



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

E. L .C CIVIL SUIT NO.139 OF 2013

RAJ WALIA.....PLAINTIFF/APPLICANT

VERSUS

GABRIEL M. WANDERI1ST DEFENDANT/RESPONDENT

MODERN SECURITIES LTD2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to an application by **Notice of Motion** dated **13th September, 2013** in which the applicant seeks the substantive order that the court be pleased to grant leave to the plaintiff to amend the plaint herein.
 2. The application is based on the grounds on the face thereof and the supporting affidavit of **Raj Walia** sworn on **16th September, 2013**.
 3. The application is opposed. **Gabriel M. Wanderi** the 1st respondent herein, filed a replying affidavit sworn on **16th January 2014**.
 4. The applicant is represented by the firm of **Waiganjo & Company Advocates** while the firm of **Mirugi Kariuki and Company Advocates** represent the respondents.
 5. The plaintiff depones that she instructed the firm of **Karanja Mbugua & Company Advocates** to file this suit with the following as defendants; **Gabriel M. Wanderi, Harrison Waitindi Kahiga and Modern Securities Ltd**.
- She avers that she signed court documents with all three defendants therein but only became aware on **18th September, 2013** that the name of **Harrison Waitindi Kahiga** the intended 2nd defendant had been un procedurally deleted without her authority. It is on this basis that she seeks to be allowed to amend the plaint to include the name that was un procedurally removed without her consent.
6. In opposing the application the 1st defendant avers that the application is an abuse of the court process. He does not respond to the issues raised by the applicant in her affidavit but instead gives reasons why the amendment should not be allowed. It is his view that the party intending to be introduced is his advocate who had been conducting this matter since it was filed and it was only out of malice, mischief and a personal grudge the plaintiff had against his counsel that she wanted to enjoin him in the suit and prevent him from participating in the hearing of this suit while all along the advocate had been acting as the 1st

Defendant's agent.

7. When the application came before me for hearing on **21st January, 2014** both counsels basically rehearsed what was stated in the pleadings and affidavits of their respective parties which I have considered.

8. I find the following question for determination. Was the intended 2nd defendant's name un procedurally deleted from the pleadings or is he being introduced as an intended new party?

9. I have taken time to study the pleadings and affidavits filed by the firm of **Karanja Mbugua & Company Advocates** when instituting this suit. These include the plaint dated **6th February 2013**, verifying affidavit of even date, Notice of Motion and affidavit also of even date, plaintiff's written statement and plaintiff's list of documents. I have made the following observations; All the above documents requiring the signature by Raj Walia, the plaintiff herein have write out applied to the name of Harrison Waitindi Kahiga. These include the verifying affidavit, plaintiff's written statement and the plaintiff's list of Documents. The affidavit supporting the Notice of Motion dated **6th February, 2013** still bears the name of Harrison Waitindi Kahiga P O Box 1689 , Nakuru as one of the parties to be served with the affidavit.

10. The power to amend pleadings is donated by the **Civil Procedure Act section 100** and the **Civil Procedure Rules**. The court of appeal in *Central Kenya Ltd –Trust Bank Limited (2002) 2 E.A. 365* held inter alia that;-

“...a party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding multiplying of suits...”

In the court of appeal's view, a court of law is enjoined to be magnanimous in allowing amendments so as to allow parties ventilate the real issues in controversy. I agree with the reasons of the above decision that amendment of pleadings should be allowed with as great latitude as would allow the court to deal with the real controversy.

11. **Order 1 Rule 1** of the **Civil Procedure Rules** provides; **All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.**

12. The plaintiff has sworn her affidavit under oath stating clearly what her instructions to her counsel were. She has even annexed documents to support her allegation. I have no reason to doubt her. I too have made my own observations and I am satisfied that indeed the plaintiff intended from the beginning that Harrison Waitindi Kahiga be a defendant in this suit. I am also convinced that he was initially named as a defendant in the pleadings and the pleadings were tampered with and his name deleted. The respondents have also not controverted the allegations made by the applicant. Whichever the case as stated in paragraph 10 of this ruling amendments should be allowed so as to allow parties ventilate the real issues in controversy.

13. The defendant is at liberty to apply to have his name stuck out as a party if he feels he has been wrongly joined or if there is no cause of action against him under **Order 1 Rule 14** of the **Civil Procedure Rules**.

14. For the above reasons I allow the application by the plaintiff and grant her leave to amend the plaint with costs.

It is so ordered.

Dated, signed and delivered in open Court at Nakuru this 4th day of July 2014.

L WAITHAKA

JUDGE

PRESENT

Mr Waiganjo for the plaintiff/Applicant

Mr Karanja for the Defendant/Respondent

Emmanuel Maelo: Court Clerk

L N WAITHAKA

JUDGE