



REPUBLIC OF KENYA



KENYA LAW
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**Qayrat Food Limited v Mohamed & 6 others (Civil Suit
18 of 2017) [2023] KEHC 1708 (KLR) (8 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1708 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 18 OF 2017
OA SEWE, J
MARCH 8, 2023**

BETWEEN

QAYRAT FOOD LIMITED PLAINTIFF

AND

SAFIYA AHMED MOHAMED 1ST DEFENDANT

AWEYS AHMED MOHAMED 2ND DEFENDANT

ZEIN AHMED MOHAMED 3RD DEFENDANT

ABDIFATAH HASSAM MOHAMED 4TH DEFENDANT

KAAB INVESTMENTS LIMITED 5TH DEFENDANT

MIDDLE EAST BANK LIMITED 6TH DEFENDANT

THE REGISTRAR OF COMPANIES 7TH DEFENDANT

RULING

1. The Notice of Motion dated December 6, 2021 was filed herein on December 23, 2021 by the plaintiff. It is expressed to have been filed under Order 8 Rules 3 and 5 as well as Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#), for leave to further amend the Plaintiff in terms of the draft Further Amended Plaintiff annexed to the Supporting Affidavit. The plaintiff also prayed that costs of the application be in the cause. The application is supported by the averments set out in the affidavit of one of the shareholders of the plaintiff, Mr Omar Dine, sworn on December 6, 2021, together with the documents annexed thereto.
2. It was averred by Mr Dine that an Amended Plaintiff was filed herein on May 14, 2018 and served upon the defendants; and that the suit involves the fraudulent charging by the 2nd to 6th defendants of Plot Number Kilifi/Mtwapa/1865 owned by the plaintiff without the consent of the other directors. He



further averred that investigations were instituted by the DCI, Mombasa vide Criminal Case Number 1588 of 2021, indicating that the property has since been sold to JCB Ventures (Kenya) Limited (hereinafter, "JCB Ventures") despite the injunctive orders of the Court dated March 16, 2018; and therefore that it is necessary to enjoin JCB Ventures to this suit. The deponent annexed to his affidavit copies of a letter dated August 31, 2021 given to him by the DCI, Mombasa, a copy of the Charge Sheet filed against Aweys Ahmed Mohammed in connection with the allegations of forgery and uttering false documents in the name of the plaintiff, as well as a draft Further Amended Plaintiff, among other documents.

3. On behalf of the 6th defendant, who was the chargee in the matter, a Replying Affidavit was filed herein on February 28, 2022, sworn by its Managing Director, Mr Isaac Mwige. Mr Mwige denied that the suit property was sold by the 6th defendant as chargee in breach of an injunction issued by the Court on March 16, 2018 or on any other date. Mr Mwige deposed that the 6th defendant appealed against the grant of the injunction in Mombasa Civil Appeal No 85 of 2018 and that in a judgment delivered on June 19, 2019, the Court of Appeal discharged the said injunction. He therefore averred that the application for further amendment of the Plaintiff is based on a false allegation and is therefore an abuse of the process of the Court.
4. Mr Mwige further averred that he got to learn from one of the directors of the plaintiff, one Aweys Ahmed Mohamed, that neither the Board of Directors nor the Company's members had authorized Mr Omar Dine to make the application for amendment of the Plaintiff, or to file this suit for that matter. He added that the said Aweys Ahmed confirmed to him that the plaintiff has no assets currently and yet it is still indebted to the 6th defendant; and therefore that the plaintiff is incapable of paying the costs of these proceedings.
5. The application was canvassed by way of written submissions, pursuant to the directions issued on February 17, 2022. The parties thereafter had an opportunity to highlight their submissions on June 30, 2022. Thus, Mr Okata, learned counsel for the plaintiff, relied on his written submission dated March 10, 2022. He highlighted the fact that one of the directors of the plaintiff, Mr Aweys Mohamed, was charged in court on July 19, 2021 for forging the minutes of the plaintiff and improperly obtaining a benefit from the forgery in terms of a loan of Kshs. 35,000,000/= from the 6th defendant for which the plaintiff's property title number Kilifi/Mtwapa/1865 (the suit property) was fraudulently used as security. Counsel submitted that, in the circumstances, the plaintiff has a valid cause of action which, if successful, may see the fraudulent transaction nullified.
6. Mr Okata further submitted that, since the property has already been sold to JCB Ventures, for it to revert to the plaintiff would require the participation in these proceedings by JCB Ventures; and therefore that the application for further amendment of the Plaintiff is well-grounded. He relied on HCCC No 7 of 2017: Kajiado St. Patrick's Hill School Limited v Bank of Africa Kenya Limited and HCCC No 5 of 2014: Malindi Merry Beach Limited v Barclays Bank of Kenya Limited & Another for the proposition that all necessary amendments ought to be allowed for the purpose of determining the real questions in controversy between the parties. Thus, Mr Okata prayed that the application be allowed and the orders sought granted.
7. On his part, Mr Esmail for the 6th defendant relied on his written submissions dated April 22, 2022. He relied on the Replying Affidavit sworn by Mr Isaac Mwige and urged the Court to find that the application is misconceived, and therefore an abuse of the process of the Court. He reiterated the issue raised in paragraph 6 of the Replying Affidavit and asserted that the plaintiff's authority was never obtained for Mr Omar Dine to file either the suit or the instant application. He therefore urged for the striking out of the application in limine on that ground alone.



8. Mr Esmail also argued that the effect of the amendment would be to add a defendant to the suit; which is outside the scope of Order 8 Rules 3 and 5 of the *Civil Procedure Rules*. In his view therefore, the orders prayed for herein have been sought under the wrong provisions of the law. Additionally, Mr Esmail faulted the application in so far as it is based on the premise that the impugned sale took place in defiance of a temporary injunction that was in place at the time, yet the injunction had been discharged on appeal. Counsel accordingly prayed that the application be dismissed.
9. I have given due consideration to the application in the light of the averments set out in the parties' respective affidavits. I have likewise paid attention to the written submissions filed herein by learned counsel and the oral highlights given on June 30, 2022. A perusal of the court record shows that the suit was initiated in the individual names of the shareholders of the plaintiff, including Omar Dine Mohamed. Thereafter, after the first application for amendment, the Plaintiff was amended, with the leave of the Court, in terms of the Amended Plaintiff filed on May 14, 2018; whereupon the company, Qayrat Foods Limited, which was initially the 7th plaintiff was retained as the only plaintiff in the suit.
10. There is also no dispute that an appeal arose from the ruling of the Court (Hon. Njoki Mwangi, J.) dated March 16, 2018 by which a temporary injunction had been granted to the original plaintiffs. A perusal of the decision of the Court of Appeal in respect of an interlocutory appeal arising from the ruling reveals that the injunctive orders were ultimately discharged on appeal and the application dated February 16, 2017 dismissed. The Court of Appeal observed that:

“...What plays out clearly is the shareholders and directors internal wrangling of blame game that the directors who were in office acted without consulting and to the detriment of the shareholders...We also find the orders allowing the amendments as granted will not be prejudicial to the appellant as it was given an opportunity to file an amended defence...”
11. The wrangling continues unabated; and it is against the foregoing background that the plaintiff has sought leave to further amend its Plaintiff to implead JCB Ventures and the changed circumstances in respect of the suit property. A preliminary objection was however raised by counsel for the 6th defendant to the effect that Mr Omar Dine has no authority of the company to bring the instant application. Accordingly, Mr Esmail sought for the striking out of the application in limine on that basis. That being the case, it is imperative that the same be determined first.
12. In its Replying Affidavit, the 6th defendant alleged that he was informed by one of the Plaintiff's Directors by the name of Aweys Ahmed Mohamed that Omar Dine was not authorised to swear the Affidavit on behalf of the Company. In this regard, Mr Isaac Mwise averred thus at paragraph 6 of his Replying Affidavit:

“After the application to amend and the said supporting affidavit of Omar Dine, and called Aweys Ahmed Mohamed, one of the two Directors of the Plaintiff (the other being), who told me that neither the Board of Directors of the Plaintiff nor the Company, has authorized said Omar Dine to make the application for an amendment of Plaintiff or for that matter file this suit.”
13. It is noteworthy however that at paragraph 1 of the Supporting Affidavit, Mr Omar Dine averred that he was authorized to swear the affidavit. It is now trite that that is sufficient. In *Makupa Transit Shade*



Limited & Another v Kenya Ports Authority & another [2015] eKLR, for instance, the Court of Appeal held: -

“...In our view, the Authority, as with other corporate bodies, has its affidavits deponed on its behalf by persons with knowledge of the issues at hand who have been so authorised by it. It was therefore sufficient for the deponents to state that “they were duly authorised.” It was then up to the appellants to demonstrate by evidence that they were not so authorised...”

14. Thus, the burden of proof was on the 6th defendant to satisfy the Court that Mr Dine had no such authority. The only reference to the lack of authority is what was deposed in paragraph 6 aforesaid, which is of little worth in so far as it amounts to hearsay. In any event, it is now trite that the absence of a company resolution to institute a suit or authority to swear an affidavit is not, of itself, fatal to a suit. Hence, in the case of Leo Investments Ltd v Trident Insurance Company Limited (2014) eKLR, Hon. Odunga, J. held that: -

“...The mere failure to file the same with the plaint does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as he suit. Its absence, is therefore, not fatal to the suit...”

15. Consequently, I find no merit in the objection raised by Mr Esmail as no cogent evidence has been presented before the Court by the 6th defendant to disprove the assertion by Mr Omar Dine that he was authorized by the plaintiff to file the instant application and to depose to the facts set out in the Supporting Affidavit.
16. That said, the only issue arising for determination is whether sufficient cause has been shown by the plaintiff to warrant the grant of leave to further amend its Amended Plaint. The Plaintiff has sought leave to amend its Plaint to include a new defendant, JCB Ventures (Kenya) Ltd, among other amendments. It is alleged that the property Kilifi/Mtwapa/1865 was sold to JCB Ventures despite there being injunctive orders issued by the court on the March 16, 2018. The 6th Defendant objected to the inclusion of JCB Ventures as they claim that the prayers before court are only for amendment and not joinder of parties. According to the 6th Defendant, joinder is governed by other provisions of the law and not Order 8 Rules 3 and 5 of the Civil Procedure Rules.
17. It is now trite that reliance of the wrong provisions of the law, is not enough reason to dismiss an application. I am in agreement therefore with the expressions of Hon. Ngugi, J. (as he then was) in Nancy Nyamira & Another V Archer Dramond Morgan Ltd [2012] eKLR, that: -

“...Next, the Defendant argues that the Plaintiffs’ application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma’s remarks *Salume Namukasa v Yozefu Bukya* (1966) EA 433, invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in *Gitau v Muriuki* [1986] KLR 211 which I now follow to hold that in as long as a party’s invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the



Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded...”

18. Joinder of parties in a civil suit is provided for under Order 1 of the [Civil Procedure Rules](#). Such joinder may be on the court’s own motion or on application by either party to the suit. The relevant provision is Order 1 Rule 10 of the [Civil Procedure Rules, 2010](#) which provides: -

- (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.
- (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.
- (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.
- (4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

19. In the same vein, Order 8 Rules 3 and 5 of the [Civil Procedure Rules](#), which the plaintiff relied on, provides: -

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- (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.

...

- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

- 5(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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

20. In this case, the applicant seeks to enjoin JCB Ventures (Kenya) Limited as a Defendant because they have reason to believe that the suit property Kilifi/Mtwapa/1865 has been illegally and fraudulently acquired from the 6th Defendant by JCB Ventures, and therefore that JCB Ventures is a necessary party



as they may be affected by any order that the Court herein with regard to the said property. I am satisfied that sufficient cause has been made by the plaintiff for the joinder of JCB Ventures to this suit as the 8th defendant.

21. Apart from joinder, the applicant sought to amend his Plaintiff in other respects as indicated in the draft Further Amended Plaintiff. The rule of thumb is that amendments sought before the hearing should be freely allowed if it is shown that it will not prejudice the other side and that such prejudice if any can be compensated by an award of costs. (See the Court of Appeal in the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR). The 6th defendant objected to the amendments on the ground that the injunctive orders issued on the March 16, 2018 were set aside by the Court Appeal in the case of Civil Appeal No 85 of 2018 *Middle East Bank Kenya Limited v Mohamed Dine Mohamed & 6 others* [2019] eKLR. It is noteworthy however that not all the proposed amendments are related to the said order. Hence, I am convinced that this is a fit and proper case for the Court's discretion to be exercised in favour of amendment, noting that no prejudice will be suffered by the defendant for which costs will not be adequate recompense.
22. In the result, the application dated December 6, 2021 is allowed as prayed and orders granted as follows:
- (a) Leave be and is hereby granted to the plaintiff to further amend the Plaintiff in terms of the draft Further Amended Plaintiff annexed to the Supporting Affidavit. The Further Amended Plaintiff be filed and served within 14 days from the date hereof.
 - (b) Corresponding leave be and is hereby granted to the defendants to likewise amend their Defence, if need be. The same be done within 14 days of the date of service of the Further Amended Plaintiff.
 - (c) Costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 8TH DAY OF MARCH 2023

OLGA SEWE

JUDGE

