



REPUBLIC OF KENYA

THE ENVIRONMENT AND LAND COURT

AT NYAHURURU

ELC NO 151 OF 2017

KENOL KOBIL LTD.....PLAINTIFF/ RESPONDENT

VERSUS

DAVID MUGO NDUMIA

JAMES MWANGI NDUMIA

JULIA NYAGUTHI NDUMIA

MARY NJAMBI NDUMIA (sued as the Administrators and legal representatives of the Estate of

DANSON NDUMIA MUKURIA).....1ST DEFENDANT/APPLICANT

JAMES MWANGI NDUMIA.....2ND DEFENDANT/APPLICANT

DAVID MUGO NDUMIA.....3rd DEFENDANT/APPLICANT

RULING

1. On the 28th May 2019, upon the delivery of a ruling dismissing an application by Defendants to have the suit herein struck out for reason that it disclosed no reasonable cause of action, the court directed the parties to comply with the provisions of Order 11 of the Civil Procedure Rules within 21 days of the ruling so that the matter could proceed on for the hearing of the main suit.
2. Pursuant to these directions by the court, the Plaintiff herein filed their amended Plaintiff on the 18th June 2019 which was out of time and contrary to the court's directions, wherein they sought to have the same deemed as properly on record. Corresponding leave was sought by the Defendants to file their amended defence within 14 days.
3. The Plaintiff which was amended on the 10th June 2019 and filed on the 14th June 2019 was deemed as properly on record wherein leave was granted to the Defendants to file and serve their amended defence within 14 days as prayed.
4. It was pursuant to these directions that on the 22nd July 2019 when the matter came up to confirm compliance, that the Defendants informed the court that while they were preparing their amended defence that they had realized that the amended Plaintiff was substantially different from the Plaintiff on record whereby it had become impossible to prepare their amended defence, they thus filed a Notice of Motion dated 8th July 2019 to have the said amended Plaintiff struck out. Parties were granted leave to file their respective affidavits to the said application, wherein by consent, they sought to have the said application disposed of by way of written submissions.
5. On the 4th November 2019 parties highlighted on their written submissions wherein the Defendant's submission was to the effect that after having filed their submissions on the 16th September 2019, the Plaintiffs had neither filed their response nor had they filed any submissions. That their application as it stood was undefended and therefore they prayed that their prayers be granted as prayed in their Notice of Motion dated the 8th July 2019. That while this matter was pending, that the Plaintiffs had filed another application by way of a Notice of Motion dated the 21st August 2019 wherein the Defendants had filed their Replying Affidavit on the 29th October 2019.
6. The Plaintiff's response to the Defendants' submission was that they had not filed a response or submissions in response to their application because after having perused the Defendant's application which sought to strike out their amended Plaintiff dated the 28th May 2019, they had indeed realized that their amended Plaintiff was defective. The reason being that they had inadvertently received a wrong Plaintiff

as part of bundles from the Plaintiff's previous Counsel.

7. That upon being served with the application to strike out, they had perused the court record and had ascertained that the Plaintiff sought to be amended was not the same as the original Plaintiff filed in the court herein. That in the circumstance and with respect to the application dated 8th July 2019, they were agreeable for the amended Plaintiff to be removed from the court record.

8. That having noted the mistake, they had in turn filed an application dated 21st August 2019 in which they had sought leave to withdraw the defective amended Plaintiff and to pray that the initial 14 days granted to them to file the amended Plaintiff be enlarged and they be granted leave to file a proper amended Plaintiff. That they had now annexed a proper amended Plaintiff to their application dated the 21st August 2019. They sought for their prayers to be allowed as prayed so that the parties could set the matter down for hearing.

9. In response, Counsel for the Defendant objected to the application while submitting that the same was coming late in the day. That the Plaintiff's Counsel had been served with their Notice of Motion on the 17th July 2019 wherein the matter was mentioned on 22nd July 2019. That the Plaintiff had ample time to peruse the application, to verify the correct position and to make the current application on or before the 22nd July 2019, on which day the court had given directions on the hearing of the Defendant's application wherein the Plaintiff did not raise any objection for seeking consent to withdraw the amended Plaintiff. That since what was coming up was the highlighting of their notice of motion which was undefended, that the orders sought be granted as prayed and the Plaintiffs can thereafter take any action.

Determination.

10. Upon considering the submissions by Counsel on their respective applications, it is clear that indeed, after the Plaintiff had sought for leave to amend their Plaintiff, which leave was granted with corresponding leave to the Defendant to file an amended Defence in response, the Plaintiff had filed an amended Plaintiff which was materially and substantially different from the original Plaintiff sought to be amended wherein the Defendants sought to have the same struck out.

11. Having noted their mistake, the Plaintiff conceded that they had filed an application dated the 21st August 2019 in which they sought leave to withdraw the defective amended Plaintiff and prayed that the initial 14 days granted to them to file the amended Plaintiff be enlarged and they be granted leave to file a proper amended Plaintiff. That the filing of the defective amended Plaintiff was inadvertent for reasons that after they had received bundle of documents from Counsel who had previously acted for the Plaintiff, they had inadvertently amended a Plaintiff that had been filed as part of annexures in an affidavit in the bundle of documents instead of amending the original Plaintiff, which they had now amended and presented before court. They sought to withdraw the defective Plaintiff as failure to do so would prejudice the Plaintiff.

12. In **Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127** titled "***amendment with leave-time to amend***" the same is to the effect that

It is stated that the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."

13. In the decided case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, the court held while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

"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 true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."

14. In the instant case, the Plaintiff submits that there was an inadvertent oversight on their part which they came to realize only after the defendant had filed an application to strike out the amended Plaintiff wherein they had noted that indeed it was substantially different in material and in fact with the original Plaintiff that they had initially been granted leave to amend. That the error was excusable as they had relied on documents issued to them by the Plaintiff's previous Counsel.

15. The Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party. The general power to amend pleadings is donated by **section 100** of the *Civil Procedure Act* which is the substantive law and its handmaiden

16. **Order 8 Rule 5 of the Civil Procedure Rules** provides as follows:

"For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order."

17. The above provision of the law expressly provides that the court has discretionary power to amend pleadings at any stage before

judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case which discretion must be exercised judiciously and not whimsically.

18. I find that amendment sought will remove the inadvertent error; reconcile the pleadings and the evidence without introducing any new or inconsistent cause of action. The amendment is not, therefore, an abuse of the court process and neither is it made in bad faith. I also find that the application to withdraw the defective amended Plaintiff and substituting it with a proper amended Plaintiff was filed without undue delay as soon as the Plaintiff had discovered the anomaly.

19. I have weighed all the above principles and considered the Plaintiffs' sentiments at paragraph 4-6 of their Affidavit dated the 21st August 2019 to their application that indeed they had filed inadvertently amended a Plaintiff that had been filed as part of annexures in an affidavit in the bundle of documents instead of amending the original Plaintiff. I finds that amending the said Plaintiff will not be prejudicial to the Defendants in any way.

20. In this regard I would restate the words of Apaloo, JA in the case of **Philip Chemowolo & Another v Augustine Kubende, [1982-88] 1 KAR 103** that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

21. In the case of **Masagu Ole Koitelet Naumo v Principal Magistrate Kajiado Law Courts & another [2014] eKLR** the court held that:

Whereas the failure by a party to properly institute proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalized in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed.

22. The foregoing being my view of the matter, dismiss the Defendants' application dated the 8th July 2019 and allow the Plaintiff's application dated the 21st August 2019. The defective amended Plaintiff is herein withdrawn and marked as such. The Plaintiff shall file and serve a proper amended Plaintiff within 14 days. Corresponding leave is also granted to the Defendant to file and serve their amended Defence within 14 days upon service.

23. In line with the holding in the case of **Masagu Ole Koitelet Naumo** (supra) the Plaintiff shall be condemned to meet the costs of this application.

Dated and delivered at Nyahururu this 10th day of December 2019

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE