



Unlimited Directions Kenya Limited v HFC Limited & another (Miscellaneous Application E343 of 2019) [2021] KEHC 188 (KLR) (Commercial and Tax) (4 November 2021) (Ruling)

Neutral citation: [2021] KEHC 188 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E343 OF 2019
WA OKWANY, J
NOVEMBER 4, 2021**

BETWEEN

UNLIMITED DIRECTIONS KENYA LIMITED PLAINTIFF

AND

HFC LIMITED 1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES 2ND DEFENDANT

RULING

1. The 1st defendant filed the application dated 4th November 2020 seeking the following orders;
 1. Spent.
 2. THAT this Honourable Court be pleased to grant leave to the 1st defendant/ Applicant to enjoin Robert Mukusya Kioko and Valentina Cortini as plaintiffs in this matter in the terms of the annexed draft amended defence and counterclaim.
 3. THAT this honourable court be pleased to grant leave to the 1st defendant/ applicant to amend the defence herein to include a Counterclaim in the terms of the annexed draft amended defence and counterclaim.
 4. THAT this honourable court be pleased to grant such further orders as it may deem just and expedient based on the special circumstances of the matter.
 5. THAT the costs of this application be provided for.



2. The application is supported by the affidavit of Joseph Lule and is based on the following grounds; -
 1. THAT Robert Mukusya Kioko and Valentina Cortini, Directors of the Plaintiff/respondent, executed a Directors guarantee and Indemnity dated 19th November 2015 as additional security for the facility advanced to the Plaintiff/respondent that is the subject matter of these proceedings and their presence before this court is necessary for the effectual and complete adjudication and determination of all the questions involved in this suit.
 2. THAT after the applicants exercise of its statutory power of sale over the Suit property the proceeds realized were not sufficient to fully offset the respondent's outstanding secured obligations, and the proposed amendments are necessary for the purpose of enabling this Honourable court hear and determine the real questions in controversy between the parties.
 3. THAT the respondent has remained in possession of the suit property notwithstanding their sale during the public auction held on 30th September 2019, and the proposed amendments are necessary for the purpose of enabling this Honourable court hear and determine all the real questions of controversy between the parties;
 4. THAT the interests of justice will best be served if the orders sought herein are granted.
 5. THAT this application has been brought within reasonable time.
 6. THAT the respondent and proposed plaintiff will not suffer any prejudice if the orders sought herein are granted, as they will be granted corresponding leave to file their defenses if any.
3. The respondent opposed the application through the replying affidavit of its Director Mr. Robert M. Kioko who states that the defendant cannot add parties, as plaintiffs, to the plaintiff's case, as the said parties have not indicated that they have a claim against the applicant. According to the respondent, the plaintiff is the only party in a position to add parties to the suit, as claimants, by amending its plaint.
4. The respondent's deponent further states that the proposed amendment is an indirect attempt to lift the plaintiff's corporate veil as the facility agreement was between the two parties, namely; Housing Finance Limited and the Plaintiff, in which case, the suit should be confined to the said parties.
5. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant is entitled to the orders sought.
6. Order 1 Rule 10 of the *Civil Procedure Rules* provides as follows;
 - “(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”



7. The applicant's case is that the two parties should be enjoined to the suit because they executed the deed of guarantee in their personal capacities as guarantors thereby giving the 1st defendant discretion to enforce the guarantee against them. The respondent, on the other hand, argued that the defendant cannot add parties, as plaintiffs, to the plaintiff's suit.
8. A perusal of the court file indicates that indeed, Valentina Cortini and Robert Mukusya executed a deed of guarantee on 19th November 2015 consenting that the 1st defendant could enforce it against them if the need arose. I find that the issues raised by the 1st defendant concerning the deed of guarantee can be raised in the defendant's counterclaim. Whereas a plaintiff is a person who brings a suit against another person, the court cannot compel a party to sue or act in the capacity of a plaintiff. A counterclaim is however, a separate suit from that of the plaintiff I am of the view that the 1st defendant's grievances can be ventilated in the counterclaim.
9. In *Eastern Bakery vs Castelino (1958) EA 461* the court discussed the principles governing the amendment of pleadings as follows: -

“It will be sufficientto say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs..... The court will not refuse to allow an amendment simply because it introduces a new case But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit. The court will refuse to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

10. Order 8 Rules 3 and 5 of the Civil Procedure Rules stipulate as follows:

“3.(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.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so do so.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.



(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.

4. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint.”

“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 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.”

11. In the case of *Joseph Ochieng & 2 others vs First National Bank of Chicago Civil Appeal No. 149 of 1999*, the Court stated as follows: -

“The ratio that emerges out of what was quoted from the same 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 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 claim if by an amendment of the Plaint the Defendant would be deprived of his right to rely on Limitation Acts.”

12. In *Martin Wesula Machyo vs Housing Finance Company of Kenya Ltd & Another (2015) eKLR*, Mutungi J relied on the case of *Central Kenya Ltd vs Trust Bank Limited & 4 Others [2000] 2EA 365* where the Court of Appeal stated: -

“that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid 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.”

13. Mutungi J further observed that:

“thus the overriding consideration in an application for leave to amend is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs”.

14. The principle that emerges from the above cited cases is that the court’s power to order for an amendment is discretionary. The plaintiff conceded that the applicant had a right to amend its defence and file a counterclaim. I note that the plaintiff is not likely to suffer any prejudice if the amendments are allowed as it will be granted an opportunity to respond to the defence and counterclaim



15. I therefore find that the instant application is merited, albeit, only in regard to prayer 3 which I hereby allow in the following terms: -

1. Leave is hereby granted to the 1st defendant to amend the statement of defence and counterclaim within 14 days from the date of this ruling.
2. The respondent is granted corresponding leave to amend its pleadings, if need be, within 14 days upon service with the amended statement of defence and Counterclaim
3. That costs of this application shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF NOVEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

Ms Rita Joyce for Ms Asli for the Plaintiff.

Mr. Khisa for Muchigi for Defendant/Applicant.

Court Assistant: Margaret

