



**Panchamatia & 3 others v Prime Bank Limited & another; Pasaka Ventures Limited & 2 others (Proposed Defendant) (Commercial Case 2 of 2020) [2024] KEHC 14240 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14240 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
COMMERCIAL CASE 2 OF 2020  
RE ABURILI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**KAUSHIK PANCHAMATIA ..... 1<sup>ST</sup> PLAINTIFF  
SUNRISE HAULIERS LIMITED ..... 2<sup>ND</sup> PLAINTIFF  
RISHI HAULIERS LIMITED ..... 3<sup>RD</sup> PLAINTIFF  
DUNGA WHOLESALERS LIMITED ..... 4<sup>TH</sup> PLAINTIFF**

**AND**

**PRIME BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT  
GARAM INVESTMENT AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**PASAKA VENTURES LIMITED ..... PROPOSED DEFENDANT  
MAHESHKUMAR GS PATEL ..... PROPOSED DEFENDANT  
HIRANI HARJI KARSAM ..... PROPOSED DEFENDANT**

**RULING**

**Introduction**

1. The application for consideration is the Plaintiffs Notice of Motion dated the 22<sup>nd</sup> July 2024 brought under Article 159 (2) (d) of the *Constitution*, Section 1A & 1B of the *Civil Procedure Act*, 2010, Order 8 Rules 3 and 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and enabling provisions of the law. The Application seeks the following orders THAT:



- a. That leave be granted to the plaintiffs/applicants to amend their plaint dated 3<sup>rd</sup> June 2020 in terms of the draft amended plaint annexed in the supporting affidavit filed herewith.
  - b. That the honourable court be and is hereby pleased to join the proposed 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents to the proceedings herein as the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents.
  - c. That the amended plaint be deemed as duly filed subject to payment of the requisite court fees.
  - d. That the honourable court be pleased to make any order to give effect to the grant of prayer 3 above including filing of any necessary pleadings, directions on service of all processes filed herewith and directions in responding thereafter.
  - e. That the honourable court be and is hereby pleased to issue appropriate directions on the expedited inter parties hearing for the application herein on such date and at such time as this honourable court may direct.
  - f. That costs of this application be in the cause.
2. The application is based on the grounds on the face of it and the supporting affidavit of Kaushik Panachmatia for and on behalf of the plaintiff/applicants.
  3. Despite service, the respondents did not file any response to the application save as to submit before court that the instant application was an effort by the applicants to scuttle the pending hearing set for the 14<sup>th</sup> November 2024.

### **The Applicants' Case**

4. The applicants averred that in 2011, the 2<sup>nd</sup> and 3<sup>rd</sup> applicants operated two bank accounts with the 1<sup>st</sup> respondent that granted the 2<sup>nd</sup> applicant overdraft facilities for purposes of running its daily operations and that the said loan was secured with charges over their land Parcel Nos. Kisumu/Municipality/Block 12/310 and Kisumu/Municipality/Block 6/63 for the sums of Kshs.7,000,000 and Kshs. 27,000,000 respectively.
5. The applicants averred that they similarly filed a Notice of Motion application under certificate of urgency dated 3<sup>rd</sup> June 2020 in which they sought to orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> respondents from selling the suit properties by way of public auction but the same was dismissed vide a ruling delivered on 24<sup>th</sup> June 2020 and further that on appeal the said orders were similarly denied.
6. It was averred that subsequently the 1<sup>st</sup> and 2<sup>nd</sup> respondents proceeded to sell the suit properties by way of public auction on the 17<sup>th</sup> July 2020 and 7<sup>th</sup> August 2020 with the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> intended defendants purchasing the same.
7. The applicants thus averred that the proposed amendments to the plaint are intended to make their cause of action clear as the sale of the suit properties was marred with numerous illegalities and infraction and this will call for appropriate responses from the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as the proposed 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.
8. It was further averred that the proposed 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants are necessary parties to the suit and would be directly affected by any ruling/order as well as judgement/decree as may be rendered by the court.



9. The applicants averred that no prejudice would be occasioned on the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as the proposed 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> proposed defendants.

### **Analysis & Determination**

10. I have considered this application. I find that the only issue for determination is whether the application is merited.
11. Section 100 of the [Civil Procedure Act](#) which is the last section in the Act provides for amendment of pleadings. The section stipulates:
100. General power to amend
- 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.
12. Order 8 Rule 5 of the [Civil Procedure Rules](#) on amendment of pleadings provides:
- “(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.
- (2) This rule shall not have effect in relation to a judgment or order.”
13. The power of the Court to allow or refuse a party to amend pleadings is discretionary as was held in the case of [Andrew Wabuyele Biketi v Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others](#) [2015] eKLR, where the court in disallowing an application for amendment stated as follows:
- “...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”.
14. In the same vein, the discretionary power of the court in granting or refusing an application for amendment of pleadings should be exercised judicially and in consideration of the facts of the case in particular. The Court in [Bosire Ogero v Royal Media Services](#) [2015] eKLR, held:
- “In Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled “*amendment with leave –time to amend*“ it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise”



15. In ascertaining the requirements for exercising the discretion to grant or refuse amendment of pleadings, I borrow from the decision in the case of *Daniel Ngetich & Anor V K-Rep Bank Limited* [2013] eKLR where it was stated that:

“...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”.

16. The foregoing position was taken from the case of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported) as cited with approval in *St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR in which the Court of Appeal set out the principles governing amendment of pleadings as follows:

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings.
- d) 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.
- e) 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 limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”

17. Undoubtedly, the Honourable Court has taken judicial notice that indeed, this application has been made almost four (4) years after the Plaint was filed and after the pleadings had closed and directions given as to the hearing of the suit, with a date already set for the hearing. That notwithstanding, as indicated above, an amendment can be brought any time before the suit is concluded.

18. The reason advanced by the by the Plaintiffs for seeking for amendment to the pleadings is that the amendments are intended to make their cause of action clear as the sale of the suit properties was marred with numerous illegalities and infraction and this will call for appropriate responses from the 1<sup>st</sup> and 2<sup>nd</sup> respondents as well as the proposed 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

19. In my view, I find the proposed amendments to be in tandem with the original cause of action.



20. As to whether the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> proposed defendants/respondents may be joined in the instant proceedings, Order 1 rule 10(2) of the said 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.”

21. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori v Chege & 3 Others [2002] 2 KLR 243 where the learned distinguished Judge stated that the guiding principles when an intending party is to be joined are as follows:

1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

22. 56. In Departed Asians Property Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55 it was held as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

23. In Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being



a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

24. In this case, the intended parties are the persons who allegedly irregularly and illegally acquired properties that belonged to the plaintiff/applicants herein. The intended defendants are the only persons that can clarify this. Furthermore, any orders that may be made by this court will directly affect their interests and unless they are enjoined to these proceedings, they may be condemned unheard.
25. It is therefore my view that the intended parties’ presence in these proceedings is not only necessary in order to enable this court effectually and completely adjudicate upon and settle all the questions involved in this cause, but that the orders that this Court may issue in this Cause are likely to affect the interest of the said intended parties.
26. Further, taking into account the relationship between the parties herein as well as the intended parties to the transaction, the subject of this suit, I find that it is desirable, for avoidance of multiplicity of suits, to have the said persons joined so that they can be bound by the decision of this Court. I am fortified on this point by the decision in the case of *Martin Kirima Baitbambu v Jeremiah Miriti* [2017] eKLR, where the court pronounced itself as follows:

“The pragmatic reality has been for courts to add parties in a suit based on guarantee if it is desirable to add such party so that the court can resolve all the matters in controversy effectually and completely. Aptly here would be to invoke the procedure provided under Order 1 Rule 15 of the *Civil Procedure Rules*. I say these things for the sake of jurisprudence.”
27. The upshot of the above is that I find the application dated the 22<sup>nd</sup> July 2024 to be meritorious. It is hereby allowed.
28. The plaintiffs are granted leave to amend their plaint and to enjoin the parties as intended hereto.
29. The amended plaint shall be filed and served together with summons to enter appearance for service upon all the parties old and new as enjoined hereto within 14 days of the date hereof and necessary court fees shall be paid into court.
30. The rest of the court processes shall ensue upon service of the said summons to enter appearance together with the amended plaint.
31. Mention on 10/2/2025 in the new term to confirm compliance and for further directions.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 14<sup>TH</sup> DAY OF NOVEMBER, 2024**

**R.E. ABURILI**

**JUDGE**

