



Mathenge & another v Belle Holdings Limited & another (Civil Suit 20 of 2019) [2023] KEHC 19 (KLR) (6 January 2023) (Ruling)

Neutral citation: [2023] KEHC 19 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 20 OF 2019
OA SEWE, J
JANUARY 6, 2023**

BETWEEN

DOMINIC MUREITHI MATHENGE 1ST PLAINTIFF

PRISCILLA WANGECI NJOROGE 2ND PLAINTIFF

AND

BELLE HOLDINGS LIMITED 1ST DEFENDANT

WIRELESS CELL CONNECT LIMITED 2ND DEFENDANT

RULING

1. This ruling is in respect of the chamber summons dated July 23, 2021. It was filed pursuant sections 3A and 100 of the *Civil Procedure Act*, chapter 21 of the Laws of Kenya, as well as order 1 rule 10(2), 14 and order 8 rules 3 and 5 of the *Civil Procedure Rules, 2010*, for orders that the plaintiffs/applicants be granted leave to amend the plaint in terms of the annexed draft amended plaint; and that costs of the application be in the cause.
2. The application was premised on the grounds that the plaintiffs entered into an agreement with the defendants/respondents, pursuant to which the plaintiffs paid the purchase price in the sum of Kshs 32,382,525/= to the law firm of the firm of Balala and Abed Advocates (hereinafter “the advocates”) to hold as stakeholders pending the completion of the sale. The plaintiff further stated that the plaintiffs thereafter rescinded the sale and requested for a refund of the purchase price; but that the advocates have refused and/or neglected to return the purchase price. Hence, the plaintiff was apprehensive that the advocates have either remitted the funds to the respondents or misappropriated the same.
3. The application was supported by the affidavit filed therewith, sworn on March 29, 2021 by the 1st plaintiff, Dominic Mureithi Mathenge. The 1st plaintiff explained therein that the agreement for sale was in respect of an apartment known as apartment C7; being the penthouse situated on the fourth floor of the development known as Belle Apartments on Plot No 1665 section I Mainland North,



- Mombasa. He further stated that, having made the payment of the purchase price plus costs and stamp duty, and with the approval of the defendants, the plaintiffs obtained access to the suit premises to commence preparation for advertising and branding of their homestay (Airbnb) business when they discovered that the said apartment had been damaged and/or vandalized by the defendants. According to him, the fittings which formed part of the purchase price had been maliciously removed and taken away in breach of the agreement for sale.
4. Thus, the 1st plaintiff averred that he immediately notified the defendants of the malicious defacing of the suit property as well as their (the plaintiffs') decision to rescind the agreement for sale and seek refund of the full purchase price together with the excess payment towards costs, disbursements and stamp duty. The 1st plaintiff averred that a rescission notice was thereafter sent to the defendants through the firm of Balala & Abed Advocates; but that the said advocates blatantly declined to refund the sums paid by the plaintiffs. Hence, the need for joinder of the advocates to this suit. A draft amended plaint was annexed to the supporting affidavit for the court's consideration.
 5. In response to the application, the defendants relied on the affidavit sworn on November 2, 2021 by Mr Mohamed Ali Mohamed, an Advocate of the High Court of Kenya, practicing as such in the firm of Balala & Abed Advocates. Mr Mohamed averred that they were, at all material times, acting as agents for a disclosed principal, namely, the 1st defendant, and therefore that their firm cannot be a proper party in these proceedings. He further averred that the instant application is nothing but an attempt by the plaintiffs to exert unlawful pressure on them to discourage them from acting in this matter for the 1st defendant. Mr Mohamed added that, in any event, the transaction was completed and possession given to the plaintiffs; whereupon the funds were released to the vendor, the 2nd defendant herein. He consequently urged the court to dismiss the application.
 6. On behalf of the 2nd defendant, grounds of opposition were filed herein on December 1, 2021 by M/s Kamami Njoroge & Co Advocates thus:
 - (a) That the said application is misconceived, unmeritorious and an abuse of the court process;
 - (b) That an agent cannot be sued where there is a disclosed principal;
 - (c) That the application is an affront to professional privilege accorded to an Advocate of the High Court of Kenya whilst offering professional services;
 - (d) That the court ought to dismiss the said application with costs to the defendants.
 7. The application was canvassed by way of written submissions, pursuant to the directions dated November 4, 2021. In his written submissions filed herein on January 17, 2022, Mr Rimunya for the plaintiffs reiterated the assertion that the proposed 3rd defendant remitted the funds to the 1st and 2nd defendants before the completion of the sale and after written communication that the sale had been rescinded. Counsel also mentioned that the proposed 3rd defendant was at fault for unduly influencing the plaintiffs into executing an agreement of sale which omitted fundamental changes proposed and agreed to by both parties. He therefore asserted that, although the said firm of advocates/ the proposed 3rd defendant, was not a party to the agreement for sale, it played a vital role in holding the monies as a stakeholder.
 8. It was therefore the submission of counsel that the proposed 3rd defendant is a necessary party to these proceedings in view of the serious allegations made against it. He relied on *Irene Kemunto Ongori v Housing Finance Company of Kenya Limited [2018] eKLR*; HCCC No 66 of 2005: *Elegant Freighters v Oriental Commercial Bank (formerly Delphis Bank Limited)* and ELC No 665 of 2013: *Martin*



Wesula Machyo v Housing Finance Company of Kenya & Njiru Enterprises in urging the court to allow the application.

9. On behalf of the 1st defendant, Mr Mohamed relied on his written submissions filed on March 16, 2022. He proposed only one issue for determination, namely: whether the plaintiffs have shown that the proposed 3rd defendant, which is also the firm of advocates acting for the 1st defendant's in this suit, ought to be included in the proceedings in terms of the draft amended plaint. Counsel reiterated the 1st defendant's assertion that the advocates were at all times acting for a disclosed principal, which principal has been sued as the 1st defendant. Thus, Mr Mohamed took the view that to enjoin the proposed 3rd defendant would be prejudicial to the 1st defendant in terms of increased litigation costs. He relied on *Afroplast Industries Limited v Sanlam Insurance Co Limited & Another [2021] eKLR* and urged for the dismissal of the application.

10. I have given careful consideration to the plaintiffs' application and the averments in the affidavits filed herein by the parties. I have likewise paid attention to the written submissions filed by learned counsel on behalf of the parties and the authorities relied on by them. In terms of joinder of parties, order 1 rule 10(2) of the *Civil Procedure Rules* provides that:

“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.”

11. There is no gainsaying therefore that the discretion of the court to grant leave to amend pleading is indeed wide. But it is also trite that the discretion is not intended to be exercised whimsically or capriciously. The court must be convinced that the party whose joinder is sought is a necessary party to the proceedings; and that the proposed joinder is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. Moreover, order 8 rules 3(1) of the *Civil Procedure Rules*, is explicit 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.”

12. Accordingly, in *Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunication Corporation [2007] eKLR*, it was held that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim.”

13. Likewise, in *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014] eKLR* it was observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of



amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

14. The principles that guide the exercise of discretion in an application of this nature were discussed in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (supra) by the Court of Appeal thus:

“The law on amendment of pleading ... was summarized by this court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading – 12th Edition, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No 149 of 1991 as follows:-

“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.” (see also *Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR*)

15. Hence, from the averments in the affidavits filed in respect of the instant application as well as the written submissions filed herein, only one issue presents itself for determination, namely: whether the proposed amendment is necessary for the just and effectual resolution of this dispute.

16. I have looked at the initial plaint filed on April 1, 2019 vis-à-vis the draft amended plaint annexed to the plaintiffs’ application. What emerges therefrom is that serious allegations, including fraud, were directed at the advocates and detailed particulars thereof supplied at paragraph 22 of the plaint. They include:

- (a) Failure to provide proof of the success of the change of user process and the parking spaces plan for the development prior to execution of the sale agreement;
- (b) Failure to mention and list in the agreement for sale the furniture, fittings and fixtures within the property that the plaintiffs had previously viewed and accepted as part of the sale transaction and for which the plaintiffs had already paid a deposit of Kshs 255,000/=;
- (c) Failure to have the agreement for sale stamped as required.

17. In *Kinluc Holdings v Mint Holdings Ltd & Another [1998] eKLR* the Court of Appeal pointed out that an advocate can be held liable for the role played in a conveyancing matter if the circumstances warrant it. It held:

“The obligation of the purchaser to pay the balance of the purchase price and the obligation of the advocate to receive the said sum as a stakeholder and hold the same until successful completion are two factors closely interwoven and it would be prudent for the superior court to decide on all issues at the same time to bring finality to the litigation.”

18. I am therefore satisfied that the plaintiffs have shown that the firm of Balala & Abed advocates is a necessary party to this suit; and that its joinder is necessary to ensure an effectual and complete



determination of this dispute. I hasten to add that whether or not the plaintiffs' allegations will pass muster will only be clear after the hearing; and therefore the assertions by Mr Mohamed that the advocates were acting for a disclosed principal and that the advocates were in a privileged position are matters that must await the hearing.

19. In the result, I find merit in the plaintiff's application dated July 23, 2021. The same is hereby allowed and orders granted as prayed in the following terms:

- (a) That leave be and is hereby granted to the plaintiffs to amend their plaint in terms of the draft amended plaint annexed to the supporting affidavit herein.
- (b) That the amended plaint be filed and served within 14 days from the date hereof; with corresponding leave to the defendants to amend their defence, if need be.
- (c) That the costs of the application be costs in the cause.

20. Orders accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MOMBASA THIS 6TH DAY OF JANUARY, 2023.

OLGA SEWE

JUDGE

