Likoko & 5 others v Makchina & another (Commercial Case E024 of 2021) [2024] KEHC 8942 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8942 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

COMMERCIAL CASE E024 OF 2021

HI ONG'UDI, J

JULY 24, 2024

BETWEEN

STANILAUS WEKESA LIKOKO ..... 1ST PLAINTIFF

NOEL VUYANZI VWAMU ..... 2ND PLAINTIFF

MAUREEN WANGUI ..... 3RD PLAINTIFF

RUTH WACUKA KARITU ..... 4TH PLAINTIFF

JANE LUCY MUNYASISLI ..... 5TH PLAINTIFF

BERNARD KIPTUM ..... 6TH PLAINTIFF

AND

MAGISTER LIOUBOV MAKCHINA ..... 1ST DEFENDANT

SAVANNA INTERNATIONAL LIMITED ..... 2ND DEFENDANT

RULING

1. The Notice of motion dated 7th August 2023 by the plaintiffs/applicants herein prays for the following orders;

   i. That this honourable court be pleased to grant the applicants leave to amend the plaint dated 30th August 2021.

   ii. That the annexed draft amended plaint be deemed as duly filed.

   iii. That the costs of this application be in the cause.

2. The application is premised on the grounds on the face of it as well as the affidavit of the 1st plaintiff/applicant sworn on even date. He deponed that on 18th July 2023, upon conducting due diligence search, the plaintiffs/applicants established that they have been irregularly struck out as shareholders

of the 2nd defendant /respondent company. Further that vide the CR 12 issued on 18th July, 2023, the plaintiffs/applicants shares had been allotted to the 1st defendant/respondent and others transferred to a new shareholder, Vanda Poljakova. He added that they were not privy to any meeting and/or resolution to appoint another shareholder of the 2nd defendant/respondent company.

3. He deposed further that the plaintiffs/applicants were not invited to give their express approvals for the transfer of their shares in the company. Therefore, that the amendment of the plaint was necessary so as to introduce the claim for the irregular removal of shareholders through the Registrar of Companies without notice and approval by the said shareholders. In addition, that the amendment was necessary to enable them establish their claim against the Registrar of companies.

4. The respondents in response filed a replying affidavit sworn on 21st November 2023 by the 1st defendant/respondent, who averred that the applicants' attempt to amend their plaint had not been proposed in good faith. Further, that the said application was unsubstantiated and had been made in a bid to unnecessarily cause further delay of the matter and continue to cause prejudice to the defendants. He added that no reason had been given to show how the amendments sought were necessary for the effectual hearing and determination of the plaintiffs'/applicants' case.

5. He averred further that shareholding was not one of the issues for trial and therefore by the said proposed amendments the plaintiffs/applicants were introducing a new cause of action which was untenable. Further, that it was common ground he was the beneficial owner of all the shares held by the plaintiffs/applicants in the 2nd defendant/respondent pursuant to Declarations of Trust dated 29th June 2009 and 3rd July 2009 which documents are found at pages 8-13 of the defendants'/respondents' documents filed in this suit. He added that nothing in law and fact barred transfer of shares in the circumstances and no consent or such transfer was required from the plaintiffs/applicants as alleged. He urged the court to dismiss the instant application with costs to the defendants /respondents and that the case proceeds for hearing.

6. The application was canvassed by way of written submissions.

Plaintiffs/applicants submissions

7. These were filed by Kotonya Njoroge LLP Advocates and are dated 18th March, 2023. Counsel identified two issues for determination by this court.

8. The first issue for determination is whether leave should be granted to the plaintiffs/applicants to amend the plaint dated 30th August 2021. Counsel relied on Order 8 rule 5 of the *Civil Procedure Rules* which provides as follows;

    1. For purposes 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.

    2. This rule shall not have effect in relation to a judgment or order.

9. He further cited the cases of *St. Patrick Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR and *Bosire Ogero v Royal Media Services* [2015] eKLR, and submitted that the court had the discretionary power to allow for amendment of the plaint dated 30th August 2021 and such discretion must be exercised judicially. He submitted further that courts would generally allow amendment of pleadings to determine the real controversy between the parties. He added that a court could only decline an

amendment if it were of the opinion that the amendment would cause injustice or irreparable loss to the opposite party or if it was a device to abuse the process of the court.

10. On the second issue as to whether the plaintiffs/applicants should be allowed to amend the plaint dated 30th August 2021 counsel submitted that indeed the plaintiff'/applicants' shares were transferred and thus their application was brought in good faith. Further, that the plaintiffs/applicants had challenged the purported transfer of their shares for lack of authority or approval and their advocates had written a protest letter on 4th August 2023 to the Registrar of Companies. In the said letter, the plaintiffs/applicant demanded for the immediate reinstatement of their names as shareholders in the 1st defendant's/respondent's company.

11. Counsel went on to submit that the Registrar of Companies, who was the proposed 3rd defendant as per the draft amended plaint, had not reinstated the plaintiffs'/respondents' names in the register. Therefore, it was crucial for the court to determine the question of the irregular change of the 1st defendant's/1st respondent's details and the removal of the plaintiffs'/applicants' names from the register. That the same could only be achieved through the proposed amendment of the plaint dated 30th August 2023. He urged the court to allow the application as prayed.

Defendants'/respondents' submissions

12. The defendants'/respondents' submissions were filed by Kaplan & Straton advocates and are dated 2nd April, 2024. Counsel identified one issue for determination and that is whether the applicants had laid any basis for the orders sought in the application.

13. Counsel submitted that the court in exercising its discretion to grant or disallow amendments, it has to consider the following things;

    i. whether the amendment sought embodies a legal valid claim or defence.

    ii. the reasons why the subject matter of the amendment was not included in the original pleading or offered sooner, delay or disruption of judicial administration.

    iii. the extent to which the amendment departs from the original claim or tends to complicate the issues.

14. He placed reliance on the case of *Kassam v Bank of Baroda (Kenya) Limited* [2002] eKLR, *Ultimate Engineering Limited v Nairobi Heart Institute Limited T/A Karen Hospital* [2011] eKLR.

15. Counsel submitted further that none of the aforementioned criteria and considerations had been satisfied by the plaintiffs/applicants to warrant the amendment of the plaint as sought. In addition, that the amendments sought would not address the real question in controversy between the parties since the shareholding of the 2nd defendant/respondent was not one of the issues in dispute.

16. He went on to submit that the plaintiffs/applicants had failed to demonstrate how the amendments sought would aid in the proper and effectual determination of the issues in dispute. He placed reliance on the case of *Trishcon Construction Company v Landmark Holdings Ltd* [2016] eKLR where the Court citing the case *Eastern Bakery v Castelino* [1958] KLR explained as follows:

> "Although applications for amendment of pleadings should liberally be allowed at any stage before judgment, that discretion is a two way street where the court considers, before reaching the destination, whether the opposite party will suffer any injustice if the amendments are allowed; and whether the amendments sought amount to an abuse of the

court process, or are sought merely to cause further delay in the fair determination of the dispute, among other considerations"

17. He urged the court to dismiss the application with costs to the defendants/respondents.

Analysis and determination

18. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether the application dated 7th August 2023 is merited.

19. This application has been brought under the provisions of Section 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya and Order 8 Rules 3, 5(1) and 7 of the *Civil Procedure Rules*.

20. The plaintiffs/applicants in their submission argued that it was crucial for the court to determine the question of the irregular change of the 1st defendant's/1st respondent's details and the removal of the plaintiffs'/applicants' names from the Register. They argued further that the same could only be achieved through the proposed amendment of the plaint.

21. The defendants/respondents on their part argued that the amendments sought would not address the real question in controversy between the parties since the shareholding of the 2nd defendant/ respondent was not one of the issues in dispute. Further, that the plaintiffs/applicants had failed to demonstrate how the amendments sought would aid in the proper and effectual determination of the issues in dispute. Also, that by the said proposed amendments the plaintiffs/ applicants were introducing a new cause of action which was untenable.

22. The legal provision governing amendment of pleadings is 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. Further, Order 8 Rule 1 (1) of the *Civil Procedure Rules* stipulates that;

> " 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."

24. The Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR observed as follows;

> " 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:
>
> that a party is allowed to make such amendments as maybe 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."

25. The said court further identified the factors to be considered in an application for amendment of pleadings and stated as follows;

i. That the amendment is necessary for determining the real questions in controversy.

ii. To avoid multiplicity of suits provided there has been no undue delay.

iii. Only where no new or inconsistent cause of action is introduced "ie" if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.

iv. That no vested interest or accrued legal rights are affected.

v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

26. I have looked at the amendments sought by the plaintiffs/applicants from the draft amended plaint attached to the application. It is evident from the contents of paragraph 20B of the draft amended plaint that the plaintiffs/applicants seek to introduce the concept of fraud and illegality on the part of the 1st and 2nd respondents. This in my opinion is essentially a new cause of action from what was pleaded in the plaint initially.

27. In light of the authority cited above, it is clear that the main aim of an application for an amendment is to ensure that the court determines the real issues in controversy between the parties. The defendants/respondents argued that the said application was unsubstantiated and had been made in a bid to unnecessarily cause further delay the matter and continue to cause prejudice to the defendants. They also argued that by the proposed amendments the plaintiffs/applicants were introducing a new cause of action which was untenable.

28. I opine that though the amendment sought essentially introduces a new cause of action, the same will enable the court determine all the questions in the suit and the real controversy between the parties. The particulars of fraud and illegality as pleaded in the draft amended plaint and the cause of action in the initial plaint arise from the same chain of facts. They are challenging the alleged removal of their names as shareholders.

29. In addition, from the nature of the amendment sought, I do not see any prejudice that will be occasioned to the defendants/respondents if the same is allowed. Furthermore, as rightly put by the plaintiffs/applicants the respondents will still have a chance to respond to the amended plaint. Further still, this suit has not proceeded for hearing and the parties shall have the chance to challenge and interrogate the new issue introduced by the applicant.

30. The upshot of the foregoing is that the application dated 7th August 2023 has merit and is allowed. Costs shall be in the cause.

31. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 24TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE