



Ndumberi Farmers Co Ltd (In Liquidation) v Shah & 2 others (Environment & Land Case 1213 of 2013) [2019] KEELC 2659 (KLR) (4 July 2019) (Ruling)

Ndumberi Farmers Co. Ltd. (In Liquidation) v Vinubhai Virpal Shah & 2 others [2019]eKLR

Neutral citation: [2019] KEELC 2659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

ENVIRONMENT & LAND CASE 1213 OF 2013

SO OKONG'O, J

JULY 4, 2019

(FORMERLY HCCC NO. 342 OF 2006)

BETWEEN

NDUMBERI FARMERS CO LTD. (IN LIQUIDATION) PLAINTIFF

AND

VINUBHAI VIRPAL SHAH 1ST DEFENDANT

SETTLEMENT FUND TRUSTEES 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

RULING

1. The plaintiff brought this suit against the defendants on 4th April, 2006 seeking the following reliefs:
 - (a) An order directing the 3rd defendant to rectify the registers relating to the properties known as Land Reference Numbers 7595, 7596 and 9675, Molo by cancelling the registration of the said properties in the name of either the 1st or 2nd defendants and/or any other third party(ies) they may have been transferred to and reinstating the said properties in the name of Ndumberi Farmers Co. Ltd. the plaintiff herein.
 - (b) In the alternative, an order for the refund of the full value of Land Reference Numbers 7595, 7596 and 9675 based on the prevailing market value as at the time of judgment and payment of mesne profits in respect thereof.
 - (c) General damages.
 - (d) Costs of the suit



2. The plaint was amended on 26th September, 2006. In the amended plaint, the plaintiff averred that Ndumberi Farmers Company Limited (hereinafter referred to as “the Company”) which was undergoing liquidation was the registered proprietor of all those parcel of land known as Land Reference Numbers 7595, 7596 and 9675 (“the suit properties”). The plaintiff averred that on or about 15th June, 1994 the appointed liquidators of the company agreed to sell to the 1st defendant the suit properties at a consideration of Kshs.16,500,000/=. The plaintiff averred that the 1st defendant did not pay to the plaintiff a deposit of 10% of the purchase price in accordance with clause 3 of the agreement for sale. The plaintiff averred further that on 26th October, 1996 the plaintiff’s then advocates forwarded to the 1st defendant’s advocates the completion documents on the 1st defendant’s said advocates’ undertaking to release to the plaintiff’s said advocates a sum of Kshs.15,680,000/= within 30 days of registration of the transfer in favour of the 1st defendant.
3. The plaintiff averred that following unexplained delay on the part of the 1st defendant to complete the agreement, the plaintiff’s then advocates wrote to the 1st defendant’s advocates to return to them the completion documents. When the said advocates failed to respond, the plaintiff’s advocates decided to carry out a search on the title of the suit properties which revealed that the same had already been transferred to the 1st defendant fraudulently on 9th March, 1998 using instruments of transfer other than the ones which were forwarded to the 1st defendant’s advocates in 1996. The plaintiff averred that as at the date of filing the suit, the 1st defendant had not made any payment to the plaintiff on account of the purchase price for the suit properties. The plaintiff averred that the sale of the suit properties to the 1st defendant was vitiated on account of the 1st defendant’s failure to complete the agreement and as such the 1st defendant did not obtain valid titles in respect of the suit properties.
4. The plaintiff averred that in or about the year 2001, the 1st defendant fraudulently sold the suit properties to the 2nd defendant. The plaintiff averred that the 1st defendant having acquired the suit properties fraudulently, he had no title in the same which he could pass to the 2nd defendant.
5. The 1st defendant filed a statement of defence on 31st August, 2006. The 1st defendant admitted that the plaintiff was at all material times the registered proprietor of the suit properties. The 1st defendant averred that it paid to the plaintiff the full purchase price for the suit properties in the sum of Kshs.16,500,000/=. The 1st defendant denied that it acquired the suit properties fraudulently and urged the court to dismiss the plaintiff’s suit with costs.
6. For reasons which are not clear from the record, the 1st defendant filed another statement of defence on 20th February, 2017 through the firm P. K. Kibet & Company Advocates. This in my view was irregular. The 1st Defendant could only amend its statement of defence that he filed in person on 31st August, 2006 with leave of the court but could not file a completely new defence.
7. The 2nd and 3rd defendants filed a joint statement of defence on 4th March, 2008. The 2nd and 3rd defendants denied the plaintiff’s claim in its entirety. The 2nd and 3rd defendants denied being involved in fraud or any irregularity in relation to the suit properties.
8. The hearing of the suit commenced on 19th July, 2017. The court has so far taken the evidence of two witnesses for the plaintiff one of whom his evidence has been heard in part. What is now before the court is the plaintiff’s application brought by way of Notice of Motion dated 9th November, 2017 seeking leave to further amend the plaint in the manner set out in the draft further amended plaint annexed to the affidavit in support of the application. The application which was brought under Order 8 Rule 3 of the Civil Procedure Rules was brought on the grounds that; in its Annual General Meeting held in November, 2003, several persons including Ezekiel Kamau Kariuki the deponent of the affidavit



in support of the application were appointed as the company's 2nd set of liquidators with power to sue and be sued. The plaintiff averred that the suit herein was filed in 2006 while the company was in liquidation but in the name of the company instead of that of the liquidators. The plaintiff averred that it was necessary to amend the plaint further to bring the suit in the name of the liquidator as provided for in law. The plaintiff averred that the intended amendment would not prejudice the defendants in any way. The application was supported by the affidavit of Ezekiel Kamau Kariuki sworn on 9th November, 2017 in which he reiterated what I have stated above.

9. The application was opposed by the 1st defendant through Notice of Preliminary Objection dated 21st December, 2017. In his preliminary objection, the 1st defendant contended that the plaintiff's application was misconceived, defective and amounted to an abuse of the process of the court. The 1st defendant contended further that the 2nd set of liquidators of the company who are sought to be substituted as plaintiffs were not lawfully appointed. The 1st defendant averred that Ezekiel Kamau Kariuki who swore the affidavit in support of the application was not a member of Ndumberi Farmers Company Limited ("the company"). The 1st defendant averred further that this suit was filed without the authority of the members or legitimate liquidators of the company. The 1st defendant contended further that the firm of J. M. Njenga & Company Advocates were not validly appointed and instructed to file the present suit. The 1st defendant urged the court to dismiss the plaintiff's application and proceed to strike out the suit with costs.
10. At the hearing of the application, Ms. Wambua appeared for the plaintiff/applicant while Mr. Kibet appeared for the 1st defendant. There was no appearance for the 2nd and 3rd defendants. In her submissions in support of the application, Ms. Wambua submitted that the plaintiff's application sought to amend the plaint so that the suit may be brought in the name of the liquidators of the company. She submitted that the intended amendment would assist the court to determine all the issues between the parties and that the same would not prejudice the defendants. Ms. Wambua submitted that it is not necessary to dismiss a suit if life can be breathed into it through an amendment. She relied on the case of *Bosire Ogero v Royal Media Services* [2015] eKLR and submitted that amendment of pleadings can be allowed at any time. With regard to the 1st defendant's contention that the 2nd set of liquidators of the company sought to be joined in the suit as plaintiffs had been appointed contrary to section 298 and 299 of the repealed Companies Act, Chapter 486 Laws of Kenya (now repealed), Ms. Wambua submitted that that was not the case. She submitted that the said section of the repealed Companies Act was not applicable as the company had already appointed liquidators and as such it was not necessary to apply to the court to appoint a liquidator for the company as required under Section 298 of the said Act. As to whether Ezekiel Kamau Kariuki who swore the affidavit in support of the application was a shareholder of the company, Ms. Wambua submitted that the said Ezekiel Kamau Kariuki had already testified in the suit and had produced evidence showing that he was a shareholder of the company. With regard to the issue of the legality of the appointment of the firm of J. M. Njenga & Company Advocates to act for the plaintiff and to file this suit, Ms. Wambua submitted that the said firm was validly appointed and instructed to act for the plaintiff in the present suit. She referred the court to the documents at pages 23, 24 and 26 of the plaintiff's supplementary bundle of documents as evidence of the said law firm's appointment to act for the plaintiff.
11. Ms. Wambua submitted that an amendment can be allowed even if it is intended to correct a defect in the pleadings. She argued that the defect which the plaintiff intended to correct in the case was that of bringing a suit in the name of the company instead of that of its liquidators.
12. In his submissions in reply, Mr. Kibet submitted that the plaintiff's application to further amend the plaint was brought in bad faith in that the application was intended to accommodate Ezekiel Kamau Kariuki who was not a member of Ndumberi Farmers Co. Limited ("the company"). Mr.



Kibet reiterated that the 2nd set of liquidators sought to be substituted as plaintiffs in the suit were not legitimately appointed in accordance with sections 298 and 299 of the *Companies Act*, Cap 486 Laws of Kenya (now repealed). Mr. Kibet submitted that since the plaintiff was in voluntary liquidation, new liquidators could only be appointed by the court and appropriate notice of their appointment given.

13. In a rejoinder, Ms. Wambua reiterated that section 298 and 299 of the repealed *Companies Act* only applied to situations where there was no liquidator appointed by the Company and that the same was not the case here since liquidators had been appointed and appropriate notice given to the Registrar of Companies.
14. I have considered the plaintiff's application together with the notice of preliminary objection filed by the 1st defendant in opposition thereto. The plaintiff's application was brought under Order 8 rules 3 and 5 of the Civil Procedure Rules. Order 8 rule 3(1) of the Civil Procedure Rules gives the court power at any stage of the proceedings to allow any party to amend his pleadings while Order 8 rule 3(5) of the Civil Procedure Rules provides that such amendment may be allowed even if its effect is to add or substitute a new cause of action. It is clear from the foregoing that the power to grant leave to a party to amend his pleadings is discretionary. The principles upon which the court exercises its discretion on applications for leave to amend pleadings are now well settled. In *Bullen & Leake & Jacob's Precedents of Pleadings*, 12th Edition which was cited with approval in the case of *Joseph Ochieng and 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991*, the authors stated as follows:

“.....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 the costs can compensate the other side; that the proposed amendments 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 with one of a substantially different character which could more conveniently be made the subject of a fresh action....”
15. In the case of *Central Kenya Limited v Trust Bank & 5 others*, Civil Appeal No. 222 of 1998 the court stated that:

“ 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 be properly compensated in costs.”
16. The principal reason given by the plaintiff for the amendment sought is that, whereas the plaintiff company is in voluntary liquidation, the suit was brought in the name of the company instead of that of liquidators and that the amendment sought is intended to bring on board the liquidators of the company as plaintiffs in place of the company.
17. As I have stated earlier in this ruling, the plaintiff's application was opposed by the 1st defendant only. The 2nd and 3rd defendants filed grounds of opposition but did not turn up in court during the hearing of the application. For the 1st defendant, his response to the application was by way of notice of preliminary objection. I am of the view that the issues raised by the 1st defendant in his notice of preliminary objection dated 21st December, 2017 are not issues of pure points of law. Whether the liquidators who are sought to be substituted in the suit as plaintiffs were validly elected is an issue of both law and fact. It cannot therefore be determined as a preliminary point of law as it would require evidence to determine. The 1st defendant had contended that the said liquidators should have been appointed in accordance with the provisions of Sections 298 and 299 of the *companies Act*, Cap 486,



Laws of Kenya (now repealed). I am in agreement with the plaintiff's advocate that the provisions of Section 298 of the repealed *Companies Act* are not relevant in the circumstances of this case. The court is empowered to appoint a liquidator under Section 298 of the *Companies Act* in the circumstances only where there is no liquidator. In the present case, the members of the company duly appointed liquidators. Whether or not a notice of such appointment was given is a matter of evidence that can only be determined at the trial. The same applies to the issue as to whether or not Ezekiel Kamau Kariuki who swore the affidavit in support of the application is a member of the plaintiff company. As rightly submitted by the plaintiff's advocate, Ezekiel Kamau Kariuki has already given evidence in this suit to the effect that he is a shareholder of the plaintiff company. He has produced a number of documents to prove his status in the plaintiff. The court cannot determine the issue of his membership of the plaintiff in a summary manner through preliminary objection. The issue will have to await final judgment.

18. The 1st defendant had also taken issue with the appointment of the firm of J. M. Njenga & Company Advocates to act for the plaintiff in this matter. The 1st defendant had contended that there was no resolution or valid resolution of the members appointing the firm of J. M. Njenga & Company advocates and instructing them to institute the present suit. At the hearing of the application, the plaintiff's advocate referred the court to the correspondence in the plaintiff's supplementary list of documents through which the firm was appointed to act for the plaintiff.
19. In the case of *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others (2015) eKLR*, the Court of Appeal cited with approval the Uganda Supreme Court case of *United Assurance Co. Ltd. v Attorney General SCCA No. 1 of 1998*, in which the court stated that:

“.....it is now settled, as the law, that, it does not require a board of directors, or even the general meeting of members to sit and resolve to instruct counsel to file proceedings on behalf and in the names of the company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of a board to act on behalf of that company.”
20. The 1st defendant did not place any evidence before the court to controvert the evidence produced by the plaintiff which shows that the liquidators of the plaintiff appointed the firm of J. M. Njenga & Company Advocates to act for the plaintiff. In the circumstances, I find no merit in the objection by the 1st defendant directed at the appointment of the firm of J. M. Njenga & Co. Advocates and the instructions which were given to them to file the present suit.
21. From what I have stated above, it is clear that all the objections that were raised to the plaintiff's application by the 1st defendant were of a technical nature. The 1st defendant did not contend at all that the amendment sought by the plaintiff would be prejudicial to him or that he will suffer injustice if the application is allowed. I have perused the draft further amended plaint attached to the affidavit in support of the application. I have noted that the proposed amendment seeks to have the liquidators of the company as plaintiffs in the suit instead of the company. Under Order 1 rule 10(1) of the Civil Procedure Rules, the court has power at any stage of the proceedings where a suit has been instituted in the name of a wrong person as plaintiff to order that the right plaintiff be substituted for the wrong plaintiff if it is satisfied that the suit had been instituted in the name of the wrong plaintiff through bona fide mistake.
22. I am satisfied from the material before me that the suit herein was instituted in the name of the company through a bona fide mistake and that it is necessary for the determination of the real issues in dispute between the parties that the liquidators of the company be substituted as plaintiffs in the suit in place



of the company. I am also satisfied that no prejudice or injustice would be occasioned to any of the defendants by the proposed amendment which cannot be atoned in costs.

23. The upshot of the foregoing is that the plaintiff's application dated 9th November, 2017 succeeds. The application is allowed in terms of prayer 1 thereof. The plaintiff shall file further amended plaint within 14 days from the date hereof. The defendants shall be at liberty to amend their statements of defence within 14 days from the date of service of the further amended plaint. The 1st defendant shall have the costs of the application.

DELIVERED AND DATED AT NAIROBI THIS 4TH DAY OF JULY 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Ms. Wambua for the Plaintiff

N/A for the 1st Defendant

N/A for the 2nd and 3rd Defendants

Mr. Waweru-Court Assistant

