



REPUBLIC OF KENYA



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Onyango t/a Emmanuel Computer Academy v Shiloah Investments Limited (Environment & Land Case 158 of 2012) [2023] KEELC 17350 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17350 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 158 OF 2012
SO OKONG'O, J
MAY 11, 2023

BETWEEN

**JOEL OMINO ONYANGO T/A EMMANUEL COMPUTER
ACADEMY PLAINTIFF**

AND

SHILOAH INVESTMENTS LIMITED DEFENDANT

RULING

1. The application before the court is a Notice of Motion dated 4th November 2022 brought by the defendant under sections 1A, 1B and 3A of the *Civil Procedure Act* and order 7(7) and order 8(6) of the *Civil Procedure Rules*. In the application, the defendant is seeking the following orders;
 1. That the amended plaint filed on 26th November 2021 be struck out for having been filed out of the time prescribed by the rules and without leave of the court.
 2. That the cause of action has prescribed(sic).
 3. That in the alternative to prayers 1 and 2 above, the applicant/defendant be allowed to further amend its defence to include a counter-claim in terms of the draft attached to the application.
 4. That in the alternative to prayers 1 and 2 above, the court does extend time and allow the applicant/defendant to further amend its defence to include a counter-claim.
 5. That the costs of the application be provided for.
2. The application is brought on the grounds set out on the face thereof and on the supporting affidavit of Suku Elisha Sherwin sworn on 4th November 2022. In summary, the defendant has contended that the plaintiff was granted leave on 29th January 2015 to file an amended plaint. The defendant has contended that the plaintiff did not file the said amended plaint until 6 years later on 26th November 2021. The defendant has averred that since the court did not prescribe the period within which the plaintiff should



have amended the plaint, the amendment should have been effected within 14 days from the date of the order. The defendant has averred that the plaintiff filed the amended plaint outside the prescribed period without leave of the court. The defendant has contended further that it was almost 10 years since the plaintiff vacated the suit properties and his assets attached and sold. The defendant has averred that the plaintiff's cause of action was time-barred.

3. The defendant has averred that while the plaintiff was in occupation of the suit properties, the plaintiff defaulted in his rent payment obligations to the defendant. The defendant has averred that as a result of the plaintiff's breach of the tenancy agreement, the defendant suffered a loss to the tune of Kshs. 16,250,965/- which the defendant wished to claim from the plaintiff by way of a counter-claim if the plaint was not struck out.
4. The application is opposed by the plaintiff through a replying affidavit sworn on 14th November 2022. The plaintiff has averred that the delay in the filing of the amended plaint was caused by the loss of the original court file and the relocation of his previous advocates' offices. The plaintiff has averred that he filed the amended plaint as soon as the court file was reconstructed. The plaintiff has averred that the defendant also filed an amended defence in response to the said amended plaint. The plaintiff has averred that the defendant's application has been brought late in the day. The plaintiff has averred that he has given his evidence in chief and has been cross-examined. He has stated that what is remaining is only his re-examination. The plaintiff has averred that the proposed counter-claim if allowed will be prejudicial to him. The plaintiff has averred that the dispute has been in court for the last 10 years and that he will find it difficult to defend the proposed counter-claim. He has averred that he may not be able to trace some of the people he may wish to call as witnesses. The plaintiff has stated that tracing some of the documents necessary for his defence of the counter-claim would be difficult if not impossible due to the passage of time. The plaintiff has averred that the proposed counter-claim is an afterthought and the same is intended to frustrate the hearing of the suit. The plaintiff has averred that the defendant has not explained the delay in bringing the application. The plaintiff has averred further that the defendant's proposed counter-claim is time-barred.
5. The application was argued by way of written submissions. The defendant/applicant filed its submissions on 25th January 2023 while the plaintiff filed his submissions on 31st January 2023. The defendant has submitted that the amended plaint was filed out of the prescribed time without leave of the court. The defendant has submitted that the amended plaint was filed contrary to order 8 rule 6 of the *Civil Procedure Rules* and should be struck out. The defendant has submitted further that the cause of action in respect of the plaintiff's claim in the amended plaint arose in October 2012. The defendant has submitted that the claim was not brought to court until 26th November 2021 when the amended plaint was filed. The defendant has submitted that the claim which is for alleged loss suffered as a result of unlawful eviction from the suit properties is time-barred pursuant to section 4 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.
6. The defendant has submitted that it will be prejudiced if the amended plaint is allowed to stand. The defendant has submitted that it will be denied an opportunity to challenge the plaintiff's claim in the amended plaint if it is not allowed to amend its defence to plead a counter-claim. The defendant has submitted that in the event that the court is inclined to sustain the amended plaint, the defendant should be granted leave to further amend the defence to claim rent arrears and lost rent amounting to a total of Kshs. 16,250,965/-. The defendant has submitted that the defendant's claim arises from the same transaction as the plaintiff's claim and as such the plaintiff would rely on the same evidence in his defence to the counter-claim.
7. In his submissions in reply, the plaintiff has submitted that this suit was heard on the basis of the amended plaint that the defendant wants struck out. The plaintiff has submitted that the defendant's



present application was filed after the hearing of the suit had taken off and as such, it is an afterthought intended only to derail the hearing. The plaintiff has submitted that the defendant does not stand to suffer any prejudice if the hearing of the suit continues with the pleadings on record. The plaintiff has reiterated that he filed the amended plaint out of time due to the loss of the court file. The plaintiff has averred that the delay in filing the amended plaint was due to factors beyond his control. The plaintiff has submitted that the court has the discretion to extend the time provided in order 8 rule 6 of the Civil Procedure Rules. The plaintiff has urged the court to exercise its discretion and deem as filed within time both the plaintiff's amended plaint and the defendant's amended defence.

8. The plaintiff has submitted that striking out of a pleading is a draconian step which the court should be slow to take. The plaintiff has submitted that failure to file an amended plaint within the prescribed time is a technicality that the court should overlook for the sake of substantive justice. The Plaintiff cited Maestro Connections Health Systems Limited & Another v Riley Services & 13 others [2020]eKLR and Philip Chemwolo & Another v Augustine Kubede[1986]eKLR in support of the foregoing submissions.
9. The plaintiff has reiterated that the defendant's application is an afterthought. The plaintiff has submitted that the defendant has not given explanation why the application has been brought at this stage and more particularly why it did not file the proposed counter-claim together with the amended defence on 13th July 2022. The court has been urged to dismiss the application with costs.

Analysis and determination:

10. I have considered the defendant's application together with the affidavit filed in support thereof. I have also considered the plaintiff's replying affidavit filed in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The defendant's application has two limbs. The first limb seeks the striking out of the plaintiff's amended plaint filed on 26th November 2021. The second limb seeks leave to further amend the defence to plead a counter-claim. I will consider each limb of the application separately.
11. In D. T. Dobie & Company (K) Ltd. v Joseph Mbaria Muchina & Another [1982] KLR1, Madan J. A. stated as follows regarding the exercise of the power to strike out pleadings:

“No suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”
12. The defendant has sought the striking out of the plaintiff's amended plaint filed on 26th November 2021 on two grounds. The first ground is that the amended plaint was filed out of time without leave of the court. The second ground is that the plaintiff's claim in the amended plaint is time barred. It is admitted that the plaintiff was granted leave on 29th January 2015 to amend his plaint. It is also admitted that the plaintiff was supposed to file his amended plaint within 14 days from that date but filed the same several years later on 26th November 2021. order 8 rule 6 of the Civil Procedure Rules provides that if the court has made an order giving a party leave to amend a pleading, if no amendment is made within the specified period or 14 days after the order, the order ceases to have effect. The rule however gives the court power to extend the period within which the amendment was to be made. On this issue of the plaintiff's failure to file amended plaint within the prescribed time, my view is that the defendant waived the irregularity and the court cannot allow it to raise it at this stage. As I have mentioned earlier, the plaintiff filed his amended plaint on 26th November 2021, 6 years after leave was granted. With full knowledge that the amended plaint was filed irregularly, the defendant filed a defence on 13th July 2022



in response thereto without any objection or protest. Again, the hearing of this suit commenced on 26th September 2022 and the plaintiff led evidence in proof of his case as set out in the said amended plaint without any objection by the defendant. This is a clear case of a waiver of a right. In [748 Air services Ltd v Theuri Munyi](#) [2017] eKLR, the Court of Appeal cited the case of *Banning v Wright* (1972) 2 All ER 987 at page 998; where the House of Lords stated as follows on waiver:

“The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct”.

13. In [Sita Steel Rolling Mills Ltd v Jubilee Insurance Company Ltd](#) [2007] eKLR the Court stated that:

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

14. I am of the view that it would be unfair in the circumstances to strike out the amended plaint. While I do not agree with the plaintiff that failure to file an amended plaint within the prescribed time is a technicality that can be overlooked by the court, I am of the view that the waiver by the defendant of its right to object to the amended plaint at the earliest opportunity renders the raising of the issue at this stage a technicality. On account of the said waiver, I will overlook the plaintiff's failure to file the amended plaint within the prescribed period. I am therefore not persuaded that a case has been made out for striking out of the amended plaint on that account.

15. On the issue of the plaintiff's claim in the amended plaint being time-barred, I am not persuaded at this stage that, that is the case. I am of the view that in the circumstances of this case, the issue as to when the cause of action the subject of the plaintiff's claim in the amended plaint arose can only be determined at the trial. Now that the hearing of the suit has commenced, I see no reason why I should determine the issue in a summary manner.

16. Due to the foregoing, the limb of the defendant's application seeking the striking of the plaintiff's amended plaint fails on both grounds on which it was based.

17. As mentioned earlier, the other limb of the application seeks further amendment of the defence. The principles upon which this court exercises its discretion on applications for amendment of pleadings are now well settled. The law on amendments is that, parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid multiplicity of suits, provided, no 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 party.

18. In Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition that was cited in the case of [Joseph Ochieng & 2 Others v First National Bank of Chicago](#), Civil Appeal No. 149 of 1991, the authors stated as follows on the court's power to grant leave to the parties to amend their pleadings:

“...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 the 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...”

19. What I gather from the foregoing is that, applications for leave to amend pleadings should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs. See also, *Central Kenya Ltd. v Trust Bank Limited & 4 others*, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998.
20. An applicant for leave to amend a pleading must therefore satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties. The onus then shifts to the party opposing such amendment to show that the amendment sought would result in prejudice to him which cannot be compensated in costs and/or that the amendment sought would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him.
21. I have perused the affidavit in support of the defendant’s application together with the draft counter-claim annexed thereto. I am satisfied that the amendment sought would enable this court to effectually and completely adjudicate upon and settle all questions in controversy between the parties in this suit. I am not persuaded that the proposed amendment will prejudice the plaintiff or that the same would cause him any injustice. I am also not satisfied at this stage that the claim sought to be introduced by way of the proposed counter-claim is time barred. The defendant is at liberty to pursue the argument at the trial and the court will rule on it in final judgment. Since the plaintiff has already given his evidence in chief, I will grant him leave to give further evidence in chief if he so wishes. He will also have the liberty to file a supplementary list of documents and witness statements. These will remove any prejudice that the plaintiff may suffer if the defendant’s application for leave to amend the defence is allowed.
22. For the foregoing reasons, the defendant’s Notice of Motion application dated 4th November 2022 succeeds on the alternative prayer. The application is allowed on the following terms;
 1. The defendant is granted leave to amend further its amended defence dated 7th July 2022 to plead a counter-claim in terms of the draft counter-claim annexed to the affidavit in support of the application.
 2. The further amended defence shall be filed within 14 days from the date hereof.
 3. The plaintiff shall be at liberty to file a reply to further amended defence and defence to counter-claim within 14 days of service of the further amended defence.
 4. Both parties are granted leave to file further list of documents and witness statements if necessary together with their new pleadings.
 5. The plaintiff shall be at liberty to give further evidence in chief and to be further cross-examined.
 6. The costs of the application shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF MAY 2023

S. OKONG’O



JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Aron for the Plaintiff

Mr. Qeu for the Defendant

Ms. J. Omondi-Court Assistant

