



**Maina v Industrial & Commercial Development Corporation & another
(Commercial Case 10 of 2023) [2024] KEHC 7169 (KLR) (3 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 7169 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
COMMERCIAL CASE 10 OF 2023
DO CHEPKWONY, J
MAY 3, 2024**

BETWEEN

PETER KIAMA MAINA APPLICANT

AND

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION 1ST
RESPONDENT**

JOSMACK COMPANY LIMITED 2ND RESPONDENT

RULING

1. This suit was initially instructed at the Environment and Land Court, Thika as ELC No.11 of 2020. But on 11th May, 2023, the same was transferred to this court for hearing and determination.

On 20th November, 2023, the parties through their respective counsel made their first appearance before this court. Mr. Karauka, counsel for the Plaintiff then requested for leave to amend the Plaintiff so as to include an Interested Party in the matter. He contended that the suit property which was owned by the Plaintiff had been sold to another party by the Defendant during the ongoing litigation. Mr. Karauka emphasized the importance of updating the court record to accurately reflect the status of the property and to involve the Interested Party who stands to be implicated by the court's forthcoming decision. His argument is that the court has considerable discretion to approve the request for amendment and add the Third Party so that all the issues arising herein be litigated at once.
2. In opposing this request, Mr. Muiruri representing the 1st Defendant, resisted the proposed amendments and the joinder of the Third Party. He argued that the suit land abated and that the Plaintiff should submit a formal Motion to include the said Third Party.
3. In rejoinder, Mr. Karauka disputed the Motion that the suit had abated and maintained that the suit land been continuously active.



4. I wish to start with the discussion on whether the suit has abated. According to the provisions of Order 24 Rule 1 of the [Civil Procedure Rules](#), 2010;

“a suit shall abate at the death of a Plaintiff or Defendant unless the cause of action survives or continues against the legal representatives of the deceased”.

5. Mr. Muiruri, counsel for the 1st Defendant claimed that the suit had abated because some of the Defendants’ Directors had passed on and the Plaintiff did not collect and serve the Summons as is required under the [Civil Procedure Rules](#).

6. However, the court disagrees with the Motion that a suit would abate due to the death of some Directors as this then would amount to overlooking the fact that a Company has a separate legal identity from its members. Therefore, a suit against the Company does not cease due to a Director’s death.

7. In regard to abatement of a suit due to failure to issue or take out Summons and serve the same upon the other party, Order 5 Rule 1(6) of the [Civil Procedure Rules](#) states that:-

“If Summons are issued but not collected for service within thirty days of issuance or notification, then the suit will abate.”

8. Furthermore, Order 5 Rule 1(2) of the [Civil Procedure Rules](#) specified that:-

“..... Summons cannot be issued unless they are signed and sealed by the Court.”

9. In this case, there is no evidence that Summons were signed and sealed by the court or that the Plaintiff failed to collect such Summons. And without such proof, it cannot be concluded that the suit has abated.

10. Concerning the Plaintiff’s request to amend the Plaintiff, Order 8 Rule 3 of the [Civil Procedure Rules](#) provides for amendment of pleadings with leave of court in the following terms:-

[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.

Further Order 8 Rule 5 gives the court the general power to amend pleadings;-

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[1]. For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of 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.

11. In light of the abovementioned rules, the court would like to note that before it can allow a request for an amendment of a suit or any detail thereof, it has to first look into the intent and purpose of the amendment, whether any prejudice will be suffered by the other party or parties in dispute and whether the prejudice can be compensated by way of costs.

12. The goal of any amendment should be to allow the parties to adjust their legal claims to reflect the actual facts they wished to rely on, rather than on incorrect assumptions. Normally, courts should permit such amendments to address the real issue at hand or to prevent multiplicity of suits, as long as there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested



interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.

13. Applying these principles to the current case, it is clear that the Plaintiff initiated the suit while the suit property was still registered in his name while aiming to prevent the Defendants from selling it. However, the property has since been sold to a Third Party, a fact not yet formally pleaded in the pleadings. Therefore, it is necessary to amend the legal claims to reflect the time situation. Since the trial has not started, in this court's view, allowing the amendment will not cause any harm or injustice to the Defendants, who will have the opportunity to respond to the averments in the Amended Plaintiff.
 14. In regard to the inclusion of an Interested Party in the amended pleadings, Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 outlines how a court may decide to add a party to a case.
 15. Order 1 Rule 10(2) reads 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.
 16. From this rule, the court is clearly granted the discretion to order the name of a person who ought to be enjoined whether as a Plaintiff or Defendant, or whose presence before the court may be necessary, to enable the court to effectually and completely adjudicate upon the matter and settle all questions involved in the said suits.
 17. Rule 10(2) above expressly provides that the orders for joinder of parties can be made upon or without the application of either party, hence this court's disagreement with the 1st Defendant's counsel that the Plaintiff had to first make a formal application before seeking to enjoin the Third Party who purchased the suit property. Such orders may be made by the court on its own motion.
 18. Be that as it may, as long as it can be demonstrated that a party has a legitimate interest in the subject matter, there is little reason to deny such a person a joinder as an Interested Party. As Interested Party has repeatedly been said that to be a party who has a stake in the proceedings and stands to be affected by the decision of the court.
 19. In this case, the party to be added as an Interested Party is the one who brought the property from the Defendants, thus having a stake in the property that justified their inclusion in this suit. This court is convinced that its decision could impact on the Interested Party's rights over the property.
 20. Therefore, based on the above discussion, the court issues the following directions:-
 - a. The Plaintiff be and is hereby granted leave to file and serve an Amended Plaintiff that includes all relevant parties to the suit within twenty-one (21) days from the date of this order.
 - b. That the Defendants shall equally file and serve amended defence within fourteen (14) days of being served with the Amended Plaintiff.
 - c. Mention onJune, 2024 for parties to confirm compliance with the pre-trial directions.
- It is so ordered.

**DIRECTIONS DELIVERED, DATED AND SIGNED AT KIAMBU THIS ...3RD ... DAY OF.....
MAY....., 2024.**



D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Nyagah holding brief for Mr. Kurauka counsel for Plaintiff

Mr. Juma counsel for 1st Defendant (ICDC)

Court Assistant - Martin

