



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 277 OF 2015

RELIANCE METALS LIMITED.....PLAINTIFF

VERSUS

VERONICAH WANJIKU WACIURI t/a

GARDEN VILLA BAR & HOTEL.....DEFENDANT

CONSOLIDATED WITH

ELC NO. 33 OF 2016

VEJORDIA GARDEN VILLA LTD..... PLAINTIFF

VERSUS

RELIANCE METALS LTD..... DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 18th December 2017, filed by the plaintiff in ELC Case No. 277 of 2015. The application seeks the following orders:

1. Spent.

2. That the honourable court be pleased to issue orders enjoining Evans Kipchenger Korir, Advocate as a co-defendant in this suit.

3. That this honourable court be pleased to grant leave to the plaintiff to amend its plaint as per the proposed amended plaint annexed hereto.

4. That the proposed amended plaint annexed hereto be treated as the plaintiff's amended plaint and that the same be duly filed and served within seven (7) days and following appropriate orders of the court allowing amendment.

5. That the defendant be at liberty to amend, file and serve its defence within seven (7) days after service of the duly filed amended plaint.

6. That the costs of this application be costs in the cause.

2. The application is supported by an affidavit sworn by Patel Mukesh Bhai Ambalal, a director of Reliance Metals Ltd. He deposed that Evans Kipchenger Korir, Advocate, the proposed 2nd defendant formulated or witnessed a Sale Agreement dated 15th November 2010 for sale of half share of the suit property herein by the plaintiff to the 1st defendant for Ksh.17 million. The plaintiff has denied knowledge of the said agreement, its execution or even receipt of a deposit of Kshs.2 million arising from it. The plaintiff contends that the said agreement is a forgery and therefore prays that Evans Kipchenger Korir be joined to this matter as a defendant to enable him shed light on the matter.

3. The application is opposed by the defendant though a replying affidavit sworn on 16th January 2018. She deposed that Evans Kipchenger Korir is a witness for the defendant who has filed his witness statement in this case. She added that Mr. Kipchenger's role in the matter was a professional one as one advocate and that the issues the plaintiff is raising against him can be adequately addressed through cross examination. She termed the application as one whose aim is to simply frustrate the hearing of the suit.

4. In his submissions, Mr. Otieno, learned counsel for the applicant argued that it is better to have Mr. Kipchenger as a party to the case and not merely a witness. On his part, Mr. Ndubi, learned counsel for the respondent submitted that the application lacks merit and that since Mr. Kipchenger is already a witness for the defendant, he cannot be made a party. He also pointed out that no relief is sought against Mr. Kipchenger in the draft amended plaint.

5. I have considered the application, the affidavit, submissions and authorities cited. On the face of it, what is before the court is an application for leave to amend the plaint, an application in respect of which the principles applicable are straight forward: leave to amend should be freely granted unless some prejudice which cannot be compensated by costs will be occasioned to the opposite party.

6. The application is brought under **Order 1 rule 3** of the **Civil Procedure Rules, 2010**. The rule provides:

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

7. Of relevance is also **Order 1 rule 10(2)** which addresses the concept of ‘necessary party’. It provides:

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

8. A reading of the two rules above shows that for a person to qualify to be joined as a defendant, a right to relief must be alleged to exist against him or his presence before the court should be necessary in order to enable the court effectually and completely adjudicate upon questions in the suit. Since presence of a person before the court can be achieved through other means such as Summons to Witness, it will not always be the case that everyone who has something useful to state in a case must or should be joined by the plaintiff as a defendant. Being a defendant in a case calls for more involvement in terms of time and other resources. A defendant will have to file defence either in person or through counsel. Even if no relief is claimed against a particular defendant, there is always the risk that costs may be awarded against him. In short, being made a defendant in a case carries with it a burden. The court must consider whether the interests of justice in a particular case justify saddling a person with these extra obligations and demands.

9. To guard against wanton and uncalled for joinder as defendants, **Order 4 rule 5** provides:

The plaintiff shall show that the defendant is or claims to be interested in the subject-matter, and that he is liable to be called upon to answer the plaintiff’s demand.

10. I have perused the draft amended plaint in the present case. There is no relief sought against Mr. Kipchenger. According to the plaintiff, Mr. Kipchenger is sought to be joined as a defendant so that he can “shed light” on the Sale Agreement dated 15th November 2010 which he attested. I also note that the defendant herein filed a “Further Supplementary (sic) List of Defendant’s Witnesses and Statements” on 12th October 2017 and that annexed to it is a Witness Statement signed by Mr. Kipchenger wherein he addresses the issue of the sale agreement. Consequently, at the time the application was filed, Mr. Kipchenger had already been lined up as a witness for the defendant.

11. Mr. Kipchenger is an advocate, an officer of this court. The applicant acknowledges that his involvement in the matter was in his professional capacity as such. Though there are allegations of fraud in the body of the plaint, no relief is sought against him for which he would be liable to be called upon to answer. There is no suggestion that there would be any difficulty securing his attendance in court both as a witness and an officer of the court. I am therefore not persuaded that this is a fit and proper case in which to allow the joinder sought.

12. In the end, Notice of Motion dated 18th December 2017 is dismissed with costs to the respondent.

Dated, signed and delivered in open court at Nakuru this 20th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Otieno for the plaintiff/applicant

Ms. Alwala holding brief for Mr. Ndubi for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi