



REPUBLIC OF KENYA



Maple Management Limited v Kihara & another (Environment & Land Case E265 of 2022) [2024] KEELC 5628 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5628 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E265 OF 2022**

**AA OMOLLO, J
JULY 18, 2024**

BETWEEN

MAPLE MANAGEMENT LIMITED PLAINTIFF

AND

**SGEBO TUNDURA GAGI T/A GAGI INVESTMENTS
LIMITED 1ST DEFENDANT**

JULIANA NJAMBI KIHARA 2ND DEFENDANT

RULING

1. For determination is the Notice of Motion dated 8th February, 2024 brought by the Plaintiff. It sought the following orders;
 1. That leave be and is hereby granted to the Applicant to amend its Complaint dated 11th August, 2022 and filed in this Court on even date as per the draft annexed hereto.
 2. That the draft Amended Complaint annexed hereto be deemed as duly filed and served upon payment of the requisite fees.
 3. That this Honourable Court be pleased to make such further and/or other orders as it may deem fit in the circumstances.
 4. That the costs of this Application be provided for.
2. That the application is based on the following grounds;
 1. That after careful review and perusal of all the pleadings filed herein and in consideration of the Ruling delivered by this Honourable Court on 27th April, 2023, it has become necessary to amend the Complaint dated 11th August, 2022 and filed in Court on the same day in order to enable this Honourable Court determine the real issues in controversy between the parties herein



and to facilitate an effectual and final determination of the same on their true and substantive merits.

2. That the proposed amendments to the Plaint are intended to enable the Applicant to fully ascertain its claim against the proper Defendants and to seek appropriate relief against in respect of the subject matter of this suit.
 3. That the proposed amendments to the Plaint herein are intended to bring before this Honourable Court the real matters in controversy and all proper parties in this suit so that the same are determined on their true and substantive merits.
 4. That the amendments that the Applicant intends to introduce are pertinent to the effectual and final determination of the real issues in dispute between the parties.
 5. That the proposed amendments will not occasion any prejudice to the Respondents.
3. That affidavit sworn in support of the motion by Roy Wachira on 8th February 2024 reiterated similar facts as stated in the grounds on the face of the motion. The application was opposed by the 2nd Defendant/Respondent vide a replying affidavit sworn on 19th April, 2024 by Segbo Tundura Gagi. He deposed that the application is an orchestrated ploy aimed at misleading the court because the Applicants have no cause of action against the Respondents. He avers that the 1st Respondent who is a majority shareholder in the Applicant leased to his business the swimming pool and the health club for carrying on business from May 2021 until they were stopped by this court.
 4. He deposed that by a ruling delivered by hon Patricia May in BPRT case E626 of 2022 on 13th Feb 2023 emphasized the fact that the 2nd Respondent had heavily invested in the suit premises hence their interests cannot be overlooked. That the intended amendment is mischievous as it is aimed at running away from compensating the 2nd Respondent. He added that as a management company, the Applicant has no proprietary rights in the suit property and thus cannot purport to sue on behalf of the sectional unit owners.
 5. The 2nd Defendant also filed a preliminary objection dated 19th April 2024. It pleaded inter alia, that the Applicant has no locus standi to bring the application and or to amend the plaint. Second, that the Court has no jurisdiction as the Plaint is barred by the Limitation of Actions Act section 7 and section 20 & 30 of the Sectional Properties Act. He also averred that the application is incurable defective and should be dismissed with costs.
 6. The plaintiff did not file any submissions while the 2nd Defendant's submissions in support of the P.O was dated 14th June 2024. I have considered the preliminary objection raised vis a vi my ruling delivered on 27th April 2024 and whether I can deal with the present application for amendment. In the P.O dated 11th November 2024 raised by the Defendants, they urged the court to find that this suit was sub-judice the BPRT case no E628 of 2022 and that the court lacked jurisdiction to entertain the application dated 11th August 2022. The preliminary objection was upheld in part that the application dated 11th August 2022 was struck out and the interim orders in place vacated.
 7. However, the suit was not struck out and which the 2nd Defendant now wants the suit to be struck out for want of jurisdiction he has submitted as much. He supported his submissions by relying on the stated statutes and the case of *Lilian S vs Caltex Oil Kenya Ltd* (1989)Eklr. It is trite law that jurisdiction is everything and where a court lacks jurisdiction, it should down its tools. It is also trite law that a preliminary objection should be so clear on its face so as not to require evidence to prove it.



8. The question is whether the plaint should suffer the same consequences as the application of August 2022 as submitted by the 2nd Defendant. The plaintiff is described as a limited liability company incorporated under the provisions of the *Companies Act*. The 2nd Defendant is arguing that it does not have capacity because the party before the court is a company and not a co-operation as is envisaged under section 18 of the *Sectional Properties Act*. This an argument that would require evidence to differentiate the two and cannot be ascertained by a P.O.
9. As regards the application of section 20 and 30 of the *Sectional Properties Act*, some of the prayers sought in the plaint included
 - i. A declaration that the 1st Defendant does not possess any valid and or proprietary rights over the swimming pool/health club erected on Al.r. No 1870/VI/85.
 - ii. An award of special damages in the sum of Kshs 1,614, 200 against the first defendant being the outstanding service charge arrears.
10. There is no doubt in my mind that the Internal Dispute Resolution body to be created under the *Sectional Properties Act* does not have powers to take away rights of a registered property owner as is being sought in this suit. The want of jurisdiction of this court being invoked to strike out the suit is thus misplaced and without any merit. It is noteworthy that the preliminary objection was also filed after the Plaintiff filed an application to amend its plaint and annexed a draft amended plaint. The draft amended plaint has included a prayer directed at the Land Registrar to cancel entry no 6 in the 1st Defendant's Lease dated 6th November 2000 in so far as it purports to grant ownership of L.R 1870/VI/85 (the suit property) to the 1st Defendant.
11. For the reasons stated, I find no merit in the preliminary objection dated 19th April 2024 and proceed to dismiss it with costs.
12. Under order 8 rule 3 of the *Civil Procedure Rules*, the law allows for amendment of pleadings at any stage of the proceedings. This Rule provides that;
 1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
13. Further, order 1 rule 10(2) of the *Civil Procedure Rules* provides thus;
 - (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."
14. Thus the cited provisions of the *Civil Procedure rules* which governs these proceedings alongside other provisions of the law allow amendment at any stage as well as addition or removal of parties. In this instance, the applicant wishes to replace the name of the 2nd Defendant with other parties and which action the 2nd Respondent has vehemently opposed because he insists he has a claim against the applicant.
15. In paragraph 19 of the original plaint sought to be amended, the Applicant pleaded that the 2nd Respondent proceeded to illegally install a generator in the premises and that it has been commercial business within the premises which is prohibited and despite the same causing nuisance to the home



owners. It also pleaded to an order served upon them by the 2nd Respondent which order emanated from the Business Premises Tribunal in a reference filed by the 2nd Defendant.

16. In the proposed draft amended plaint, the Applicant pleads at paragraph 12 that the 1st Defendant/ Respondent had illegally leased the impugned premises to third parties. Although the name of the third party is not disclosed, the cause of action in this suit revolves around acquisition of title of the suit premises (the swimming pool area and the health club) by the 1st Defendant and the leasing out of the same to parties for carrying on business. The 2nd Defendant has clearly stated that he is the person the premises were leased to and he alleges that he is entitled to some compensation. He is thus a necessary party to the current proceedings.
17. The Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit and referred to the Ugandan case of *Deported Asians Custodian Board vs. Jaffer Brothers Ltd* [1999] 1 E.A. 55 (SCU) as well as *Civicon Limited vs. Kivu Watt Limited and 2 Others* [2015] eKLR in which the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.” (underline mine for emphasis).

18. Though the Plaintiff may aver that it no longer has any claim as against the 2nd Defendant but under the provisions of order 1 rule 10(2) of the *Civil Procedure Rules*, the 2nd Respondent could still apply to be joined to bring his claim against parties to this suit. Allowing amendment that removes the name of a necessary party would serve no purpose if the circumstances are obvious as in this case that the party wants to stay as allowing. The amendment in the manner proposed will be inviting an application for joinder. The result would be a waste of judicial time in writing rulings applications that would have been avoided.
19. In conclusion, I make orders that the preliminary objection by the 2nd Defendant is dismissed with costs. The application dated 8th February 2024 is allowed and the Plaintiff is granted leave to amend the plaint but the amendment is conditioned that the name of the 2nd Defendant Segbo Tundura Gagi t/a Gagi Investments Ltd is not removed as a party to these proceedings. Costs of the application ordered in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JULY, 2024

A. OMOLLO

JUDGE

