enforce the guarantee issued by the proposed necessary parties jointly and severally.
5. It was deponed that the joinder of the Plaintiff's Directors in this suit will entail a further amendment of the Defence and Counter-claim to enable the 1st Defendant enforce the guarantee; and that the court has jurisdiction to allow amendment of pleadings at any stage of the proceedings.
6. In response to the application, the Plaintiff through its Director deponed that the debts of a company cannot be the debts of its directors and members; that the debts of a company can only legally accrue to its members on proof of fraud on the part of its directors and members and upon lifting the corporate veil and that in any event, the proceedings seek to recover sums against the Defendants and as the parties' liabilities have not crystallized, the application is premature. The parties did not file submissions.

Analysis & Determination

7. Having considered the Motion and the Affidavits, the issues that arise for determination are;
 - i. Whether the Application for the joinder of the proposed parties as Co-Defendants/ necessary parties is merited and if so;
 - ii. Whether the consequential order of amendment of the Defence and Counterclaim ought to be granted?
8. The 1st Defendant/Applicant seeks the joinder of the proposed parties as Co-Defendants in the Counter-claim and/or necessary parties and the amendment of the Defence and Counter-claim to reflect this position. The application is premised on Order 1 Rule 10 (2) of the *Civil Procedure Rules* which stipulates as follows:
 - (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."



9. With respect to joinder of Defendants, Order 1 Rule 3 of the [Civil Procedure Rules](#) is instructive and states thus;

“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.”

10. In [Pravin Bowry vs John Ward & Another](#) [2015] eKLR, the Court of Appeal while considering the principles to be considered in an application for joinder of parties to a suit referred to the Ugandan case of [Deported Asians Custodian Board vs Jaffer Brothers Ltd](#) [1999] 1 E.A. 55 (SCU) where the court stated as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

11. Equally, the Court of Appeal in [Civicon Limited vs Kivuwatt Limited and 2 Others](#) [2015] eKLR observed as follows;

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined.”

12. The Court in [Civicon Limited](#)(supra) further placed reliance on its earlier decision in [Meme v Republic](#) (2004) KLR 637 where in considering an application for joinder, it had held that joinder will be permissible:

- a. Where the presence of the party will result in the complete settlement of all the question involved in the proceedings;
- b. Where the joinder will provide protection for the rights of a party who would otherwise be adversely affected in law: and
- c. Where the joinder will prevent a likely course of proliferated litigation?



13. By way of a brief background, the Plaintiff instituted this suit against the Defendant seeking inter-alia for an order that the Lease entered into between itself and the 1st Defendant is void and/or was vitiated by misrepresentation and as such, the Plaintiff is entitled to a refund of the monies paid as rent for the suit premises amounting to Kshs 4,000,000.
14. The Plaintiff has further claimed for the sum of Kshs 7,600,000 for loss of business and Kshs 10,365,000 for improvements and assets. Vide the amended Defence and Counter-claim, the 1st and 2nd Defendants' have sought as against the Plaintiff the sum of Kshs 6,371,263 being the outstanding rental arrears.
15. According to the 1st Defendant/Applicant, the proposed parties are personal guarantors of the Plaintiff in favour of the 1st Defendant guaranteeing the observance of the Plaintiff's obligations under the lease and that the 1st Defendant having counterclaimed against the Plaintiff, it intends to enforce the aforesaid guarantee and the two guarantors are therefore necessary parties.
16. On its part, the Plaintiff, through its Director, asserts that the application is premature because no liability has yet been established against itself and that Directors and Members of a company cannot be liable for a company's' debts until fraud and/or illegality is proven against the Directors after lifting of the corporate veil.
17. The obligation of a guarantor was clearly and succinctly set out in *Halsbury's Laws of England* 4th Edition Vol. 20 paragraph 194, as follows:

“On the default of the principal debtor causing loss to the creditor, the guarantor is, apart from special stipulation, immediately liable to the full extend of his obligation, without being entitled to require either notice of the default or previous recourse against the principal ...”
18. In the present case, the 1st Defendant/Applicant has produced into evidence a Lease Agreement entered into between itself and the Plaintiff. Indeed, clause 7 of the Lease Agreement provides for the Guarantors Covenants as set out under the ninth schedule, which schedule provides as follows:

“That during the term, the Tenant will punctually pay rent and observe and perform the covenants and other terms of this lease and if at any time during the term the Tenant makes any default in payment of the rents or in observing or performing any of the covenants or other terms to this lease, the guarantors will pay the rents and observe or perform the covenants or terms in respect of which the Tenant is in default and make good to the landlord on demand and indemnify the landlord against losses, damages, costs and expenses arising or incurred by the Landlord.”
19. It is evident from the foregoing that the 1st Defendant is entitled to seek from the proposed parties any sums due to it from the Plaintiff. That being so, the said guarantors are necessary parties in that respect. The issues between the Plaintiff and the 1st and 2nd Defendants are related to the set of facts that relate to the guarantee that was given by the proposed parties. In this regard, it would be a waste of the precious judicial time to require the 1st Defendant to litigate separately with the proposed parties should it eventually succeed.
20. Indeed, it not having been indicated in the Lease Agreement that the guarantee was given by the proposed parties in their capacity as Directors of the Plaintiff, it follows that the Plaintiff's opposition to the application for joinder of the guarantors in the suit on account that they cannot be sued as Directors until the corporate veil is lifted is unmerited. Additionally, it has not been stated by the



Plaintiff that the joinder of the said guarantors will prejudice any party. As expressed by the Court of Appeal in *JMK vs MWM & Another* [2015] eKLR, citing with approval the case of *Central Kenya Limited vs Trust Bank & 4 Others*, CA No. 222 of 1998;

“all amendments should be freely allowed and 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 properly be compensated for in costs.”

21. In the circumstances, the court finds that the 1st Defendant has made out a case for the inclusion of the proposed parties in this suit to enable the court to effectually determine the dispute between all the parties.

22. The general power of the court to amend pleadings is drawn from Section 100 of the *Civil Procedure Act* which provides as follows;

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

23. Order 8 Rule 3(1), (2) and (5) of the *Civil Procedure Rules*, 2010 provide as follows;

(3)

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

24. Whereas Order 8 Rule 5(1) provides;

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

25. The principles upon which a court acts in an application to amend a pleadings were set out by the Court of Appeal in *Central Kenya Limited vs Trust Bank Limited* (2000) eKLR which referred to



commentaries on the Indian Civil Procedure Code by Chittaley and Rao where the learned authors stated as follows with regard to the rule to amendment of pleadings;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state: A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

26. More recently, the Court of Appeal in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] eKLR affirmed that the law applicable to amendment of pleadings is as stated in Bullen and Leake & Jacob's *Precedents of Pleadings* – 12th Edition and captured in the Court of Appeal decision in *Joseph Ochieng & 2 Others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 thus:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

27. In the present case, the amendment has been sought to effect joinder of the proposed parties as Co-Defendants and/or necessary parties. Having found merit in the prayer seeking to join the proposed parties in the Counter claim, it follows that the amendment is necessary.

28. For those reasons, the application dated 12th October, 2021 is found to be merited and is allowed in the following terms;

- a. Leave be and is hereby granted to the 1st Defendant/Applicant to join David Ndungu Kamau and Rahab Kiarie Ndungi as co-defendants/necessary parties in the Counter-claim.
- b. Leave be and is hereby granted to the 1st Defendant to amend its Amended Defence and Counter-Claim Amended on 24th April, 2019 in terms of the draft Further Amended Defence and Counter-claim.
- c. Leave be and is hereby granted to the 1st Defendant Applicant to file its Further Amended Defence and Counter-claim within 15 days from the date hereof.
- d. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 7TH DAY OF JULY, 2022.

O. A. ANGOTE

JUDGE



In the presence of;

Mr. Gikera for the Defendant/Applicant

Mr. Chege for the Plaintiff/Respondent

Mr. Nyaribo for Mr. Macharia for the Defendants

Court Assistant - June

