



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C. NO. 152 OF 2013

HELLEN WANJIRU KIRAGU and

MARY NJERI KIRAGU (suing as the legal

representatives of the estate of the late

JAMES KIRAGU KIGOTHO (deceased).....PLAINTIFFS

VERSUS

JAMES NDUNG’U MIRINGU.....DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated **6th November, 2013** taken out by the plaintiff under **Order 8 Rule 3 (1), Order 51 Rule 1** of the **Civil Procedure Rules (2010)** and **Section 3A of the Civil Procedure Act** and all enabling provisions of the Law. The application seeks the following orders *inter alia*:

- a) **That the plaintiffs be granted leave to amend the plaint filed herein**
- b) **That the amended plaint be deemed as duly filed upon payment of the prerequisite court filing fees and the defendant do have corresponding leave to file his amended defence**
- c) **That costs of this application be provided for.**

2. The application is premised on the grounds on its face and is supported by the affidavit of **Hellen Wanjiru Kiragu**, who depones that it is necessary to amend the plaint to include the **Liquidation agent of Kenya Finance Bank Ltd and Joseph Githirwa Muturi t/a Muga Auctioneer & General Agents** as defendants, to assist the court determine the real issues in this suit, namely to uncover whether there was fraud perpetrated by the proposed defendants as alleged by the plaintiff; that it was also necessary to amend the plaint as the allegations of fraud as contained in the plant ought to be itemised as required by the legal provisions on framing pleadings which could not have been possible without including the intended defendants.

3. The application is contested vide the defendant's Grounds of Opposition dated **20th November, 2013** on the grounds that the plaintiffs have no locus to institute this suit; that the application is bad in law, unwarranted and an abuse of the court process; that the cause of action against the parties sought

to be enjoined has been caught up by limitations and/ or is premature; that the application breaches provisions of the Companies Act and the Auctioneers Act.

4. On **15th January, 2014** parties agreed to dispose of the application by way of written submissions. The applicant filed their written submissions on **27th January, 2014** while the defendants filed theirs on **4th February, 2014**.

5. Counsel for the Plaintiff, submitted that the proposed amendment was necessary and was made in the interest of justice so that the court could determine the real issues in controversy. Further the defendant would suffer no prejudice or injustice if the application was allowed. They relied on the cases of **Quip Limited v East African Marine Systems Ltd [2009] eKLR** and **Harrison C. Kariuki v Blue Shield Insurance Co Ltd** where **Waweru J**, in upholding the court of appeal's decision in the case of **Central Kenya Limited VS. Trust Bank Limited (2000) EARL 36** held that the guiding principle in the application to amend pleadings is that the same will be liberally and freely permitted unless prejudice and injustice will be occasioned to the opposite party.

6. Counsel for the defendant submitted that the application was made in contravention of the rules of natural justice and fell within the exception in the case of **Harrison C. Kariuki v Blue Shield Insurance Co Ltd** (supra) because the application was tainted with lethargy and the amendments sought to introduce new, illegal and inconsistent cause of action. He further submitted that the amendments were meant to delay justice as the plaintiff knew even before filing suit what had transpired and should have joined the proposed defendants from the beginning; that the proposed defendants should have been served with this application so that they could participate in its hearing as they would be affected by any orders issued by the court. They relied on the case of **Republic v Kigera CR Appeal No. 48 of 1986**.

7. Counsel further submitted that the action was time barred as against the proposed **3rd** Defendant (the auctioneer) since the challenged sale occurred on **7th December, 2007** which is now more than 6 years ago. Furthermore, proceedings against the liquidator (proposed **2nd** defendant) were incompetent, as they defied the provisions of **Section 228** of the Companies Act, which required that leave of the court be sought before enjoining or bringing proceedings against the liquidator. The applicant having filed no such application, the joinder of the proposed **2nd** defendant in the suit was premature and illegal. He relied on the case of **Ruth Wanjiku Kagiri v Reliance Bank Limited (in liquidation) & 2 others [2012] eKLR**.

8. I have read and carefully considered the pleadings and submissions by the parties to this application. The issue that stands out for determination is whether the plaintiff should be allowed to amend the plaint.

9. The courts have over time in various cases, allowed amendments of pleadings in almost all instances except where such an amendment would result in an injustice or prejudice to the other party which cannot properly be compensated for in costs (See **Beoco Ltd VAlfa Laval Co. Ltd (1994) 4 All ER. 464**). The power to order amendment of pleadings is discretionary power. Albeit wide, it is exercised upon defined legal principles. I wish to be guided by the decision in **AAT Holdings Limited V Diamond Shields International Limited NBI HCCC No. 442 of 2013** where the court held as follows,

"The general power of the court to amend pleadings draws from Section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 Rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that;1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the

exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in Central Kenya Ltd V Trust Bank Ltd & 5 Others Civil Appeal No. 222 of 1998 as shown below:-

- i) That are necessary for determining the real question in controversy.
- ii) To avoid multiplicity of suits provided there has been no undue delay.
- iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- iv) That no vested interest or accrued legal rights is affected; and
- v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs

10. Whereas, I agree that amendments of pleadings should be allowed in almost all instances except where such an amendment would result in an injustice or prejudice to the other part which cannot properly be compensated for in costs, the defendant has raised an important issue about seeking leave before instituting proceedings against a Company in liquidation.

11. **Section 228** of the Companies Act Cap 486 provides:

"When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceeding shall be proceeded with or commenced against the Company except by leave of the court and subject to such terms as the court may impose."

12. In one of the cases relied on by Counsel for the defendant, **Ruth Wanjiku Kagiri V Reliance Bank Limited (In Liquidation) & 2 others** [2012] eKLR, the court cited with approval the case of **Kissi Petroleum Products Ltd v Kobil Petroleum** [2006] eKLR, where the court of appeal held **"...The winding up order has already been made by the winding up court. It is not however operational because this Court has stayed its rigours. Such an order of stay cannot, however, whittle down the provisions of the section 228. Until the winding up order is set aside, leave of the court is still required for the continuation of the proceedings by the company. Leave to institute the appeal has not been obtained. The applicant is seeking a discretionary Order. In dealing with the application, the court cannot ignore the provisions of section 228 as any appeal without leave of the court would be incompetent..."**

13. Similarly In the case of **David Gilbert Hastie & Another V Trust Bank Ltd. (In Liquidation)** [2009] eKLR the court held, **"Upon reading the provisions of the Companies Act and authorities relied upon and upon hearing submissions regarding the issue, it is clear that the proceedings by or against a company in liquidation must be controlled by court to avoid the disposing of the company's assets for the benefit of only some of the creditors. It is therefore mandatory that before commencing suit, leave must be obtained from the court. Failure to do so renders the suit a nullity. In this case there is no doubt that the plaint was filed one day before the leave was granted."**

14. In the instant case, there is no doubt that the plaintiff is seeking to enjoin the 2nd defendant without leave of the court as required under **Section 228** of the Companies Act Cap, 486. In my view the applicant has prematurely brought this application against the proposed 2nd defendant without following the laid down procedure.

15. As regards the proposed 3rd defendant, he was merely an agent of the bank acting on its instruction when he sold the suit property by way of Public Auction. Without the liquidator of the bank

as a party in this suit there is no claim by the plaintiffs against the proposed 3rd defendant and he is therefore an unnecessary party in the absence of the proposed 2nd defendant.

16. For the above reasons, the Notice of Motion dated 6th November, 2013 is struck out with costs.

Dated and Signed at Nakuru this 10th day of October 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Njuguna for Respondents

N/A for Applicants

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE