



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 31 OF 2012

DOREEN MBIRO WALLACE PLAINTIFF

-VERSUS-

JAMES KENNEDY MUTIA 1ST DEFENDANT

POLARISE ENTERPRISES LIMITED 2ND DEFENDANT

NIC BANK LIMITED 3RD DEFENDANT

R U L I N G

1. The two applications before the court are Notices of Motion dated **10th February 2015** and **25th March 2015** both filed by the Plaintiff.
2. The application jointly seek to secure the orders named therein and specifically an order of leave to amend the Plaintiff and to join to the suit the 4th Defendant. The applications are supported by affidavit of **Doreen Mbiro Wallace** who is also the Plaintiff.
3. The Plaintiff's case is that she filed this suit through a Plaintiff dated 23rd January 2012. However, upon perusal of pleadings she found out that she had insufficiently pleaded fraudulent conduct by the Defendant, and had also not pleaded essential facts relating to her own contribution in the purchase of the suit property. The Applicant states that it is important for the effective determination of this matter that leave be granted to her to amend the Plaintiff so that it clearly brings out the real issues in controversy. If the case is heard without the inclusion of the elements of fraud, elements of breach of trust and the fact of the Plaintiff's contributions to the purchase of the suit property, the Applicant states that she will suffer great loss and prejudice.
4. The application is opposed by all the Defendants. The 1st Defendant has sworn an affidavit in reply on behalf of himself and on behalf of the 2nd Defendant. The Affidavit is sworn on 11th March 2015. The deponent states that the application is baseless, and has been brought after an inordinate delay. The deponent further says that Applicant is not privy to the agreement of sale involving the suit property.
5. The 3rd Defendant also opposed the application vide a replying affidavit sworn on 5th June 2015 by Kelvin Mbaabu, who is a Senior Legal Officer with the 3rd Defendant Bank. The deponent states that the application is barred by laches and is an abuse of the court process. The 3rd Defendant states that the application seeks to introduce a new cause of action inconsistent with

the previous cause of action and which was not initially pleaded and which will be pre-judicial to the 3rd Defendant.

6. Parties filed submissions which I have carefully considered. The issue raised for consideration is whether I can exercise my discretion to allow the application.
7. The Application is in compliance with Order 1 Rule 3 of the Civil Procedure Rules which states as follows:

“All persons may be joined as defendant 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 could arise.”

8. The Applicant’s prayer that the intended 4th Defendant, Texan Limited, be enjoined in this suit is premised on the fact that the Applicant will have a right to relief against Texan Limited. This is because Texan Limited is named as the Chargor in the suit property.

The Applicant has raised concerns on how the intended 4th Defendant came upon the matrimonial property and therefore, omitting the 4th Defendant would deny the Applicant any right to relief that this Honourable Court may grant. This would necessitate the Applicant to file another suit touching on the same facts, which may be a subject of *res judicata*.

9. The Applicant refers this Court to Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:

“the Court may at any stage of the proceedings order that the name of any person who ought to have been joined and whose presence may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit be added.”

10. This court can exercise its discretion to allow the Applicant enjoin the intended 4th Defendant so as to enable the Court effectually and completely adjudicate upon and settle all the issues that are in contention in this suit. In the case of **John Gitau Mungai v Stephen Thuku Kabebe & 3 others [2014] eKLR**, the court sought inspiration from the words of **Bowden L.J. in Cooper -Vs- (1883) 26 Ch D 700 at 711** with the following words:

“It is a well-established principle that the object of the court is to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I don’t regard such amendments as a matter of favour or grace....”

11. The Defendants have failed to show how the proposed amendment to enjoin the 4th Defendant will occasion injustice or injury which cannot be compensated by an award of costs. The inclusion of the intended 4th Defendant is necessary to determine the issues of fraud, which the Applicant has pleaded in the original Plaintiff filed on 23rd January 2012 and now specifically pleaded in the Applicant’s Plaintiff in the Amended Plaintiff annexed to the Applicant’s Application. See the case of **John Gitau Mungai v Stephen Thuku Kabebe & 3 others [2014] eKLR**, where the court stated as follows;

“The Defendants have not shown that the proposed amendments will occasion them injustice or

injury which cannot be compensated by an award of costs. Indeed...is necessary to determine the issues of fraud that have been pleaded by the Plaintiff viz-a-viz the transfer of the suit property to the Defendants. This in effect will avoid a multiplicity of suits and will allow this court to effectively and effectually determine the issues. As was held by the Supreme Court of Uganda in Gasu Transport Services (Bus) Ltd. -Vs- Obene (1990-1994) E.A 88, courts should generally give leave to amend pleadings rather than give judgments in ignorance of the facts which ought to be known before rights are definitely decided.

12. In the case of **Lucy Nungari Ngigi & 128 others v National Bank of Kenya Limited & another [2015] eKLR**, the Court stated that;

“...joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of parties may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties. This is the test I shall apply in this case.”

13. It is my view that the amendment being sought by the Applicant is not incompatible to or totally different from the existing cause of action. The Applicant's inclusion of the intended 4th Defendant will not be incompatible with the causes of action because the intended 4th Defendant is strongly involved in the suit property and a common question of fact or law would reasonably arise between the existing Defendants and the intended 4th Defendant.
14. In the exercise of my discretion to grant the application, I have also considered that the Plaintiff and the 1st Defendant are or were at one point in time living as husband and wife. This in itself lends credence to any claim the Plaintiff may make on the suit properly being a matrimonial property. A decision on this suit or indeed this application should not be based on technicality of procedure, but the Applicant should be given real opportunity to ventilate her grievances without any resort to technicalities of procedure.
15. In the upshot, the Plaintiff's application before the court is allowed as prayed with costs to the Defendants/Respondent.
16. The annexed draft amended Plaint herein is deemed filed as soon as the Plaintiff pays for the filing fees. The Defendant shall file amended defence, if any, within 10 days of this Ruling.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 2ND DAY OF OCTOBER 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Manange for the Plaintiff

Mr. Kimani for 1st and Defendants

M/s Kemunto holding brief for Mubur for 3rd Defendant

Teresia – Court Clerk



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