



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 126 OF 2018

(FORMERLY CIVIL SUIT NO.255 OF 2014)

CENTRAL BANK OF KENYA PENSION FUND

REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

LEONARD MUDACHI T/A BLANCOS

LOUNGE AND GRILL.....1ST DEFENDANT

WILLIAM MUDACHI T/A BLANCOS

LOUNGE AND GRILL.....2ND DEFENDANT

RULING

The Plaintiff filed the notice of motion dated 14th September 2017 seeking leave to amend the plaint dated 28th August 2014 as well as orders to join Blancos Holdings Limited and Blancos Lounge and Grill Limited as the 3rd and 4th Defendants in these proceedings. The Plaintiff also sought an order that upon joinder of the proposed parties, the draft amended plaint be deemed to be duly filed.

The application was made on grounds that the lease, which is the subject matter of the suit was executed between the Plaintiff as the lessor and Blancos Holdings Limited and Blancos Lounge and Grill limited as the lessees and hence they were essential and integral parties to the lease agreements.

The application was supported by the affidavit of Mr. Fredrick Ochwa, counsel in conduct of the matter on behalf of the Plaintiff. He deponed that the cause of action in this matter arose out of non-payment of charges due on leases granted by the Plaintiff to the parties in the year 2008. He further deponed that the leases were granted to Blancos Holdings Limited and Blancos Lounge and Grill Limited and annexed extracts of the first and last pages of the leases as evidence of the lease agreements. He also deponed that the performance of the lessee's obligations in the said leases were guaranteed by the 1st and 2nd defendants who executed personal guarantees vide which they absolutely and unconditionally guaranteed the observance and performance of all the covenants and conditions by the said lessees of their obligations under the leases including the obligation to pay rent and all outgoings under the leases.

He deponed further that the Plaintiff wished to obtain remedies against the proposed 3rd and 4th Defendants and no effectual order can be granted in their absence in the proceedings.

The Defendants opposed the Applicant's application through the replying affidavit sworn by Esther Muigai, counsel in for the Defendant. She deponed that the Plaintiff's application was an afterthought, since the Plaintiff has all along been aware of the lease which was entered into in 2008, but did not join the proposed 3rd and 4th Defendant in the plaint. She deponed that the amendments sought will introduce a new cause of action which is time barred, the leases being contracts. She also deponed that the Plaintiff's application for amendment was made in bad faith since it sought to defeat the defendants accrued defence.

The court has considered the pleadings, affidavits, annexures and submissions filed by the respective parties. Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or *suo moto*, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party.

The court finds that the applicant has demonstrated that Blancos Holdings Limited and Blancos lounge and Grill limited were parties in the leases that gave rise to this dispute. They were the lessees while the 1st and 2nd Defendants were guarantors of the lessees to the lease. It is necessary that the proposed 3rd and 4th Defendants are joined to the suit for the effectual adjudication and final determination of all issues in the dispute. The leases were executed on 17th June 2008.

The Defendants submitted that allowing this application would amount to circumventing their defence. They filed a list of authorities on the position that an amendment ought not to be allowed where it appears that it intends to circumvent the defendant's defence. In particular, **Ultimate Engineering Limited Nairobi Heart Institute Limited T/A Karen Hospital [2011] eKLR** can be distinguished from this case in which the Defendants admit in their defence that a lease was registered. The Defendants have not demonstrated that the proposed amendments will prejudice them in any way.

In **JMK Vs MWM & Another [2015] eKLR**, the Court of Appeal sitting at Malindi cited with approval **Central Kenya Ltd. V. Trust Bank & 4 Others, Ca No. 222 Of 1998**, which affirmed that the guiding principle in amendment of pleadings and joinder of parties is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated in costs.

The Application dated 14th September 2017 is allowed. Blancos Holding Limited and Blancos Lounge and Grill Limited shall be joined to these proceedings as the 3rd and 4th Defendants respectively. The amended Plaintiff shall be filed and served on the Defendants within 3 days. The 1st and 2nd Defendants are granted corresponding leave to amend their defence within 7 days of service of the Amended Plaintiff. The costs of the application shall be in the cause.

Dated and delivered at Nairobi this 21st day of February 2019.

K. BOR

JUDGE

In the presence of: -

Ms. C.K. Chege for the Plaintiff

Ms. E. Muigai for the Defendants

Mr. V. Owuor- Court Assistant