



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 2 OF 1988

GEORGE FRANCIS SIMIYU.....PLAINTIFF

-VERSUS-

GEORGE OMUROKA.....1ST DEFENDANT

REV. JOHN GATU.....2ND DEFENDANT

(sued as the General Secretary and Chairman, respectively, for and on behalf of themselves and other member of the Protestant Churches Medical Association)

SAMUEL M. MUTAI.....3RD DEFENDANT

CHRISTOPHER WANJALA.....4TH DEFENDANT

JOHN E. THUKU.....5TH DEFENDANT

JAMES I. MUINDIA.....6TH DEFENDANT

THE PROTESTANT CHURCHES MEDICAL

ASSOCIATION REGISTERED TRUSTEES.....7TH DEFENDANT

RULING

[1] Before the Court for determination is the Notice of Motion dated **16 May 2019**. It was filed herein by the Plaintiff, **George Francis Simiyu** pursuant to the provisions of **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, as well as **Order 8 Rule 3** and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** for orders that:

[a] The Court be pleased to grant leave to the Plaintiff to further amend the Plaint herein as shown in the Draft Further, Further Amended Plaint annexed to the application;

[b] That the Draft Further, Further Amended Plaint be deemed duly filed and served;

[c] The costs of the application be in the cause.

[2] The application was premised on the grounds that, following the de-consolidation ruling made herein that this case be tried separately from **Nairobi High Court Civil Suit No. 122 of 1987**, it has become necessary for the applicant to further amend the Plaintiff to enable the Court determine the real issues in controversy. In support of the application, the Plaintiff relied on his affidavit, sworn in that regard on **16 May 2019**, wherein he furnished the background to the application, tracing it from **1988** when this suit was filed. He explained that, in the year **2007**, an order was made herein for the consolidation of the two suits; but that the Amended Plaintiff did not capture the key issues for determination as they were inadvertently mixed up with issues for determination in **Nairobi HCCC No. 122 of 1987**; hence the need for the further amendment.

[3] The application was duly served and a Replying Affidavit filed thereto by **Lutta & Company Advocates**, on behalf of the Defendants. The affidavit was sworn by **Mr. Walter Akwabi, Advocate**. It was the contention of **Mr. Akwabi** that the application is bad in law; and that to allow it would work injustice against the Defendants. He annexed the pertinent documents to the Replying Affidavit to support the chronology of the events enumerated by him. The Plaintiff also responded to the Replying Affidavit by filing the Supplementary Affidavit sworn by the Plaintiff on **9 July 2019**.

[4] At the instance of the parties, directions were given on the **4 July 2019** that the application was canvassed by way of written submissions; though by **16 July 2019** when the matter was reserved for ruling, only the Plaintiff had complied. In his written submissions dated **10 July 2019**, **Mr. Omenya** for the Plaintiff reiterated the Plaintiff's averments and urged the Court to find that sufficient grounds have been laid to warrant the issuance of the orders prayed for by the Plaintiff. Counsel relied on the provisions of **Order 1 Rules 7, 9 and 10(2)** of the **Civil Procedure Rules** and the case of **Irene Kemunto Ongori vs. Housing Finance Company of Kenya Limited [2018] eKLR** to support his arguments.

[5] Having considered the application in the light of the written submissions, the only issue to consider is whether the application for the further amendment of the Plaintiff is warranted. There appears to be no dispute as to the factual basis of the application as it is largely borne out of the court record. The record shows that the Plaintiff filed this suit against the Attorney General way back on **7 January 1988** claiming exemplary and punitive damages for wrongful arrest, unlawful confinement and malicious prosecution, assault, trespass and defamation; together with interest and costs. By that time, he had already filed Nairobi **HCCC No. 122 of 1987** (hereinafter, "**the Nairobi Suit**") against **George Omukora, Rev. John Gatu, Samuel Mutai, Christopher Wanjala, John Thuku, James Mundia and the Protestant Churches Medical Association Trustees** for, *inter alia*, wrongful dismissal and conversion.

[6] In the course of time, an application was filed herein by the Plaintiff, dated **15 November 1995**, seeking the transfer of the Nairobi Suit with a view of having it consolidated with this suit. The court record also shows that the said application was the subject of the proceedings of **25 July 2007** before **Hon. Ibrahim, J.** (as he then was); and that it was allowed and a formal Order extracted and issued on **8 August 2007**. The 7th Defendant was not happy with the consolidation. It therefore sought review vide the dated **4 October 2011**. That application was the subject of the ruling by **Hon. Ngenye-Macharia, J.** dated **18 April 2013**. The result thereof was that the order of consolidation was set aside and the Nairobi Suit returned to the Civil Division of the High Court at Milimani Law Courts.

[7] By the time the split order was made, the Plaintiff had been amended with the leave of the Court and an Amended Plaintiff filed that, in effect, consolidated the two Plaintiffs. A copy thereof is to be found as page 9 of the Defendant's Replying Affidavit; and it confirms that the Amended Plaintiff was filed in the Nairobi Suit. It is noteworthy that, in the Amended Plaintiff, the **Attorney General**, who is a necessary party in this suit, was left out as a defendant. It is in the light of the foregoing that the Plaintiff now seeks leave to amend the Plaintiff, to align it with the realities of the present status of the file.

[8] The application was filed pursuant, *inter alia*, to **Order 8 Rules 3** of the **Civil Procedure Rules**, which provides, in Subrule (1) that:

"...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."

And **Rule 5(1)** in particular provides that:

"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."

[9] The rationale for amendment of pleadings was discussed in **Nyamodi Ochieng Nyamogo vs Kenya Posts and Telecommunication Corporation [2007] eKLR**, wherein it was held that:

"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim."

[10] Accordingly, if the Court is satisfied that good cause has been shown for it, it ought to allow an amendment, notwithstanding previous amendments. In this case, the Plaintiff averred in the Supporting Affidavit that circumstances have changed since the last amendment and that it is therefore necessary to align the Plaint to accord with those changes. Documentary proof was provided to that effect, which has not been refuted. That, to my mind, is a justifiable cause; and since the hearing is yet to commence, no prejudice will be suffered by the Defendant for which an award of costs would be insufficient as a recompense. Indeed, in **Eastern Bakery vs. Castelino [1958] EA 461** it was held thus:

"...amendment to pleadings sought before the hearing 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."

[11] Although the Respondent's averred in the Replying Affidavit that there has been inordinate delay in filing the application and that the Defendants will be prejudiced, it was not stated in what manner, granted that the proposed 1st, 4th and 5th Defendants have all along been a parties to this suit. Since, the ruling of **18 April 2013** did not expressly strike out the Defendants from this suit, by reason of the amendment, the rest of the Defendants not cited in the Draft Further, Further Amended Plaint will be relieved of the obligation to defend this suit. Thus, it is my finding that no prejudice will befall the Defendants which cannot be compensated by way of costs. Indeed, the assertion of **Mr. Wabwire**, learned Counsel for the Attorney General was that the Attorney General is already a party to the suit; and as rightly pointed out by the Plaintiff in his Supplementary Affidavit, the proposed defendants will be given an opportunity to respond to the claim against them and raise whatever defences, including limitation, if available to them.

[12] It is instructive that **Order I Rule 10(2)** of the **Civil Procedure Rules** recognizes that:

"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."

[13] In the result, it is my finding that the Plaintiff's application dated **16 May 2019** does have merit. The same is hereby allowed and orders granted as prayed in the following terms:

[a] That leave be and is hereby granted to the Plaintiff to further amend his Plaint in terms of the draft Further Further Amended Plaint annexed to the Supporting Affidavit herein.

[b] That the Further Further Amended Plaint be filed and served within 14 days from the date hereof in accordance with the provisions of **Order 7 Rules 1 and 17 of the Civil Procedure Rules**

[c] That the costs of the application be borne by the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 23RD DAY OF JANUARY, 2020

OLGA SEWE

JUDGE