



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL CASE NO. 5 OF 2019

LEWAR VENTURES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

EQUITY BANK (KENYA) LIMITED.....DEFENDANT/RESPONDENT

RULING

The applicant moved this court by way of a Notice of Motion Application dated 19/1/2021 filed on 28/1/2021, through the firm of H. Obach & Partners. It seeks the following orders: -

- a. That the applicant be granted leave to amend its plaint as set out in the draft amended plaint annexed thereto.**
- b. That this court be pleased to grant an order to amend the plaint to go in tandem with the applicant's application dated 20/8/2019, subsequent orders issued on the same date and with the valuer's report.**
- c. That the draft amended plaint attached to the application be deemed as duly filed and served upon payment of requisite court fees.**
- d. Costs be in the cause.**

The application is based on the grounds appearing on the face thereof and the Supporting Affidavit of **Elvine Leware Macgare**, the Director of the applicant, sworn on 19/1/2021 on its behalf.

Elvine deponed that this suit was instituted, seeking to stop the sale of the suit property; that the applicant sought the legal services of E. Kisia & Company Advocates who drafted the plaint dated 8/7/2021; that it later withdrew its services and instructed the firm currently on record; that the present Counsel filed an application dated 20/8/2019 where consent order for valuation was recorded that the respondent was auctioning the applicant's property on the land parcel number SUNA EAST/WASWETA I/9151 at Kshs. 19, 500,000/= which action prompted the applicant to seek the services of a valuer who established the current market value of the property to be Kshs. 88,200,000/= and the forced sale value at Kshs. 66, 150,000/=; that the valuation done at the instance of the respondent which put the value of the property at Kshs. 52,000,000/=, has since increased from August 2015 due to the developments done on the land; that since the property had been sold by the respondent, the parties consented to valuation of the property which put the value of the property at Kshs. 47,000,000/=; that the said amendment will go in tandem with the applicant's application dated 20/8/2019, subsequent orders issued on the same and the valuation report, given that the suit property has already been sold.

The application was opposed. The respondent filed grounds of opposition through the firm of Ogejo, Omboto & Kijala Co. Advocates. The grounds of opposition were as follows: -

- i. That the application is incurably defective, misconceived and hinged on the wrong principles of law and procedure;**
- ii. The application as presented is a wanton abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the court and legal process;**
- iii. That the application does not meet the evidentiary threshold of the orders sought;**
- iv. The application as presented is not legally tenable;**
- v. The application should be dismissed with costs.**

The application was canvassed by way of written submissions. The applicant filed its submissions dated 26/7/2021 on 6/8/2021. On whether the application for leave to amend the plaint has merit, reliance was made on the provisions of Section 100 of the Civil Procedure Act, Order 1 Rule 10 and Order 8 of the Civil Procedure Rules which grants parties the right to amend pleadings. Counsel also relied on several decided cases and further submitted that owing to the valuation report, the circumstances of the case have changed necessitating the amendment of the plaint.

The respondent filed its submissions dated 31/8/2021 on 26/10/2021. The respondent submitted on a similar issue as the applicant. The respondent relied on the provisions of Order 2 Rule 13 and Order 8 Rule 1 (1). On the former provision, the respondent submitted that the provision directs that all pleadings should be closed within a particular time frame after service has been effected; that even if the subsequent provisions expressly permits amendment of pleadings, it states that it should be done before pleadings are closed; that in this matter, the pleadings should have been deemed closed after service of the defendant's replying affidavit.

Further, the respondent submitted that the applicant had ample time to amend their plaint dated 8/7/2019 and the period of pleadings having been concluded, it would not be in the best interest of justice to bring an application for amendment. Furthermore, the hearing had already commenced. To buttress this position, the respondent relied on the cases of Civil Case Number 2205 of 2000 **Harrison C. Kariuki vs Blue Shield Insurance Co. Ltd and Land Case Number 113 of 2012 Lawrence Owino Omondi vs Kenneth Inea Muyera**. The respondent urged this court to dismiss the application with costs.

I have considered the applicant's notice of motion, the grounds of opposition and the rival submissions. The single issue for determination is whether the applicant is deserving of leave to amend its plaint.

Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court as follows: -

(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.

Further, **Order 8, rule 5** gives the court the general power to amend.

5. (1) 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.

While the argument of the respondent that Order 8 Rule 1 (1) is particular that amendments of pleadings may be done without leave at any time before close of pleadings is plausible, the purpose of allowing amendment of pleadings is to enable the court to determine the real issues in controversy between the parties once and for all. For the court to allow the amendment, it has to first look into the intent and purpose of the amendment and whether any prejudice will be suffered by the other party or parties in dispute and whether prejudice can be compensated by way of costs.

In **Institute For Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR** the court held:-

“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....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

The Court of Appeal outlined the principles in amendment of pleadings in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** as follows: -

“The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the

amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.

The applicant's case is that after the valuation report was prepared, it became necessary for it to effect amendments on its plaint filed earlier on 8/7/2019. The amendments to be introduced are the figures in the valuation report which arose from a consent order by both parties on 4/6/2020. This new amendment is not foreign or inconsistent with the subsisting cause of action which is centered around the sale of the suit property which was sold without a proper valuation report that no prejudice or injustice will be suffered by the respondent. Although the respondent is concerned about the timing of the application for amendment, it should not be lost to it that the right to a fair hearing as enshrined under Article 50 of the Constitution, 2010 is a non derogable right that should be accorded to every litigant. Further, the respondent has the right to file an amended defence if need be, hence, no prejudice will be suffered.

The applicant asked this court that the order to amend the plaint should go in tandem with the application dated 20/8/2019, subsequent orders issued on the same date and with the valuer's report. I have considered the application dated 20/8/2019 and the subsequent orders issued on 29/10/2019. The court allowed the applicant's application since it was unopposed and issued an injunctive order against the defendant/respondent from interfering with the suit property in any way.

Paragraph 11 of the applicant's supporting affidavit indicates that the suit property has already been sold in my view. An injunctive orders shall serve no purpose at this stage. Since the draft amended plaint introduces paragraphs 17 - 20 which contains the figures in the valuation report of 24/7/2020, it only makes sense to allow the amendment of the plaint in terms of the valuation report.

In the end, I find that the application dated 19/1/2021 is merited and I allow it in the following terms: -

a) That the applicant be and is hereby granted leave to amend its plaint in terms of the draft amended plaint annexed to its application; and the Valuation report.

b) That the draft amended plaint be and is hereby deemed as duly filed and served upon payment of requisite court fees within 7 days of this ruling.

c) Upon service, the respondent be and is hereby at liberty to file and serve an amended defence within 14 days. The applicant to file and serve a reply to the amended defence within 7 days of service.

d) Mention on 24th May, 2022 to confirm compliance with Order 11 of the Civil Procedure Rules and to take directions.

e) Costs be in the cause.

DATED, DELIVERED AND SIGNED AT MIGORI THIS 30TH DAY OF MARCH, 2022.

R. WENDOH

JUDGE

RULING DELIVERED IN THE PRESENCE OF

MR. KISUGWA FOR THE APPLICANT.

NO APPEARANCE FOR THE RESPONDENT.

NYAUKE COURT ASSISTANT.