



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. 44 OF 2016

CRESCENT CONSTRUCTION LIMITED.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

By Notice of Motion Application dated 25th June 2018, pursuant to **Order 8 Rule 3 (1) (5) and 7 of the Civil Procedure Rules, section 1A, 1B and 3A of the Civil Procedure Act**, the Applicant sought orders;

- a) That the Plaintiff/Applicant be granted leave to amend its Plaint to join **Keysian Auctioneers** as a Defendant in this suit and to amend certain aspects of the plaint as per the draft annexed hereto;
- b) That the Defendant/Respondent be at liberty to file a defence to the amended Plaint if it so wishes;
- c) That the costs of this application be in the cause.

The Application was based on grounds;

- a) That **Keysian Auctioneers** are the auctioneers that sold the Plaintiff's property while the Defendant had issued a written confirmation that the auction had been suspended.
- b) That the proposed amendments are intended to bring before this Honourable court the real matters in controversy between the parties herein so that the same are determined on their true and substantive merits.
- c) That the proposed amendments are further necessitated by information relevant for the fair and just determination of the real questions in controversy in this suit.
- d) That the proposed amendments will not occasion any prejudice to the Defendant/Respondent.
- e) That the proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by the Plaintiff/Applicant in this suit.

PLAINTIFF/APPLICANT'S SUBMISSIONS

THE LAW

Circumstances where court may order a party to be enjoined in a suit

Order 1 Rule 10(2) of the Civil Procedure Rules 2010, states that;

“10. Substitution and addition of parties-

1) Where....

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

The court's jurisdiction is discretionary; the court may allow a party that will aid in adjudicating matters before it to be enjoined in the suit.

Further to the above, in Law Society of Kenya –vs- Martin Day & 3 others [2015] eKLR, Justice Aburili under paragraph 40 stated;

“In Karuturu Networks Ltd & Another –vs- Dally Figgis Advocates, Nairobi court of Appeal CA No. 293/2009 it was held that;

“The application of the overriding objective principle does not operate to uproot the established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness and that in interpreting the law or rules made there under, the court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution...”

In National Social Security Fund Board of trustee –vs- Ankhan Holding Limited & 2 others [2006] eKLR, Justice Fred A. Ochieng held that;

“While liability in tort may not necessarily be equated to liability arising from contract, I nonetheless hold the view that there is room for the applicable principles being applied to both categories of claim. In the case of Standard Chartered Bank –vs- Pakistan National Shipping Corporation [2002] UKHL 43, Lord Hoffman said;

“And just as an agent can contract on behalf of another without incurring personal liability so an agent can assume responsibility on behalf of another...”

...no one can escape liability for his fraud by saying “I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not liable...”

He concluded by stating that:

“I am convinced that there is cause of action against the 2nd and 3rd Defendants, not because they were directors of the 1st defendant, but because they may have committed acts of false misrepresentation or of fraud, on the plaintiff. If the plaintiff may prove its claims against the said two defendants, they may well be found liable personally.”

DEFENDANT/RESPONDENT'S SUBMISSIONS

The Respondent opposed the Application on the grounds that the intended joinder of M/S Keysian Auctioneers to the suit herein breaches the well-established legal principle that where the principal is disclosed, the agent is not to be sued.

Similarly, while citing with approval the **Victor Mabachi** and **Anthony Wareheim** cases, the Court of Appeal in City Council of Nairobi – vs- Wilfred Kamau Githua t/a Githua Associates & another [2016]eKLR held as follows;

“In the circumstances of this case, the 2nd respondent cannot be sued as agent where there is a disclosed principal [the appellant]. There is therefore no cause of action against the 2nd respondent. The principle of common law is that where the principal is disclosed, the agent is not to be sued. There are no factors vitiating the liability of the disclosed principal. Accordingly, the enjoinder of the 2nd respondent in this case is unwarranted.”

The Respondent submits that the Applicant has not pleaded and/or proved any instances of fraud and/or misrepresentation on the part of the intended 2nd Defendant. Further, at no time or at all did the 1st Respondent instruct the intended 2nd defendant to suspend the Auction as alleged. The only instructions issued by the 1st Respondent to the intended 2nd Defendant was/were to proceed with the Auction on its behalf in the exercise of its Statutory Power of Sale.

DETERMINATION

Order 8 rule 3, CPR [Amendment of pleading with leave] provides;

(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 to do.

In the case of Daniel Ouma Okuku vs Kenya Plantation & Agricultural Workers Union Civil Appeal 85 of 2017;

The Court of Appeal stated;

“Parties can amend their pleadings with leave of the Court at any time before judgment...in the case of SULEIMAN vs KARASHA [1989] eKLR it did not matter whether the hearing had been concluded- the court had to consider such an application for leave to amend a pleading and give effect to such an application as it deemed fit. The Court has wide discretion to amend pleadings at any stage of the proceedings so as to bring out real issues in controversy between parties and on such terms as to costs as may be just”.

DISPOSITION

1. The application to amend pleadings with leave of the court is granted.
2. The Amended Plaintiff to be deemed as filed costs to the 1st defendant.

DELIVERED SIGNED & DATED IN OPEN COURT ON 6TH DECEMBER 2019.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

MR. MUTUKU H/B MS GARANE FOR THE PLAINTIFF

MR. KAHARA FOR THE DEFENDANT

COURT ASSISTANT - JASMINE