



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 45 OF 2012

MAWANDO LIMITED.....PLAINTIFF

ZAHID IQUBAL DEAN.....INTENDED PLAINTIFF

- VERSUS -

THOUSAND PALMS BEACH HOTEL LIMITED.....1ST DEFENDANT

THE LAND REGISTRAR MOMBASA.....2ND DEFENDANT

SBM BANK (K) LTD.....INTERESTED PARTY

RULING

1. What is before this honorable court is the Chamber Summons application dated 10th March 2021. It is brought by the Intended Plaintiff under the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya, Order 1 Rule 1 (10) 2 and Order 8 Rule 1 of the Civil Procedure Rules.

THE APPLICANT'S CASE

2. The Intended Plaintiff/Applicant seeks for the following orders:

a) THAT the applicant herein ZAHID IQUBAL DEAN be joined in this suit as a Plaintiff and the Plaintiff herein be amended as per the draft amended Plaintiff duly annexed hereto.

b) THAT the draft amended Plaintiff herein be deemed as duly filed and served subject to the payment of the court's requisite fees.

c) THAT the costs of this application be in the cause.

3. The application is supported by the grounds, testimony and the supporting affidavit of ZAHID IQUBAL DEAN, who is one of the Directors and shareholders of an incorporated company trading in the names and style of "Thousands Palms Beach Hotel Limited", the 1st Defendant herein. The applicant seeks leave to be added as a Plaintiff in this matter and to have the Plaintiff amended due to the prevailing circumstances and in the interest of justice. He deposes that the Plaintiff that the applicant sought to further amend was filed in March 2012 and amended on January 2018. He avers that the draft amended Plaintiff he is in possession of the original title deed of the suit property known as Plot No. 736/II/MN Title No. CR 16392. That in January 2009, the purported directors/shareholders of the 1st Defendant acted illegally acquired a provisional title to the suit property after lying to the 2nd Defendant that the original title was lost. That the purported directors have charged the suit property without the Plaintiffs consent and Plaintiffs pray for the same to be cancelled.

THE RESPONDENT'S CASE

4. The 1st Defendant filed a Replying Affidavit in opposition to the application. The affidavit was sworn by Mr. Kinyua Kamundi, the Learned Counsel on record for the 1st Defendant. He stated that the proposed 2nd Plaintiff filed a suit being HCCC (Mombasa) No. 331 of 2008 over the same property and obtained injunctive orders. Thus, he claims to be "***res judicata or sub judice***". The deponent claims that there is no prayer in the amended Plaintiff or the further amended Plaintiff that are sought in favour of the proposed 2nd Intended Plaintiff. Instead, it is for the Mawando Limited. Mr. Kinyua claimed that the proposed 2nd Intended Plaintiff was acting in two capacities that is as a Director of the 1st Defendant as well as the director of the Plaintiff which he cannot do. The Counsel argued that there are no reasons given

why the Mr. Zahid should be added as a Plaintiff and the proposed amended Plaint does not disclose any cause of action in favour of him. It was the deponent claim that this suit had never been heard despite being filed in the year 2012 and the Applicant has failed to detail how he and the Plaintiff will suffer loss unless the Applicant is enjoined.

The Learned Counsel claims that issues before this court of company law are outside its jurisdiction, but within the exclusive jurisdiction of the High court and for that matter, the application should be dismissed for being incompetent and an abuse of the court process. When the application came up for inter parties hearing on 23rd June 2021, court directed the application to be canvassed by way of written submissions.

SUBMISSIONS

5. Counsel for the Applicant filed submissions on 7th October 2021 in support of the application. He submitted that the shareholding of the applicant in the 1st Defendant had been fraudulently transferred to strangers without his consent and that he and the Plaintiff were two distinct individuals that ought to have their day in court. Counsel claimed that the 1st Defendant/Respondent had perpetuated in the alleged fraud and the two suits that the 1st respondent had alluded to were on two different issues and have never been determined as res judicata.

6. The Learned Counsel argued that the hearing of the suit had never begun and no party in the suit would suffer prejudice if the amended was allowed. He maintained that the overriding consideration ought to be whether the amendments were necessary for determining the real question controversy and whether there was any delay in bringing the application for amendment was likely to prejudice the opposite party beyond compensation in costs. The Learned Counsel argued that the provision of Order 8 Rule 3 (5) provides that an amendment may be allowed notwithstanding that the effect would be to add or substitute a new cause of action provide such cause of action arises out of the same facts or substantial similar to the cause of action out of which relief has been claimed in the suit. He maintained that the applicant's allegation of fraud against the 1st Defendant ought to be heard by this court in a full trial where the applicant would be afforded a chance to address these issues. Counsel urged court to grant leave to amend the Plaint rather than give judgement in ignorance of the facts that ought to be know. He pleaded with court to allow the application as prayed.

7. The 1st Defendant's counsel filed submissions in opposition of the application on 18th October 2021. The Counsel submitted that the applicant has no claim over the suit property whether in the original Plaint or the intended further amended Plaint. He claimed that the applicant's issue is about his father's shares in the 1st Defendant, which were resolved in a suit by his later father hence res judicata. Issues on shares in a limited company are within the jurisdiction of the high court and not this court. Counsel argued that since this is not the first amendment sought, whatever the applicant has to say to court, he has do so in his capacity as the director of the Plaintiff or as his additional capacity as alleged director of the 1st Defendant. Counsel argued court to dismiss the application with costs.

ANALYSIS AND DETERMINATION.

8. I have keenly perused all the pleadings in this matter with a view of making a decision to the application filed by the Applicant dated 10th March, 2021.

Notwithstanding the provisions of Article 159 (2) (d) of the Constitution of Kenya, justice shall be administered without undue regard to procedural technicalities, I do order as follows:-

from the very onset, glancing at the Supporting affidavit for the filed application, it appears that though dated and commissioned but the deponent Zahid Iqbal Dean has not appended his signature on it. Additionally, apart from the supporting affidavit being unsigned, its annexure marked as 'Z1' is also neither dated, signed nor commissioned!! What a coincidence. This cannot be deemed to be an inadvertent mistake at all.

I see the issue before court is whether the omission to sign the affidavit is a breach or non-compliance with Section 5 of the Oaths and Statutory Declaration Act or whether the omission is mere irregularity that can be excused Order 19 Rule 7 of the Civil Procedure Rules.

9. **Section 5 of the Oaths and Statutory Declaration Act** provides as follows:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

10. While **Order 19 Rules 6 & 7 of the Civil Procedure Rules** provides as follows:-

6. *“The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive”; and*

7. *“The court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.”*

11. The unsigned affidavit and its annexure are failures to conform to the requirements of Section 5 as stated above. In the case of **Solomon Software (EA) Ltd & another - Versus - Microsoft Corporation t/a Great Plains Business Solutions (2002) eKLR** it was held that failure to comply with Section 5 of the Act is a breach of an Act of Parliament and therefore noncompliance is illegal. While the irregularity may be excused as provided by Order 19 Rule 7 of the Civil Procedure Rules, the subsidiary legislation cannot override the provisions of an Act of Parliament and until the law is repealed the court should not encourage noncompliance.

12. In **C.M.C Motors Group Limited – Versus - Bengeria Arap Lorir trading as Marben School and another (2012) eKLR** the court

held that “Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner of Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.

What then would be the fate of the Notice of Motion dated 10th September 2013’ that Notice of Motion not being supported by an affidavit is fatal. Such an application ought to be supported by evidence which evidence ought to be under oath. Since it is unsupported by evidence it too is hereby struck out.”

13. I am in agreement with Kasango J in the above decision. In this case, the application seeks to amend the Plaintiff and add the applicant as a 2nd Plaintiff. Such an application ought to be supported by evidence adduced in the supporting affidavit. The affidavit that adduces the evidence is fatally defective, that leaves the application incompetent and a non - starter that ought to be struck out.

DETERMINATION

14. I do find that there is nothing before the court for determination. Therefore, the Chamber summons application dated the 10th March 2021 be and is hereby struck out under Order 2 Rule 15 (1) (a), (b), (c), and (d), Order 19 (6) & (7) of the Civil Procedure Rules, 2010 and Sections 5 of the Oaths and Statutory Declaration Act, Cap 15 of the Laws of Kenya with costs to the 1st Defendant/Respondent. The Intended 2nd Plaintiff may still re consider on regularizing this anomaly in future.

15. **IT IS ORDERED** accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2021

L. NAIKUNI J

JUDGE

ENVIROMNENT AND LAND COURT

In the presence of:

M/s. Yumna, the Court Assistant

Mr. Magiya Advocate for the Plaintiff/Applicant

Mr. Kinyua Advocate for the 1st Defendant.

Attorney General for the 2nd Defendant

Onyango Advocate for the Interested party.