

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM. NO. E118 OF 2024

VIKAS GEHLOT 1ST PLAINTIFF/APPLICANT

INTEX CONSTRUCTION LIMITED 2ND PLAINTIFF/APPLICANT

-VERSUS-

SK SPORTS AND RECREATIONAL SERVICES LIMITED T/A MOMENTUM
FITNESS 1ST DEFENDANT/RESPONDENT

SAHIL KAKKAR 2ND DEFENDANT/RESPONDENT

SANIYA KAKKAR 3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiffs/applicants filed a Notice of Motion application dated 5th June 2025 brought under the provisions of Sections 1A, 1B, 3, 3A and 63(c) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 8 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of the law.
2. The plaintiffs pray to be granted leave to amend their plaint in accordance with the draft amended plaint annexed to their affidavit. The plaintiffs also pray for the draft amended plaint to be deemed as duly filed upon payment of the requisite fees, and for the defendants to be at liberty to amend their defence within fourteen (14) days thereafter, if they so wish, and for the costs of the application to be in the cause.
3. The application is supported by an affidavit sworn on 5th June 2025 by Mr. Vikas Gehlot, the 1st plaintiff herein. He averred that the plaintiffs instituted this suit through a plaint dated 4th March 2024, seeking *inter alia*, to enforce the 2nd

defendant's contractual obligation to transfer 60% of the shareholding in the 1st defendant, to him (1st plaintiff).

4. He stated that since the filing of the suit, further information has come to their attention, which is material and relevant to the just determination of the issues in controversy, and which was not available to the plaintiffs at the time of filing the suit.
5. Mr. Gehlot explained that the said information is set out in the draft amended plaint annexed to their affidavit, and includes facts and developments that go to the heart of the plaintiffs' claim and the defendants' conduct, which demonstrates further breaches of the contract and bad faith.
6. He deposed that the proposed amendments are necessary in order to enable this Court to effectually and completely adjudicate upon, and settle all the questions involved in the suit. He further deposed that the proposed amendments will not occasion any prejudice against the defendants who will be at liberty to file an amended defence, should they wish to do so.
7. Mr. Gehlot stated that the application for leave to amend has been made in good faith and without undue delay, immediately upon discovering and confirmation of new facts that necessitate the amendments. He also stated that it is in the interest of justice for the plaintiffs to be granted leave to amend their plaint, and for the draft amended plaint to be deemed as duly filed, upon payment of the requisite Court fees.
8. In opposing the application, the defendants filed a replying affidavit sworn on 4th August 2025 by Mr. Sahil Thakkar, the 2nd defendant herein, on behalf of himself and the other two defendants.

9. He contended that the instant application is defective to the extent that the draft amended plaint was not sealed by a Commissioner for Oaths, and as such, the said amended plaint adds no value to the instant application and should be expunged from this Court's record.
10. He further contended that without a draft amended plaint to show the extent of the amendments being sought, this Court cannot ascertain whether or not the provisions of the Order 8 Rule 3 of the Civil Procedure Rules, 2010, have been complied with by the plaintiffs and on that ground alone, the instant application is fatally defective and should be struck out with costs.
11. Mr. Thakkar averred that the plaintiffs have added eight (8) new paragraphs to the plaint, which he outlined in his affidavit. He contended that the introduction of new paragraphs to the amended plaint without striking out the previous paragraphs is contrary to the provisions of Order 8 Rule 7 of the Civil Procedure Rules, and for that reason the application should fail and be dismissed with costs.
12. The law firm of G&A Advocates LLP filed written submissions dated 13th October 2025 for the plaintiffs. Ms Koech, learned Counsel for the plaintiffs submitted that the proposed amendments are necessary for purposes of placing before this Court complete and accurate facts of the dispute and to enable the Court to effectively and finally determine all the real issues in controversy between the parties. She stated that the proposed amendments will not occasion any prejudice to the respondents.
13. She submitted that the draft amended plaint seeks to include additional facts arising after the institution of the suit, including details relating to the incorporation of a new company – Momentum Fitness Limited during the

pendency of these proceedings, the updated business valuation of the 1st defendant company, and further particulars of the 2nd defendant's continued failure to transfer sixty percent (60%) of the 1st defendant's shareholding to the 1st plaintiff.

14. The plaintiffs disputed the contention that their application is defective as the draft amended plaint was not duly marked and sealed by a Commissioner for Oaths. They stated that the verifying affidavit sworn by the 1st plaintiff and annexed to the draft amended plaint was duly commissioned by a qualified Commissioner for Oaths, as is evident from the record.
15. Ms Koech submitted that the draft amended plaint is properly before this Court and meets all procedural requirements under Order 8 Rule 5 of the Civil Procedure Rules, 2010. She referred to the defendants' objection as an attempt to frustrate the proceedings based on untrue assertions.
16. She stated that even assuming that any procedural technicality exists, it would be curable under Order 19 Rule 7 of the Civil Procedure Rules, 2010, which provides that an affidavit shall not be rejected merely because of a defect in form. She submitted that Article 159(2)(d) of the Constitution mandates the Court to administer justice without undue regard to procedural technicalities. She cited the decisions made by Courts in **Ken Kaunda v Wilfred Kiboro & another** [2004] eKLR and **Microsoft Corporation v Mitsumi Computer Garage Limited & another** [2001] eKLR.
17. Ms Koech submitted that Section 100 of the Civil Procedure Act, empowers Courts to amend any defect or error in any proceedings at any time and provides that all necessary amendments shall be made for the purpose of determining the real question in controversy. She also relied on Order 8 Rule 5

of the Civil Procedure Rules, 2010, which empowers a Court to either on its own motion or on the application of any party, to order any document to be amended for purposes of determining the real question in controversy between the parties.

18. Counsel submitted that the underlying purpose of the said provisions are articulated in **Halsbury's Laws of England 4th Edition (Re-issue) Volume 36(1)** paragraph 76, which states that the object of an amendment is to facilitate the determination of the real questions in dispute and to ensure that litigation proceeds on the basis of the true state of facts between the parties.
19. In submitting that amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side, Ms Koech relied on the cases of **Eastern Bakery v Caselino** [1958] EA 461, **Central Kenya LTF v Trust Bank & 4 others, Civil Appeal No. 22 of 1998, Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited** [2013] KECA 345 (KLR) and **Kassam v Bank of Baroda (Kenya) Ltd** [2002] 1 KLR 294.
20. Counsel emphasized that guided by the foregoing authorities, the plaintiffs' application satisfies all the legal and equitable considerations for being granted leave to amend the plaint.
21. She asserted that the said amendments are necessary to clarify the nature of the breach of contract complained of, to elaborate on the defendants' subsequent conduct, including the incorporation of Momentum Fitness Limited and to ensure that this Court is fully seized of the issues in dispute between the parties herein.
22. Ms Koech stated that the proposed amendments have been brought in good faith, without undue delay, and in furtherance of the overriding objective of the

Civil Procedure Act and Rules, to deliver substantive justice. She contended that the said proposed amendments will not cause prejudice to the defendants who retain the full liberty to amend their defence, should they deem it necessary.

23. Ms Koech stated that the original cause of action is the defendant's breach of contractual obligations and their subsequent actions of incorporating Momentum Fitness Limited, which is alleged to be intended to defeat the plaintiffs' contractual rights.
24. She cited the case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited** (supra), where the Court of Appeal held that amendments that merely clarify or expand upon facts consistent with the original cause of action, do not constitute a new or inconsistent claim.
25. She also cited the case of **Joseph Ochieng & 2 others v First National Bank of Chicago** Civil Appeal No. 149 of 1991, where the Court affirmed that amendments introducing additional particulars aligned with the original pleadings are permissible, provided that they do not change the nature of the action or prejudice the opposite party.
26. She contended that the defendants' reliance on Order 8 Rule 7(2) of the Civil Procedure Rules, 2010, is entirely misplaced as the applicants have duly complied with the said provisions by striking out in red all the deleted portions and underlining in red all the additions, in strict conformity with procedural requirements.
27. She submitted that even if a technical defect exists in the numbering or presentation of the draft amended plaint, such irregularity is curable prior to the filing of the final amended plaint, upon leave being granted, and it cannot form

the basis for denying substantive justice as Article 159(2)(d) of the Constitution enjoins Courts to administer justice without undue regard to procedural technicalities.

28. She emphasized that the proposed amendments do not introduce a new or inconsistent cause of action, but instead serve to clarify and particularize the issues already before the Court.
29. On the issue of the prejudice that may be occasioned to the defendants if the proposed amendments are allowed, Ms Koech submitted that the defendants had failed to demonstrate any prejudice that cannot be compensated by an award of costs. She stated that denying the plaintiffs the opportunity to amend their plaint would result in manifest injustice by preventing them from ventilating their case before Court, which would offend Article 50(1) of the Constitution.
30. She asserted that the plaintiffs have brought the application in good faith and at a stage where the substantive hearing of the suit has not commenced and that the defendants retain ample opportunity to respond to the amended pleadings, without suffering any hardship or disadvantage.
31. She prayed for the instant application to be allowed and for costs to be in the cause. She relied on the case of **Morgan Air Cargo Ltd v Everest Enterprises Ltd** [2014] eKLR, and stated that the Court therein observed that where an amendment is sought in good faith and is necessary to ensure that justice is done, the appropriate order ought to be for costs to be in the cause.
32. In submitting that costs arising from applications seeking to regularize pleadings or to enable the just determination of disputes should not attract

punitive costs, she relied in the case of **Ochieng & others v First National Bank of Chicago** Civil Appeal No. 149 of 1991, to support her argument.

33. The defendants' written submissions were filed on 10th November 2025 by the law firm of G&A Advocates.
34. Mr. Onyancha, learned Counsel for the defendants submitted that the application as filed has not complied with the provisions of Rule 9 of the Oaths and Statutory Declaration Rules, by having the draft amended plaint sealed by a Commissioner for Oaths and marked with serial letters for identification. To buttress the said submissions, Counsel relied on the case of **KCB Bank Kenya Limited v La'Paz Holding Limited** (Civil Cause E004 of 2023) [2024] KEELC 6827 (KLR) (17 October 2024) (Judgment).
35. Counsel contended that the plaintiffs herein failed to comply with the provisions of Rule 9 of the Oaths and Statutory Declaration Rules, and as such, the amended plaint to the instant application cannot be admissible and cannot be considered by this Court in determining the instant application which seeks leave to amend the original plaint.
36. Mr. Onyancha argued that having failed to tender a draft amendment pleading (sic) in support of the instant application seeking orders of amendment, this Court would not have the benefit of knowing the extent of the amendments being sought by the plaintiffs in order for this Court to grant leave to them. He relied on the case of **Mumwanjesyi Development Ltd v Mbarak Mohamed Ali** (Environment & Land Case 60 of 2016) [2022] KEELC 13816 (KLR) (5 October 2022) (Ruling), to support his argument.
37. Counsel stated that Section 100 of the Civil Procedure Act and Order 8 of the Civil Procedure Rules, 2010, provide for amendment of pleadings, with Order 7

Rule 3 of the said Rules providing for amendment of pleadings with leave of the Court after close of pleadings.

38. Mr. Onyancha contended that the plaintiffs misunderstood the contents of the response filed by the defendants. He stated that the defendants' gravamen as contained in opposition to the instant application is introduction of eight (8) new paragraphs, exclusive of the proposed prayers in the amended plaint.
39. Counsel listed down the contents of the eight (8) new paragraphs in the defendants' submissions. He submitted that paragraphs 24, 25, 28, 29 and 30 of the original plaint should have been struck out in red, while the new paragraphs should have been underlined in red as provided for in Order 8 Rule 7(2) of the Civil Procedure Rules, 2010, which had not been done by the plaintiffs in the proposed amended plaint.
40. He contended that the failure by the plaintiffs herein to adhere to the provisions of the Civil Procedure Rules, 2010, in seeking to amend the original plaint cannot be sanctioned by this Court because the same would lead to a complete change of the character of the plaintiffs' case as contained in the original plaint. Mr. Onyancha cited the case of **Tripat Singh Mangat (suing on his behalf and on behalf of Mangat I. B. Patel (MIBP) Limited v Manjeet Singh Bachu & 3 others** [2021] eKLR, to support his assertion on the said issue.
41. He added that failure to adhere to the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules, 2010, cannot be cured by the provisions of Article 159(2)(d) of the Constitution, as was held in the case of **Tripat Singh Mangat (suing on his behalf and on behalf of Mangat I. B. Patel (MIBP) Limited v Manjeet Singh Bachu & 3 others** (supra), where it was stated that Order 8 Rule 7(2) of the Civil Procedure Rules, is couched in mandatory terms, and

violation of the said provisions goes to the root of the amendment. He also cited the cases of **Cooperative Insurance Company of Kenya Limited v Paem Agencies Company Limited** [2014] KEHC 8718 (KLR) and **Odinga v Independent Electoral and boundaries Commission & 3 others** [2013] KESC 2 (KLR).

42. Counsel urged this Court to dismiss the instant application due to procedural infractions that cannot be overlooked, by failure to comply with Order 9 of the Oaths and Statutory Declarations Rules and Order 7 Rule 7(2) of the Civil Procedure Rules, 2010. He prayed for the application to be dismissed with costs.

ANALYSIS AND DETERMINATION

43. I have considered the application herein as well as its supporting affidavit. I have also considered the replying affidavit filed by the defendants and the parties' written submissions. The issues for determination are-

- (i) If the instant application is fatally defective for non-compliance with Rule 9 of the Oaths and Statutory Declarations Rules; and**
- (ii) If failure to comply with the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules, 2010, renders the instant application fatally defective.**

If the instant application is fatally defective for non-compliance with Rule 9 of the Oaths & Statutory Declarations Rules.

44. Rule 9 of the Oaths & Statutory Declarations Rules, provides as follows-

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner and shall be marked with serial letters for identification.”

45. The defendants pointed out that the proposed amended plaintiff annexed to the plaintiffs’ affidavit in support of the instant application is not sealed and marked with serial letters for identification as required under the provisions of Rule 9 of the above Rules.
46. Instead of addressing the issue raised by the defendants, the plaintiffs skirted the said issue and stated that the verifying affidavit in support of the proposed amended plaintiff had been commissioned by a Commissioner for Oaths. That was however not the issue that was brought up by the defendants, who never even made any mention of the verifying affidavit in their response to the application, or in their submissions.
47. I have examined the proposed amended plaintiff and I am in agreement with Mr. Onyancha Advocate for the defendants that the said proposed amended plaintiff was not sealed or marked for identification as an exhibit. The issue then in contention is if the failure to do so renders the said affidavit fatally defective. From a reading of Rule 9 of the Oaths & Statutory Declarations Rules, they are not drafted in permissive terms, but in mandatory terms.
48. In the case of **AAD v MED** (Matrimonial Cause E002 of 2020) [2023] KEHCC, 931 (KLR) (14th February 2023) (Ruling), Hon. Lady Justice R. Wendoh, held as follows on the issue of failure to comply with the foregoing Rules –

The provision uses the word “shall” to denote that there is no discretion on a party to choose whether or not to secure and seal

exhibits to affidavits. It is mandatory that all exhibits be sealed by the commissioner. The essence is that affidavits are an accepted form of evidence in court. Evidence which is produced in court can only be done through marking them as exhibits. In Civil proceedings a witness is expected to produce as exhibits documents he intends to rely on, to form part of his evidence for the Trial Court to consider them. Failure to do so, the documents cannot be said to be part of the evidence the witness intended to rely on. The same principle applies to evidence produced by affidavits. The exhibits affidavit must be sealed by the Commissioner for it to be considered as evidence before this Court.

49. In the case of **Francis A. Mbalanya v Cecilia N. Waema** [2017] KEELC 3356 (KLR), when faced with a similar situation, Judge O. Angote, stated thus-

“Although the plaintiff’s Advocate submitted that the failure to seal and mark the annexures is a defect in form that should be ignored by the court, the law has declared in mandatory terms that annexures must be sealed and number (sic). That is the only way they can be allowed on record. It is therefore not true, as submitted by the plaintiff’s counsel that the failure to seal and number the annexures is a procedural technicality that can be saved by the provisions of Article 159(2)(d) of the Constitution and Section 1A and 1B of the Civil Procedure Act.....”

50. The Hon. Judge in the above case, went ahead to strike out the unsealed and unnumbered exhibits but did not strike out the affidavit, as he was of the considered view that the annexures that had been struck out could still be

introduced by the filing of a supplementary affidavit, without having the initial affidavit being struck out.

51. This Court has also looked at the case of **Solomon Omwega Omache & another v Zachary O. Ayieko & 2 others** [2016] KEELC 827 (KLR), wherein Mutungi J., in considering if an application filed without sealed and numbered exhibits should be sustained held as follows-

Although the issue was not taken up by the plaintiffs the Court has a duty to uphold the sanctity of the record noting that this is a Court of record. Before the Court is a replying affidavit with annexures which are neither marked nor sealed with the commissioner's stamp. Are they really exhibits? I do not think so and they cannot be properly admitted as part of the record. I expunge the exhibits and in effect that renders the replying affidavit incomplete and therefore the same is also for rejection as without the annexures it is valueless. This should serve as a wakeup call to practitioners not to be too casual when processing documents for filing as it could be extremely costly to them and their clients as crucial evidence could be excluded owing to counsels or their assistants lack of attention and due diligence.

52. In this instance, although the supporting affidavit sworn on 5th June 2025 was commissioned by a Commissioner for Oaths, the proposed amended plaint was not sealed and marked with serial letters for identification, in compliance with Rule 9 of the Oaths & Statutory Declarations Rules, which is couched in mandatory terms. The said lapse renders the proposed amended plaint a document for striking out, which I hereby do. Since I have struck out the said proposed amended plaint, there is nothing left for me to peruse to satisfy myself

that the proposed amendments were made in good faith and were not geared towards changing the character of the case against the defendants.

53. That being the case, in the absence of supporting documents, the affidavit in support of the application herein remains an empty shell, comprising mere statements. The ripple effect is that it renders the instant application fatally defective and not worthy of consideration of the second issue that I had identified for determination.
54. The end result is that the application dated 5th June 2025 is hereby struck out with costs to the defendants.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI on this 19th day of March 2026. Ruling delivered through Microsoft Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kirwa Kiptoo h/b for Ms Karen Koech for the plaintiffs/applicants

Mr. Onyancha for the defendants/respondents

Ms B. Wokabi – Court Assistant.