



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 457 OF 2017

INAMOL JESUS BERAKOETXEA.....1ST PLAINTIFF

VICTOR SHIHOLO MUHANDIKI.....2ND PLAINTIFF

NAZIR AHMED LONE.....3RD PLAINTIFF

VERSUS

EDWARD BURIA.....1ST DEFENDANT

JOHN KAMAU WAINAINA.....2ND DEFENDANT

MAGNOLIA HEIGHTS MANAGEMENT.....3RD DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 23rd May 2018 by which **INAMOL JESUS BERA KOETXEA** (the 1st Plaintiff/Applicant), **VICTOR SHIHOLO MUHANDIKI**, the 2nd Plaintiff/Applicant and **NAZIR AHMED LONE** (the 3rd Plaintiff/Applicant) seek Orders **THAT:-**

“1. The Honourable Court be pleased to grant leave to the Plaintiff/Applicants to amend its Complaint in terms of the attached Draft Amended Complaint annexed hereto.

2. The Draft Amended Complaint be deemed as duly filed and served after payment of the requisite fee.

3. The costs of this Application be provided for.”

(2) The application was premised upon **Sections 258, 259, 260, 284, of the Companies Act 2015, 1A, 3A of the Civil Procedure Rules 2010, Article 159 of the Constitution 2010** and all enabling provisions of law and was supported by the Affidavit of even date sworn by the Director or 1st Plaintiff/Applicant.

(3) The Defendant/Respondents namely **EDWARD BURIA** (1st Defendant/Respondent), **JOHN KAMAU WAINAINA** (the 2nd Defendant/Respondent) and **MAGNOGA HEIGHTS MANAGEMENT LTD** (the 3rd Defendant/Respondent) filed Grounds of Opposition dated **15th May 2019** against Application. The Application was canvassed by way of written submissions. The Plaintiff/Applicants filed their written submissions on **28th October 2019** whilst the Defendant/Respondents filed their submissions on **11th December 2019**.

BACKGROUND

(4) The Plaintiff/Applicants first moved to Court vide a Notice of Motion application dated **10th November 2017** seeking the following inter alia orders **THAT:-**

2. Pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order of injunction, restraining the defendants from holding an Extraordinary General Meeting scheduled on 10/11/2017 at 5 p.m.

3. This Honourable Court be pleased to order the directors of the 3rd Defendant to issue a fresh Notice of Extra-Ordinary General Meeting to be convened within 60 days of such court order.

4. The cost of this Application be provided for.”

The court granted Prayer (2) of the Motion ex-parte.

(5) The Plaintiff/Applicants filed another Notice of Motion dated **24th November 2017** seeking to amend the first Notice of Motion dated **10th November 2017**. The application of **24th November 2017** was heard but was dismissed by **Hon Lady Justice Olga Sewe** vide her Ruling dated **23rd February 2018**. Thereafter the Plaintiff/Applicants filed this present application seeking to amend their Pleint.

ANALYSIS AND DETERMINATION

(6) I have considered the submissions filed by both parties. **Order 8 Rule 3(1) of the Civil Procedure Rules** provides thus:-

“...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.”

And Rule 5(1) in particular provides that:-

“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.”

(7) It is generally accepted that amendment of pleadings ought to be freely permitted to enable the court effectively determine the issues in controversy between the parties. In the case of **NYAMODI OCHIENG NYAMOGO –VS- KENYA POSTS & TELECOMMUNICATIONS CORPORATION 2007 eKLR**, it was held:-

“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.”

(8) Accordingly, if the Court is satisfied that good cause has been shown, it ought to allow an amendment. Indeed, in **Eastern Bakery Vs Castelino [1958] EA 461**, it was held that:-

“..amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”

(9) In **ALPHA KNITS LIMITED –VS- KENINDIA ASSURANCE COMPANY LTD & Another [2007] eKLR**, **Hon Justice Azangalala** (now retired) stated as follows:-

“In my view if the third party is of the view that the proposed amendments will improve the case leave cannot be refused merely because the Defendant is of a contrary view. At this stage it is immaterial that the Defendant may have a water tight answer to the proposed amendments. That is not a consideration at this stage...”

(10) The Defendant/Respondent in their Grounds of Opposition term the Plaintiff’s application an abuse of the Court process. They submit that a similar application seeking to introduce the same amendments was heard and dismissed by the Court. According to the Respondents the present application seeking to amend the Pleint is nothing but a disguised appeal against the Ruling of **Hon Justice Olga Sewe** delivered on **23rd February 2018**. They also submit that the proposed amendments seek to introduce a new cause of action and in any event the application has come too late in the day.

(11) I have perused the Ruling delivered by my learned sister **Hon Justice Olga Sewe on 23rd February 2018**. Whilst it is true that the Applicants prayer to amend the Notice of Motion dated **10th November 2017** was dismissed by the court it is important to note that the court did not declare said amendments as unwarranted or unnecessary. Rather the application was dismissed for two main reasons.

(12) Firstly, the Court found that the initial application was already spent. The court held that:-

“It is manifest therefore, that the initial application was, for all purposes and intents, spent by the time the proposed amendment was made. It is also manifest that the proposed amendment would completely so change the complexion of that application as to convert it to a whole new and fresh applications and is therefore untenable.”

(13) Secondly the Court found that the Notice of Motion dated **24th November 2017** was incompetent for falling a foul of **Rule 9** of the

Oaths and statutory Declaration Rules. On this point the Court found as follows:-

“Accordingly, since the annexures were not properly and procedurally introduced for consideration by the Court in accord with Rule 9 aforementioned, it would follow that the Notice of Motion for amendment would be hollow...”

(14) It is manifest therefore that the application to amend the Notice of Motion dated **10th November 2017** was dismissed on technicalities and not due to the insufficiency of the application. Therefore I find no merit in the Respondent’s objection.

(15) The Plaint in this matter was filed on **10th November 2017**. To date the Defendants have not filed any Defence to the said suit. Further I note that the hearing of the suit is yet to commence. As such I find that the Defendants stand to suffer no prejudice should the Plaint be amended.

(16) Finally, I allow the Plaintiff/Applicant’s application dated **23rd May 2018** in terms of prayers (1) and (2) thereof. Each party to meet its own costs for this application.

Dated in **Nairobi** this **7th** day of **July 2020**.

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Justice Maureen A. Odera