



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE NO. 17 OF 2017

FIVEWAYS MEDICAL & DIAGNOSITC (K) LTD.....PLAINTIFF

VERSUS

NORTHERN WATER SERVICES BOARD.....1ST DEFENDANT

MAHAT KUNO ROBLE.....2ND DEFENDANT

ABDALLAH ALLI.....3RD DEFENDANT

ZAINAB OSMAN IBRHIM.....4TH DEFENDANT

RULING

BACKGROUND

By a Notice of motion dated 24th September 2018 brought under Order 8 Rule 3 and 5 of the Civil Procedure Rules, Section 3 of the Civil Procedure Act and all enabling powers and provisions of the law, the 1st Defendant/Appellant seeks the following orders;

- (1) THAT this application be certified as urgent and heard on a priority basis before further hearing of the main case.**
- (2) THAT leave be and is hereby granted to the Applicant to amend its defence and consequent upon such amendment the Applicant do also make other consequential amendments to other documents including its list of documents, list of witnesses and list of issues for determination by the court.**
- (3) THAT the costs of this application be provided for.**

APPLICANT'S STATEMENT OF FACTS

The Applicant through her advocate Mr. C. P. Onono swore an affidavit in support of the application where he deposed as follows;

- (i) That new information had converged in connection with this case, which information has enabled me look at the entire case for the Plaintiff from a completely new angle.
- (ii) That out of the events I explained to the court on 9th January, 2018 I got reunited with part of my file which I had inadvertently misplaced in the court in Nairobi when this matter was still before the Nairobi ELC Court.
- (iii) That among the documents contained in the file was a copy of the certificate of incorporation Number CPR/2009/2880 of the Limited Company known as FIVE WAYS MEDICAL AND DIAGNOSTIC (K) LTD which is the name of the 1st Respondent herein.
- (iv) That with the benefit of the certificate of incorporation, a search of the company confirmed that the first witness herein Hussein Abdi Farah was indeed a director of the 1st Respondent as he had testified. The search results also showed that he was the majority shareholder in the company. The certificate of incorporation is now produced and shown to me marked CPO-1 while the search results are produced and shown to me marked CPO-2.
- (v) That with exhibit CPO-1 in my hands and in preparation for the hearing of this case slated for 9th July 2018, I sat down to study

all the 1st Respondent's documents and noticed that all the documents were uniform in the sense that they were all in the name of the 1st Respondent.

(vi) That when I looked at exhibit CPO-1 in conjunction with the other documents in the 1st Respondent's bundle of documents, I noticed strange inconsistent and irreconcilable oddities which raised numerous questions.

(vii) That out of those oddities I became convinced that it was in the interest of justice that all the documents be laid out before the court to enable the court determine the real question between the parties.

(viii) That some of the oddities I noticed were as follows;

(a) That although the Respondent was incorporated on 14th May 2009 the Letter of Allotment in its favour is dated 6th January 1999, a period of many years before the 1st Respondent was incorporated. The letter of allotment is now produced and shown to me marked CPO-3.

(b) That according to exhibit CPO-3, the allottee was to be granted a leasehold title under the Registration of Title Act for a term of 99 years with effect from 1st January 1999 yet as at the date of commencement of the leasehold interest the allottee was not yet an incorporated entity, it did not exist and nobody knows where the future directors of the company were as at that date what they were doing with their lives or for that matter, whether in the year 1999 they qualified to be directors of a limited company.

(c) That according to same exhibit CPO-3 the total sum of Kshs.44,170/= was to be paid obviously as a condition of acceptance of the allotment. Surprisingly, perusal of the 1st Respondent's documents recitals total absence of a receipt for the said amount.

(d) Item number 10 in the Plaintiff's bundle of documents is receipt No. 2578362 dated 13th January, 2009. It has two problems as follows;

(i) It is in the name of the 1st Respondent yet by 13th January, 2009 the 1st Respondent was not yet incorporated. It is now produced and shown to me marked CPO-4.

(ii) The receipt covers the period 1999 to 2009, a period during almost all of which the 1st Respondent was not yet even incorporated.

(e) Grant Number IRN 6367/1 is the first document in the 1st Respondent's bundle of documents. It grants the 1st Respondent Land Reference Number 2861 for a term of 99 years with effect from 1st January, 1999 which is the same leasehold period which appears in exhibit CPO-3 herein yet as at 1:1:1999 the 1st Respondent was not yet in existence whether as a natural person or a corporate entity. The grant now produced and shown to me marked CPO-5.

(f) That the said oddities convinced me that it was in the interest of justice that substantial amendments be made to the Applicant's defence to enable those oddities to be incorporated and thoroughly interrogated not only during the hearing of this case but also to enable the court take on board all other issues arising therefrom. A draft of the proposed amendments is annexed hereto and marked CPO-6.

(g) That I received courage and comfort from the happy coincidence that PW1 has not yet completed his testimony nor has the suit premises been viewed by the court as the Applicant has always urged the court to do. Secondly, that as the principal shareholder of the 1st Respondent, PW1 was best placed to confront and satisfactorily answer the nagging and uncomfortable questions arising from the core documents which the 1st Respondent had based its claim of ownership of the suit premises upon.

(h) That I also received courage and comfort from the fact that since it is only Pw1 who had testified no prejudice would be visited upon any of the parties to the suit.

RESPONDENT'S STATEMENT OF FACTS.

The Plaintiff/Respondent opposed the said application with a replying affidavit through its director one Hussein Abdi Farah who deponed as follow;

(a) That I have seen, read and understood all the averments set out in the affidavit sworn by C.P Onono on 24th September, 2018 together with the annexures thereto in support of the 1st Defendant's application and I swear this affidavit in response thereto and in support of the Plaintiff's opposition to the application.

(b) That I am advised by our advocates on record and I verily believe the advise to be entirely correct that Mr. C.P. Onono who is the Advocate for the 1st Defendant has purported to depone on oath facts which he has no knowledge of contrary to the Civil Procedure Rules which requires that such facts be deponed by the 1st Defendant's/Representative and not the Advocates of the 1st Defendant and consequently the supporting affidavit is incurably defective and must be struck out.

(c) That without prejudice to the foregoing, it is clearly evident from the contents of the supporting affidavit aforesaid that the 1st Defendant wishes to amend its defence to include facts they raised during the cross-examination of the Plaintiff's witness and which clearly demonstrates an act of bad faith on the part of the 1st Defendant's Advocates.

(d) That I am further advised by our advocates on record and which advise I verily believe the same to be true that the issues the 1st Defendant is now purporting to raise were duly captured in the cross-examination of the Plaintiff's witness and as such the 1st Defendant's application is a belated tactic meant to solely delay the hearing and determination of the suit.

(e) That the application has been brought at a very late stage and the reasons for the delay have not been tendered.

(f) That the application to amend the defence is highly prejudicial to the Plaintiff to amend its pleadings and call its witnesses afresh at a considerable expense.

APPLICANT'S FURTHER STATEMENT OF FACTS

The 1st Defendant/Applicant through her Advocates on record sought leave to file a further affidavit which was allowed and deponed as follows;

(a) That his firm is on record for the Applicant herein and he is therefore qualified and competent to swear this affidavit.

(b) That he has read and understood the replying affidavit sworn by Hussein Abdi Farah dated 28th January, 2019.

(c) That he was the deponent of the supporting affidavit dated 24th September, 2018.

(d) That the facts/information/events which formed the substratum upon which the said affidavit was grounded were facts/information/events which happened or came to his personal knowledge in his professional capacity as counsel on record.

(e) That more specifically paragraphs 2,3,4,5,6,7,8,9,10,11,12 and 13 of the said supporting affidavit related to facts/information/events which appertain to him personally or which otherwise came to his knowledge in the due exercise of his office/status /mandate as counsel on record for the Applicant.

(f) That the Applicant/1st Defendant only came to know the said facts/information/events as reported to them by himself hence he was the correct person to swear the said affidavit as he did.

(g) That it was patently clear that the detailed facts and information set out in the supporting affidavit were not covered during cross-examination neither were the contradictory and worrying contents of the Respondent's documents raised/covered/dealt with during the said cross-examination.

(h) That he shall during the hearing of this application draw the attention of the court to the fact that the deponent of the replying affidavit has COMPLETELY AVOIDED dealing with the merits or otherwise of the specific issues raised by the documents which he himself put forth before the court in support of his claim for the suit premises.

(i) That unrelenting search for the truth is the core function of every trial. It would be authentically to that core function if documented facts which go to the very root of the matters in issue between the parties were to be excluded on technicalities.

1ST DEFENDANT'S SUBMISSION

In addition to the affidavit evidence, the 1st Respondent/Defendant through the firm of C. P Onono & Co. Advocates made the following submissions;

(i) That the Notice of motion before the court is fully and exhaustively supported by documents whose contents and authenticity have never been questioned by the 1st Respondent and they believe that the 1st Respondent has never questioned the documents because all the documents relate exclusively to itself.

(ii) That they observe that other than the said certificate of incorporation the remaining documents are products of the 1st Respondent's own list of documents.

(iii) That with the benefit of the highlight this court must by now have a reason to suspect that failure to list and produce the certificate of incorporation was a DELIBERATE mission by Five Ways because when the certificate of incorporation is read together with the other Five Ways documents it will be quickly realized that they are not and cannot be faithful and intimate bedmates because the certificate of incorporation exposes the nakedness, untruths and outright of lies of the remaining documents listed by the 1st Respondent.

(iv) That the court must by now have also noticed that the replying affidavit by HAF has completely avoided addressing confronting or in any other way dealing with the specific issues raised by his own documents.

(v) That the grounds and reasons given in the replying affidavit go to the very root, the very foundation and to the very building blocks upon which Five Way's case was constructed. Therefore, to exclude the specific issue raised by the application and the supporting affidavit would be to undermine this court's primary function which is the relentless search for the truth.

(vi) That in this case neither HAF nor Five Ways had contented the authenticity or contents of the documents upon which the application before the court are based.

(vii) That Hassan Abdi Farah is a director and main shareholder of Five Ways. The hearing of this case is still in its infancy and that Hassan Abdi Farah personally appeared in court at least twice since the case was transferred to Garissa. His availability has never been a problem and being a director and main shareholder of Five Ways there is no better witness who can answer the specific burning issues raised by his documents since the case for Five Ways is yet to be closed no prejudice will be suffered by any party.

THE 2ND AND 4TH DEFENDANTS WRITTEN SUBMISIONS.

The 2nd and 4th Defendants through the firm of Sagana, Biriq & Co. Advocates submitted as follows;

(I) That the issue that crystalizes in this application is whether the Applicant has satisfied the conditions for allowing an amendment to pleadings.

(II) He cited the case of **Clesoi Holdings Limited –Vs- Prime Bank Ltd (2016) e KLR**, where the court pronounced itself on the conditions to be satisfied in order for an amendment of pleadings to be allowed.

(III) That the Applicant seeks to amend their defence on the basis that new information has emerged in the case due to the fact that the Applicant's counsel was re-united with some documents that he had previously misplaced in the conduct of this matter.

(IV) That the documents that counsel for the Applicant got re-acquainted with reveal several inconsistencies that raise fundamental questions as to how the Plaintiff acquired their alleged title to the suit property necessitating the amendments as stipulated in the draft defence by counsel for the Applicant.

(V) The Learned Counsel cited Order 8 Rule 5 (1) CPR 2010.

(VI) The counsel for the 2nd and 4th Defendants also cited the case of **Joseph Ochieng & 2 others –Vs- First National Bank of Chicago, Civil Appeal No. 149 of 1991** and the ratio emerging therefrom.

(VII) That the Applicant herein has approached this Honourable Court seeking to amend its defence at the earliest instance after the said facts that they seek to introduce came to their attention.

(VIII) That the application was filed on the 24th September 2018.

(IX) That furthermore, mere delay ought not to deny the Applicant the right to amend their defence in the interest of justice. They cited the case of **Central Kenya Limited –Vs- Trust Bank Limited (2000) EALR 365**.

(X) That the amendments proposed by the Applicant herein seek to bring material facts before the court so that the same is interrogated and its veracity tested during trial.

(XI) That the same does not introduce a new cause of action but only seeks to bring to the attention of the court facts that will aid the court in determining the matter before it. The learned counsels also cited the case of **Institute for Social Accountability & Another –Vs- Parliament of Kenya and 3 Others (2014) KLR**.

(XII) That the anomalies identified by the 1st Defendant raise fundamental questions in this suit as to how the Plaintiff's alleged title was acquired and the same ought to be interrogated fully via viva voce evidence.

(XIII) That the effect of the said amendments proposed by the Applicant would be such that the court is furnished with all the facts pertinent to this suit to enable it determine the real question in controversy between the parties.

(XIV) That the objective of the court is to determine the real dispute and that the proposed amendments facilitates the achievement of the said objective.

(XV) That the Plaintiff will not be prejudiced in any way as both parties will be accorded an opportunity to argue their case before this court as the case is still at the trial stage and the Plaintiff has not even closed its case. In that regard the Respondents herein will not be prejudiced if the amendment is allowed and that the Plaintiffs case will not be defeat.

(XVI) The counsel for the 2nd and 4th Defendants cited Order 18 Rule 10 of the Civil Procedure Rule and Section 146 (4) of the Evidence Act.

(XVII) That from the foregoing the Respondent will not be prejudiced in any manner since the provisions of the law under Order 18 Rule 10 CPR as read with Section 146 (4) of the Evidence Act offers a chance to it to recall witnesses for further examination, cross-

examination and/or re-examination so as to get to the bottom of issues raised in the amended defence.

LEGAL ANALYSIS AND DECISION

I have considered the affidavit evidence, the annexures thereto, the submissions by counsels and the applicable law. This Honourable Court and precedents from the Superior Courts have rendered themselves on the import of Order 8 Rule 3 & 5 of the Civil Procedure Rules on the principles for amendment of pleadings and the General Rule is that amendment of pleadings are freely allowed. However, there are exception to the rule where it is shown that the application for amendment has been made very late in the day, where the opposite party had testified and called all his witnesses some of whom may have died or their memories have failed or that the proposed amendment if allowed would take away a right of defence under the Limitations Act. An application for amendment can also be disallowed if it is made in bad faith.

In the case of **Central Kenya Limited –Vs- Trust Bank Limited (2000) EALR 365**, the court held thus;

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy, already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merit of the case rather than holding it captive to form of the action and proceedings” (Emphasis added)

Again, in **Joseph Ocheing & 2 Others –Vs- First National Bank of Chicago, Civil Appeal No. 149 of 1991** the court held;

“ The ratio that emerges out of what was quoted from the said 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 it should be allowed if made in good faith provided costs can compensate the other side” (emphasis added.)

I fully agree with the interpretation of the law and have nothing useful to add. In the instant application, the Applicant through her counsel having the conduct of this case on their behalf stated on oath that he had misplaced his office file and later reunited with the same and that upon perusal, he found some documents including a copy of certificate of incorporation number CPR/2009/2880 of the Limited Company known as FIVE WAYS MEDICAL AND DIAGNOSTIC (K) LTD which is the name of the Plaintiff/Respondent in this case. From the letter of allotment and the certificate of lease issued in respect of the suit property the Applicant realized that there are irreconcilable and inconsistent statements of facts which she now wishes to incorporate in their statement of defence by way of amendments so that the real issues in controversy can be determined. Though the application is strenuously opposed, I find the application for amendment by the 1st Respondent made in good faith and will enable this Honourable Court determine the real issues in controversy. The court takes Judicial Notice that the Plaintiff has called two witnesses but she has not closed her case. Should the application be allowed and the Plaintiff wishes to amend their defence and even to recall the two witnesses who have already testified the costs of recalling the witnesses shall be borne by the Applicant/1st Defendant. I also wish to comment on the arguments and submissions by the Plaintiff/Respondent that Mr. C.P. Onono Advocate has no locus standi to swear the affidavit in support of the application and that the said affidavit should have been sworn by a director of the 1st Defendant/Applicant Company or any other person authorized by the company. Mr. C. P. Onono in his further affidavit stated that the facts and/or information which formed the substratum upon which the said affidavit was grounded were facts and/or information which came to his personal knowledge in the course of his professional duties as counsel for the Applicant/1st Defendant. I totally agree with Mr. C. P. Onono that if some information may have been obtained by counsel while in the course of his professional duties it therefore follows that he has authority to depone to those facts.

The upshot of my finding is that the Notice of Motion dated 28th September 2018 is merited and the same is allowed as follows;

- 1. The 1st Defendant/Applicant is hereby granted leave to amend her defence in the manner proposed in the 1st Defendant’s draft amended defence annexed to the supporting affidavit together with other consequential amendments to other documents including its list of documents, list of witnesses and list of issues for determination within 14 days from today.**
- 2. The Plaintiff/Respondent and the 2nd, 3rd and 4th Defendants shall be at liberty to amend and serve their pleadings in accordance with the Civil Procedure Rules.**
- 3. Hearing on 22/3/2021.**
- 4. Thrown away costs which I assess at Kshs.10,000/=(ten thousand) to be paid to the Plaintiff/Respondent before the next court action.**

Read, delivered and signed in the Open Court this 26th day of November, 2020.

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E. C Cherono (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Dundotich for Plaintiff
2. M/s Kiangai holding brief Muganda for the 2nd & 4th Defendant.
3. Mr. Onono for the 1st Defendant/Applicant.