



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Mwenda v Afribusiness LLP & 2 others (Cause E409 of 2020)
[2023] KEELRC 472 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 472 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E409 OF 2020
JK GAKERI, J
FEBRUARY 22, 2023**

BETWEEN

PATRICK NJOROGE MWENDA CLAIMANT

AND

AFRIBUSINESS LLP 1ST RESPONDENT

ANNABELL KARANJA 2ND RESPONDENT

MARYLIN WERE MWANGI 3RD RESPONDENT

RULING

1. Before the court for determination is a notice of motion dated September 16, 2022 by the applicant seeking orders that:
 1. Spent.
 2. Leave be granted to the claimant to amend the statement of claim attached to the affidavit.
 3. The amended statement of claim be deemed duly filed and served.
 4. The costs of the application be provided for.
2. The notice of motion filed under certificate of urgency is expressed under section 1A, 1B and 3A of the *Civil Procedure Act* and order VIII of the *Civil Procedure Rules*, 2010 and is based on the grounds expressed on its face and the supporting affidavit of Patrick Njoroge Mwenda who deposes that he and the respondents entered into a contract on May 16, 2017 under which he was to assume the role of consulting Director at the 1st respondent's LLP and the 2nd respondent was the sole proprietor of the 1st respondent and his gross pay rate was Kshs 150,000/= per month.
3. That the applicant served faithfully and diligently.



4. The applicant deposes that he was underpaid in December 2017 and received no pay from January to April 2018 but continued to render services through borrowing from family and friends which was unsustainable.
5. That the respondents deducted but did not remit tax to the Kenya Revenue Authority as they had undertaken.
6. That the respondent did not issue a certificate of service.

Respondent's Case

7. In opposition to the notice of motion dated September 16, 2022, the respondents filed grounds of opposition dated October 24, 2022 stating that the proposed addition of the 3rd respondent would be improper as she had no contractual relationship with the claimant and was simply a partner to the 1st respondent which is a limited liability partnership with a separate legal personality.
8. That the intended joinder was an attempt to lift the veil of incorporation contrary to the law and the presence of the 3rd respondent was unnecessary for the adjudication of the suit.
9. It is the respondents case that the application by the claimant is scandalous, vexatious and an abuse of the process of the court as there was an application of misjoinder by the 2nd respondent dated October 19, 2021 where the same issues have been canvassed and the applicant did not respond to the application for nearly one year.

Applicant's Submissions

10. The applicant's counsel listed two issues for determination, namely;
 - i. Whether the applicant should be granted leave to amend his amended statement of claim.
 - ii. Whether the amended statement of claim should be deemed as filed as served.
11. As to whether leave should be granted to amend the statement of claim, the applicant's counsel submitted that the application was made in good faith, the amendment sets a legally valid claim as it buttresses the pleadings.
12. Reliance was made on the decision in *St Patrick's Hill School Ltd V Bank of Africa Kenya Ltd* (2018) eKLR as well as the sentiments of Bramwell LJ in *Tildesley V Harper* (1878) 10 ch D.
13. Counsel submitted that the proposed amendment was meant to plead matters of fact critical to the findings of the court in determining the question whether the corporate veil of the 1st respondent should be lifted.
14. As regards the second issue, the court was urged to allow the amended claim as duly filed and served to facilitate expeditious disposal of the matter to save court's time.

Respondent's Submission

15. The respondent's counsel identified two issues for determination, namely;
 - i. Whether it was proper to amend the statement of claim and a proposed 3rd respondent.
 - ii. Whether the application is properly before this court for determination.



16. As regards the 1st issue, it was submitted that there was a difference between the 1st, 2nd and 3rd respondents as the 1st respondent was a limited liability partnership in accordance with section 6(2) of the *Limited Liability Partnership Act*, 2011.
17. Reliance was made on the decision in *Salomon V Salomon & Co. Ltd* (1897) AC 78 cited by the Court of Appeal in *Charles Ray Makuto V Almakony Ltd & another* (2016) eKLR to underscore the law on legal personality of a company from its directors and shareholders.
18. Counsel submitted that by stating that the proposed 3rd respondent was the proprietor/managing partner of the 1st respondent, counsel was in fact lifting the corporate veil of the 1st respondent without justification. It was submitted that aribusiness development was a body corporate, a different entity from the 1st respondent and the annexure relied upon was not relevant.
19. Counsel urged that should the court find that the 3rd respondent was the partner/proprietor of the 1st respondent, then the 2nd and 3rd respondents were agents of a disclosed principal and should thus not be enjoined as was held in *Antony Francis t/a Wareham & 2 others V Kenya Post Office Savings Bank*.
20. It was urged that the applicant had failed to demonstrate that joinder of 2nd and 3rd respondents was warranted as the applicant had no action against them.
21. As to whether the application was properly before the court, the decision in *Satya Bhama Gandhi V Director of Public Prosecutions & 3 others* (2018) eKLR was relied upon to urge that the court should protect itself from abuse.
22. Similarly, the decision in *Green Square Ltd V Shaladia Associates & 2 others* (2017) eKLR was cited to underscore the principles applicable in enjoining of parties to a suit.
23. Finally, it was submitted that the applicant had failed to prove how the ends of justice would be determined by enjoining the 2nd and 3rd respondents.
24. The court was urged to dismiss the application.

Determination

25. The issues for determination are;
 - i. Whether the 3rd respondent should be enjoined to the suit.
 - ii. Whether the amended statement of claim should be deemed as duly filed and served.
26. The principles governing amendment of pleadings were laid down by the Court of Appeal in *Ochieng & others V First National Bank of Chicago* Civil Appeal No. 147 of 1991 cited with approval in *St. Patricks Hill School Ltd V Bank of Africa Kenya Ltd* (*Supra*).
27. In *Harrison C Kariuki V Blue Shield Insurance Co Ltd* (2006) eKLR, HPG Waweru held as follows;

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense delay, or bother occasioned to him.

The main thing is that it be in the interest of justice that the amendments sought be permitted in order that the real question in controversy between the parties are delivered.”



28. In *Central Kenya Ltd V Trust Bank Ltd* (2000) EALR 365, the Court of Appeal enunciated the 4 conditions to be satisfied for a party to be allowed to amend pleadings. i.e
- i. There has been no undue delay.
 - ii. No new or inconsistent cause of action is introduced.
 - iii. No vested interest or accrued legal right is affected and
 - iv. The amendment (can) be allowed without injustice to the other side. The court was emphatic that “Accordingly, all amendments should be freely allowed at any stage of the proceedings provided that the amendments . . .does not result in prejudice or injustice to the other party that (cannot) be properly compensated for in costs . . .”
29. It is trite law that the essence of the court’s jurisdiction to permit a proposed amendment of pleadings is to enable the court determine the suit before it and the application must be made without delay, in good faith and at any stage of the proceedings. See *Institute for Social Accountability & another V Parliament of Kenya & 3 others* (2014) eKLR, *Elijah Kipngeno Arap Bii V Kenya Commercial Bank Ltd* (2013) eKLR.
30. In *Eastern Bakery V Castelino* (1958) EA 461, the court held as follows;
- “It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.
31. The court is guided accordingly.
32. In the instant case, the suit was filed on August 20, 2020 and the instant application was filed on September 23, 2022 more than two (2) years later. The application is arguably not timeous.
33. Strangely, neither the supporting affidavit nor the grounds relied upon mention or make reference to the place or role of the proposed 3rd respondent in the suit. The supporting affidavit merely rehashes the facts relied upon.
34. The copies of the registration documents on record are reticent on the relationship between 1st respondent and the proposed 3rd respondent.
35. In the absence of documentary or other evidence connecting the proposed 3rd respondent to the other party(ies) to the claim, the court is in agreement with the respondent’s counsel’s submission that the applicant has not demonstrated how the interests of justice shall not be served if the 3rd respondent’s name was not added.
36. Similarly, and as contended by counsel for the respondents, the 1st respondent is a body corporate distinct and separate from its partners as ordained by section 6(2) and (3) of the *Limited Liability Partnership Act*, 2011, and thus capable of doing all acts and things that a body corporate may lawfully do.
37. Although it is trite law that the power to grant leave to amend pleadings should be exercised liberally and freely, in this case, the applicant has not demonstrated reasons for the proposed 3rd respondent and justice and prejudice may be occasioned to the proposed 3rd respondent.
38. In sum, the purpose of the proposed addition has not been demonstrated and the same is disallowed.



39. As regards the second issue, having found that the proposed amendment is unjustified, this issue does not arise.
40. However, the foregoing notwithstanding, the applicant is at liberty to amend the statement of claim in such other manner as he may be necessary.
41. In light of the partial success of the application, it is only fair that parties bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 22ND DAY OF FEBRUARY 2023

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

