



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERICHO**

**ELC CASE NO.3 OF 2017**

**LIBYA OIL KENYA LIMITED.....PLAINTIFF /APPLICANT**

**-VERSUS-**

**JOEL KIPKORIR SIEL.....1<sup>st</sup> DEFENDANT/RESPONDENT**

**ORYX ENERGIES LIMITED .....2<sup>nd</sup> RESPONDENT/RESPONDENT(intended)**

**RULING**

1. The Plaintiff/Applicant brings its Notice of Motion dated the 13<sup>th</sup> March 2020 under the provisions of Order 50 Rules 6, Order 8 Rule 3 and 6 of the Civil Procedure Rules and Sections 1, 1A, 1B, 3A and 95 of the Civil Procedure Act and all the enabling provisions of the law, seeking that the court reinstates its Orders made in the ruling of 6<sup>th</sup> February 2019 granting it leave to enjoin Oryx Energies Limited, amend its Plaintiff in terms of the draft amended Plaintiff, and for an extension of time to file the same.
2. The Application is based on the grounds on its face as well as on Applicant's supporting affidavit dated the 13<sup>th</sup> March 2020.
3. The Notice of Motion was opposed by both the 1<sup>st</sup> Defendant and the intended 2<sup>nd</sup> Defendant via their Replying affidavits dated the 25<sup>th</sup> September 2020 and the 23<sup>rd</sup> September 2020 respectively.
4. On the 29<sup>th</sup> September 2020, by consent directions were taken that the said application be disposed of by way of written submissions to which Parties complied.

**Applicant's written submissions.**

5. The Applicant submitted that vide the Orders made in the ruling delivered on 6<sup>th</sup> February 2019 they had been granted leave to file an amended Plaintiff to enjoin Oryx Energies Limited as a 2<sup>nd</sup> Defendant. However this was not done as an Associate who was dealing with the matter at their firm left the firm without either updating the file nor doing a proper hand over.
6. That the Respondents had continued with the acts of conversion contrary to the interlocutory Orders made on 20<sup>th</sup> January 2017 and therefore the intended 2<sup>nd</sup> Defendant was a necessary party in the proceedings for full and effective determination of issues arising in the suit.
7. That further, the Plaintiff Company having changed its name in the cause of the proceedings, it was appropriate to amend the Plaintiff to include the Plaintiff's new name from the former name to 'Ola Energy Kenya Limited'. Reliance was placed on the provisions of Order 1 Rule 10(2) and (4) of the Civil Procedure Rules
8. That the Orders for amendment having lapsed and in view of the need to effect the change herein above stated, the application for reinstatement of the lapsed Orders, extension of time and amendment of the Plaintiff in terms of the draft amended Plaintiff was merited and should be allowed.
9. The Applicant framed their issues for determination as follows;
  - i. Whether the Plaintiff is within the principles for amendment of pleadings.
  - ii. Whether the mistake of the Counsel ought to be visited on the client.

iii. Whether the reinstatement of the lapsed Orders occasioned prejudice to the Respondents.

10. On the first issue, the Applicant relied on the provisions of Order 8 Rule 6 of the Civil Procedure Rules to submit that where a party failed to amend its pleading within the time specified by the court after obtaining leave, then such order ceased to have effect unless it was extended by the court. That the court's orders of 6<sup>th</sup> February 2019 lapsed on 27<sup>th</sup> February 2019 and unless the same were extended by the court, the Applicant would not be at liberty to file their amended Plaintiff.

11. That as evidenced in their supporting affidavit, as well as a letter dated 15<sup>th</sup> July 2019 (herein annexed) an Associate in their firm M/S Harrison Mwangi Advocate who was dealing with the matter left the firm without either updating the file or doing a proper hand over. That this evidence was also supported by the sworn affidavit of Samson Ng'an'ga on behalf of the 2<sup>nd</sup> Defendant/Respondent to the effect that the said Associate did not appear in court when the matter was mentioned on the 27<sup>th</sup> March 2019, 16<sup>th</sup> May 2019 and 26<sup>th</sup> June 2019. The Applicant only became aware of the situation in July 2019 which was after the leave granted by the court had lapsed.

12. That the provisions of Order 50 Rule 5 of the Civil Procedure Rules and Section 95 of the Civil Procedure Act bestowed upon the court the power to enlarge time. That the delay in bringing the application as explained in the supporting affidavit was because after the Applicant had learnt of their predicament in the month of July 2019, their legal Counsel had proceeded on maternity leave and only resumed in office in January 2020 wherein the application was prepared in the month of March 2020 and forwarded for filing. Immediate filing was however hampered by the disruption of the court operations occasioned by the corona virus epidemic wherein the courts had been closed.

13. That it was trite law that the pleadings could be amended at any time before judgment of the court was delivered in a suit. That this principle served the purpose of ensuring that the ends of justice are met and so that the courts could adjudicate over the issues in dispute in an efficacious and conclusive manner. The Applicant relied on the decided case in **Kampala Coach Limited vs. First Community Bank Limited & Another [2016] eKLR**. That judgment in this matter had not been delivered and the suit was yet to be heard. That the Respondents had gone ahead to appropriate and convert the fuel dispensing equipment and other movable assets. That the court had powers under sections 1A, 1B, and 3A of the Civil Procedure Act to allow the application herein so that the matter could be set down for pretrial directions and hearing thereafter.

14. On the second issue for determination, the Applicant submitted that in cases where it has been shown that there had been a lapse or mistake on the part of a litigant's Counsel, the interests of justice were served by not punishing the litigant for the mistake of his advocate. That the predicament in this matter as herein above stated was highly regrettable wherein the Applicant beseeched the court not to punish the Plaintiff Company but rather make Orders that would conserve the ends of justice. Reliance was placed on the decisions in the case of **Belinda Murai & 6 Others vs Amos Wainaina [1974] eKLR** and **Phillip Chemweno & Another vs Augustine Kubende [1986] eKLR**.

15. As to whether the reinstatement of the lapsed orders occasioned prejudice to the Respondents, the Applicant submitted that although both Respondents had separately deponed that they would suffer prejudice, yet were the orders made on 6<sup>th</sup> February 2019 be reinstated to allow the Applicant to file their amended Plaintiff, the Respondents would not suffer any prejudice which could not be compensated with an award for costs. That on the contrary parties would have a fair chance to prosecute their case based on the issues pleaded in their respective pleadings wherein the court could give the final determination on the disputed issues. The Applicant relied on the decided case in **Ncholas Kipotoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & Others [2013] eKLR**.

16. The Applicant sought that their application be allowed and that throw way costs be granted in favour of the Respondents so as to prevent the ends of justice from being defeated.

#### **1<sup>st</sup> Respondent's submissions.**

17. The 1<sup>st</sup> Respondent in opposition to the Applicant's application and after giving a background of the matter in issue, submitted that upon the failure by the Applicant to file their amended Plaintiff within the further extended 14 days of the Orders initially granted, their application had automatically lapsed and therefore the suit should proceed for full hearing. That no proper explanation or grounds had been given to explain the long delay in complying with the court's orders two years after the same had been issued.

18. On whether the Applicant's application was merited and should be granted as prayed, the 1<sup>st</sup> Respondent's submission was to the effect that pursuant to the court's orders of 15<sup>th</sup> February 2019 having lapsed over 19 months to the time the Applicant filed the application, a further extension of 14 days had been granted and no plausible excuse had been given by the Applicant for the delay to comply with the said orders.

19. The principles for extension of time was summarized by the Supreme Court in **County Executive of Kisumu vs County Government of Kisumu [2017] eKLR** where the court had cited its decision in the case of **Nicholas Kiptoo arap Salat vs Independent Electoral & Boundaries Commission & Others (2014) eKLR**.

20. That it was clear from the supporting affidavit and annexures by the Respondents that the Applicant had not complied with the court orders but expected the court to assist them in their illegal acts. They sought that the Applicant's application be dismissed with costs.

#### **2<sup>nd</sup> intended Respondent's submissions.**

21. The 2<sup>nd</sup> intended Respondent's submission in opposition to the Applicant's application was that the same had been filed with inordinate delay wherein there had been no reasonable cause for the delay even after the court had exercised its discretion twice with the respect of extension of time sought. That the historical background of the case had revealed manifest indolence on both the Plaintiff and its Counsel on record which indolence did not merit further equitable action by the court.

22. That the issue in contention was not whether the Applicant had satisfied the principles for amendment of pleadings as this had already been determined by the court's ruling of 6<sup>th</sup> February 2019, rather, the issue for determination was whether the Applicant had satisfied the criteria for extension of time for the conditional order to be reinstated as per the settled principles set by the Supreme Court in the case of **Fahim Yasin Twala vs Timamy Issa Abdalla & 2 Others [2015] eKLR**. They submitted that the Applicant had not satisfied the same to warrant the exercise of the court's discretion in allowing the application in their favour.
23. That the Applicant had not provided any reason as to why it had failed to comply with the conditional orders of 6<sup>th</sup> February 2019 and the subsequent extension orders prior to the lapse thereof on 26<sup>th</sup> June 2019.
24. That pursuant to the ruling of 6<sup>th</sup> February 2019, the matter had been mentioned severally wherein the Applicant had neither appeared in court nor filed their amended Plaintiff, The court had then magnanimously but conditionally extended leave by 14 days to enable them comply. The Applicant failed to seize the opportunity yet again wherein the court had no alternative but to confirm its directions of 16<sup>th</sup> May 2019 and the conditional leave lapsed with effect thereto.
25. That the Applicant had slept on its right and acquiesced for an unreasonable long period of time and therefore having been completely indolent in amending the Plaintiff so as to prosecute this matter, they could not now seek for the court to exercise discretion in their favour as equity did not aid the indolent. Reliance was placed in the decided case in **Equatorial Commercial Bank Limited vs. Pickwel and Deal Limited & 2 Others [2019] eKLR**
26. The 2<sup>nd</sup> intended Respondent submitted that there was unreasonable delay in filing the present application and no justifiable the reasons had been tendered by the Applicant in support thereof. Further there was no explanation given as to why their former Associate did not file their amended Plaintiff prior to his departure in July 2019. That the letter dated the 15<sup>th</sup> July 2019 only confirmed the fact that the Applicant had been aware of the court's directions and therefore their inaction could not wholly be attributed to the departure of their former Associate.
27. The 2<sup>nd</sup> intended Respondent further submitted that the Applicant's non-attendance of court on several occasions despite notice, could not be viewed as a mistake or error on their part as was held in the case of **Nicholas Munyoki Masya vs Joel Ngei Kiteme & Another [2013] eKLR**, and that in the present instance, the mistakes of the Plaintiff's advocates be laid at the doorstep of the Plaintiff. Reference was made to the decided case in **Tana & Arthi Rivers Development Authority vs. Jeremiah Kimigho Makio & 3 Others [2015] eKLR**.
28. That the Applicant had a corresponding duty to actively prosecute its case as was held in the case of **Habo Agencies Limited vs. Wilfred Odhiambo Musinga [2015] eKLR**, and particularly in view of the admitted mistakes of its advocates(if at all), which it failed to do and was therefore equally indolent in the prosecution of its case. That the provisions of Section 95 of the Civil Procedure Act which gives the court the discretion to extend time needed to be exercised judicially in favour of an Applicant who had demonstrated good and sufficient reasons for not complying with the terms imposed and not to aid an indolent litigant.
29. The 2<sup>nd</sup> intended Defendant submitted that it stood to suffer substantial prejudice if the Plaintiff's application was allowed as prayed at this stage in time as it had not been a party and/or privy to the proceedings between the Plaintiff and the 1<sup>st</sup> Respondent with respect to the expired lease and assets. That further, it had been in possession of and had been conducting its business at the petrol station since January 2017 with the Plaintiff's knowledge.
30. That the conditional nature of the order had alluded to the need for the Plaintiff to have taken expedition steps of the matter to avoid foreclosure and prejudice likely to be suffered by a third party who had been actively engaging in business on the suit property.
31. That they had been incurring substantive legal costs despite not being a party to the proceedings which costs had been attributed to the Plaintiff's nonappearance during the proceedings and its failure to timelessly comply with court orders. That the delay in itself amounted to prejudice as it impeded on the adverse parties legitimate expectation to expeditious disposal of proceedings. Its intended joinder as a party to this proceedings had hung over their head like the sword of Damocles for over 2 years thereby curtailing its freedom of operations. That the Plaintiffs claim lay with the 1<sup>st</sup> Defendant and should it succeed, it could be compensated by an award of damages wherein the intended 2<sup>nd</sup> Defendant on the other hand would have to make substantive changes to its operations which could not be cautioned by monetary compensation. That the best interest of justice was therefore for the suit to be prosecuted in its current form to avoid occasioning further prejudice to the intended 2<sup>nd</sup> Defendant.
32. That Order 8 Rule 6 of the Civil Procedure Rules was explicit to the effect that where a party failed to amend a pleading after an order of amendment had been given by the court, the orders ceased to have effect wherein the party is taken to rely on the original pleadings. That the inordinate delay in this case was unreasonable and was not premised on justifiable grounds and the Plaintiffs inaction could not be excused and they must reckon with the consequence thereof.

#### **Determination.**

33. I have considered the Plaintiff/Applicant's application and the responses thereto by the Defendant/Respondents. I have equally considered the Parties written submissions.
34. It is not in dispute that via an application by a Notice of Motion dated 23<sup>rd</sup> July 2018, the Applicant moved the court seeking Orders that the 2<sup>nd</sup> Defendant herein be enjoined in the suit. The Applicant also sought leave to amend its Plaintiff in the terms of the Draft "Amended Plaintiff" filed therein as well as interim Orders of injunction against the 2<sup>nd</sup> Respondent pending the hearing and determination of this suit. On the **6<sup>th</sup> February, 2019 the court delivered its determination in the absence of the Applicant thereby granting the Applicant** leave to enjoin Oryx Energies (Kenya) Limited in this suit as a 2<sup>nd</sup> Defendant. The Plaintiff was also granted leave to amend and file its Plaintiff (in terms of the Draft Amended Plaintiff) within 21 days thereof.

35. It is not in dispute thus that pursuant to the court's pronouncement, a mention date for directions was slated for the 27<sup>th</sup> March 2019 with notice to the Applicant. Notice was served upon the Applicant who on the date scheduled for mention, was neither in court and neither had it complied with the Orders of 6<sup>th</sup> February 2019. A further mention date was slated for the 16<sup>th</sup> May 2019 to confirm compliance, with notice to issue upon the Applicant. On this date, there was yet again neither appearance nor compliance by the Applicant. The leave of 21 days granted had lapsed wherein the court graciously extended the leave for a further 14 days with a rider that should the Applicant not have complied within that timeframe as extended, the orders would automatically lapse and the suit shall proceed as originally filed. The matter had then been rescheduled for mention for the last time for the 27<sup>th</sup> June 2019 to confirm compliance with a notice to issue upon the Applicant. Come that day and the same scenario was repeated wherein the court found that since leave granted to the Applicant to amend its Plaintiff had lapsed, the suit proceeds as against the 1<sup>st</sup> Defendant, as originally instituted. The 2<sup>nd</sup> intended Defendant/Respondent was discharged.

36. It worth noting that from the 27<sup>th</sup> June 2019 when the court made this Orders, the present application dated the 13<sup>th</sup> March 2020 was filed almost 8 months later wherein the Applicant now seeks that the court reinstates its orders of 6<sup>th</sup> February 2019 so as to enable it enjoin Oryx Energies Limited as a 2<sup>nd</sup> Defendant and amend its Plaintiff in terms of the draft amended Plaintiff. The Applicant further seeks to amend its Plaintiff to change its name from the former name to 'Ola Energy Kenya Limited', the Company having changed its name in the cause of the proceedings and for an extension of time to file the amended Plaintiff.

37. Both the 1<sup>st</sup> Defendant/Respondent and the intended 2<sup>nd</sup> Defendant/Respondent have vehemently opposed the Applicant's Application stating that the same was filed with inordinate delay and that there had been no reasonable cause and/or explanation for the delay more so after the court had exercised its discretion twice with respect of extension of time sought. That there had been manifest indolence on both the Plaintiff and its Counsel on record which indolence did not merit further equitable action by the court.

38. The court in its ruling of the **6<sup>th</sup> February, 2019** having **granted the Applicant** leave to enjoin Oryx Energies (Kenya) Limited in this suit as a 2<sup>nd</sup> Defendant and to amend and file its Plaintiff (in terms of the Draft Amended Plaintiff), the issue for determination herein is whether the court should exercise its discretion further and re-instate the orders of 6<sup>th</sup> February 2019, the same having lapsed.

39. I have considered the explanation given by the Applicant as to why it did not comply with the Orders of 6<sup>th</sup> February 2019 within the time frame stipulated. The happenings therein only lead to the conclusion that there was a lapse of some sort on the part of Counsel for the Plaintiff. Indeed although I find that the Plaintiff's Counsel guilty of being indolent in the prosecution of this matter, yet I have considered the possibility of the argument that the Plaintiff could have done more or could have been more vigilant about the fate of its case especially given the amount of time which had passed by. However this is not a disciplinary cause against Counsel because I believe the error herein is not one which can found a disciplinary cause at all. I would however restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

*"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."*

40. Keeping in mind that the hearing of this matter has not commenced and since the exercise of discretion of the court is to avoid an injustice or hardship resulting from accident, inadvertence or excusable mistake or error and not otherwise to delay justice, I am inclined to take judicial notice that these are unique times and justice demands that courts should not act in a vacuum overlooking the wider picture to serve the course of justice. If the orders have been in force since 6<sup>th</sup> February 2019 and only lapsed under peculiar circumstances, the court is duty bound to restore justice by reinstating them as there would be no miscarriage of justice occasioned or committed in so reinstating the orders so as to grant both parties an opportunity to ventilate their case in respect of the suit herein instituted and a determination made on merit. I am of the view that the inconvenience suffered by the Defendant/Respondents as a result of reinstatement of the orders of 6<sup>th</sup> February 2019 can be adequately remedied through an award of costs.

41. In the case of **Rover International Ltd v Cannon Film Sales Ltd (1986)3 All ER 772 at page 780 – 781**, cited in **Lochab Bros Limited V Peter Kaluma T/A Lumumba Mumma & Kaluma Advocates & 2 Others (2013) eKLR**, the Court held that;

*"A fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to be wrong."*

42. The Applicant has also sought to amend their Plaintiff further to include their new name 'Ola Energy Kenya Limited'. On this issue, I am guided by the provisions of Order 8 Rule 3 (3) of the Civil Procedure Rules to wit;

*"An amendment to correct the name of a party may be allowed under sub-Rule (2) notwithstanding that it is alleged that the effect of the amendment will substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued?."*

43. In effect, the court may allow any party to amend his pleadings at any stage of the proceedings. The Applicant has sought leave to effect an amendment in its Plaintiff to reflect its new name which action cannot be construed as an abuse of the process of the court or cause any prejudice or injustice to the defendants/Respondents keeping in mind that the change of name took place in the pendency of the matter. Further the amendment to reflect the change of name, I find, will not affect any vested interests or any accrued legal rights to the parties. The Plaintiff/Applicant is therefore granted leave to amend its Plaintiff, to reflect its change of name. Further orders are that;

- i. The Orders of 6<sup>th</sup> February 2019 are herein reinstated.
- ii. The Applicant is granted leave of 21 days to amend its Plaint to reflect its new name
- iii. The Plaintiff/Applicant is also granted 21 days from the date of this ruling to file and serve their Amended Plaint for hearing and disposal of the suit expeditiously.
- iv. The Plaintiff/Applicant shall however pay throw away costs to the each of the Defendants of Ksh 20,000/= within 21 days from this date.

**Dated and delivered via Microsoft Teams this 21<sup>st</sup> day of May 2021**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**