



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 115 OF 2010

FREDRICK MUROKI GRIEVE.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....1ST DEFENDANT

ELIZABETH NZIVA NTHENGE...2ND DEFENDANT

MARYANNE MUENI DENES.....3RD DEFENDANT

ALICE MULEKYO NZIOKA.....4TH DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion dated 02/07/2018 expressed to be brought under Article 48 and 159 of the Constitution, Section 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10, Order 8 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules. It seeks the following reliefs:-

(i) That the Plaintiff do have leave to amend the Plaintiff herein.

(ii) That the Plaintiff's intended amended plaintiff herein be deemed to have been filed and served.

(iii) That the costs of the application be provided for.

2. The Application is supported by the Plaintiff/Applicant's affidavit sworn on even date as well as the grounds on the face thereof. The Applicant's case is that certain facts were not pleaded in the plaintiff though they were included in his witness statement. It is further his case that the new issues to be introduced relate to his detention without charge which breached his human rights. The Applicant feels that the defendants will not suffer any prejudice if the amendment is allowed as they will have a chance to defend themselves. Finally it was his case that substantive justice should be done as mandated by Article 159(2) (d) of the Constitution.

3. The application was opposed. The 2nd defendant filed a replying affidavit deposing that the amendment sought appears to be a reaction from the issues raised by her Advocates during the cross-examination of the Plaintiff. She further deposed that the plaintiff should not be allowed to amend his plaintiff at this stage of the proceedings as the same will prejudice the defendants. She finally maintained that the amendment sought is statute barred.

4. Parties agreed to canvass the application by way of written submissions. It is only the plaintiff who has filed submissions.

5. The Plaintiff started by submitting that the replying affidavit should be struck out as it has been signed by somebody other than the deponent since the deponent Elizabeth Nziva Nthenge is deceased and as such the contents of the affidavit should be disregarded. It was submitted that Order 8 Rule 5 of the Civil Procedure Rules gives the court discretion to allow amendments of pleadings at any stage of the proceeding as it may deem just. It was also proposed that the proposed amendments will not prejudice the Defendants. Reliance was placed in the case of **J.C. Patel –v- B.D. Joshi - Court of Appeal for East Africa C.A. 39 of 1951 page 42, Central Kenya Ltd –v- Trust Bank Ltd. (2000) 2 EA 365, Martin Wesula Machyo –v- Housing Finance Company of Kenya Ltd[2015] eKLR, Africa Safari Club –v- Safe Rentals Limited - Civil Application Nairobi No.53 of 2010**. It was finally submitted that the amendments sought are aimed at allowing the plaintiff to plead the whole of his case in respect of the whole cause of action.

6. I have considered the application and the rival affidavits as well as the submissions presented. It is not in dispute that the hearing of the main suit has started in earnest and that the plaintiff has already tendered his evidence and that it was to come up for further hearing on the 5/07/2018 when the present application was lodged. The issues for determination are as follows:

(a) Whether the amendments sought are statute barred.

(b) Whether the Applicant has convinced the court to grant the orders sought.

7. As regards the first issue, it is noted that the Defendants have challenged the proposed amendments as being statute barred. The cause of action as disclosed in the plaint is said to have occurred on the 16/02/2010. The plaint was lodged in court on the 18/06/2010. The defendants duly filed their statements of defence and replies thereto filed by the plaintiff. Pre-trial directions were taken and matter is now proceeding. The amendments sought to be introduced into the plaint appear to have been gleaned from the averments of the plaintiff vide paragraphs 6 - 14 of the plaint dated 18/06/2010. The same averments have also been captured in the plaintiff's statement filed on 29/09/2014. The said statement was duly served upon the defendants and that they are deemed to be aware of its contents. The contemplated amendments do not introduce any new matters as such as the Plaintiff is only interested in stating the specific causes of action against each of the Defendants. The first Defendant entered appearance and filed defence in a bid to defend the suit on behalf of the police officers who were involved in the arrest and arraignment of the plaintiff in court over an alleged criminal offence committed by the Plaintiff. I am not convinced by the assertions of the 2nd and 4th Defendants that the amendments sought are statute barred because the Plaintiff is not starting a fresh claim. The claim had already been made vide the initial plaint and what the plaintiff now seeks is to be permitted to fine tune the specific allegations against the defendants and more particularly the 1st Defendant herein. Indeed the first defendant was duly served with the applications and to date there is no response filed in opposition thereto. Hence I find the same is unopposed by the said 1st Defendant. As the amendments sought relate only to the conduct of the agents of the 1st defendant as earlier claimed in the plaint, I do not see any prejudice suffered by the Defendants if the same are allowed. Amendments of pleadings are allowed vide Order 8 rule 5 of the Civil Procedure Rules and can be made at any stage of the proceedings. I find the amendments are not new matters and that the defendants have not been ambushed at all. The amendments sought are not major issues to require them to be subjected to the rigours of the Limitation of Actions Act. I find the amendments not statute barred.

8. As regards the second issue, I note that the replying affidavit by the second Defendant has been vehemently objected to by the Plaintiff on the ground that the same has been deposed by the 4th Defendant instead since the 2nd Defendant is reported to be deceased. These averments have been raised through submissions and not evidence such as an affidavit. The plaintiff has not availed any certificate of death to support the assertions. Even though the issue of death of one of the Defendants might be the case, I find the affidavit of service by one Josphat Kioko filed on 8/11/2018 seems to suggest vide paragraph 6 that the 3rd Defendant Maryanne Mueni Denes is deceased. If that is the position then the Plaintiff's claim that the 2nd Defendant is deceased is not correct. That being the position, I find it is highly likely that the 2nd Defendant signed the affidavit and which should now be considered herein.

Amendment of pleadings are allowed vide order 8 Rule 5 of the Civil Procedure Rules which provide as follows:-

“5(1) for the purpose of determining the real question in controversy between the parties, or of correcting any defect in any proceedings, the court may either of its own motion 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.”

I am cognizant of the fact that the amendment is being made rather late in the day since the main suit has already started in earnest. However, rules of natural justice dictates that a party who has come to court beseeching it to exercise discretion and allow him to modify his case should not be shut out. I have perused the initial plaint and the statement by the plaintiff and find that the amendments sought to be introduced are not per se new matters. They are actually directed at the 1st Defendant and relate to the conduct of its officers now complained of by the Plaintiff. The first Defendant has not filed any response to the application for amendment by the plaintiff and therefore I take it that it is not opposed to the application. Similarly the amendments do not affect the 2nd, 3rd and 4th Defendants in any way as they are directed at the 1st defendant and therefore I find they do not stand to be prejudiced. In the case of **Central Kenya Ltd –V- Trust Bank Ltd [2000] 2 EA 365** it was held:-

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

Being guided by the above authority, I find the plaintiff's request merited in that the real question in controversy as regards the 1st Defendant is to do with the conduct of its agents against the Plaintiff. Even though the claim might have been hinted in some of the paragraphs in the plaint and statement of the plaintiff, the amendment will clearly put the allegations against the agents of the 1st Defendant in a clear perspective. There is no likelihood of injustice caused to the defendants as they can adequately be cushioned by an award of costs. The overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious proportionate and affordable resolution of disputes governed by the Act. There is need to ensure that all the parties in the suit are at bar and on equal footing and that all the issues in controversy have been brought forward so that the same can be thrashed by the court with finality. There is thus need by this court to ensure that substantive justice is achieved as demanded under Article 159(2) (d) of the Constitution.

It is therefore my considered view that the plaintiff should be allowed to bring on board the intended amendments within a certain time line after which the parties may then get back to the hearing of the matter. An award of costs to the defendants would easily take care of their concerns.

9. In the result the Plaintiff's application dated 2/07/2018 has merit. The same is allowed in the following terms:-

(a) Leave is hereby granted to the Plaintiff to file and serve an amended plaint within fourteen (14) days from the date hereof.

(b) The Defendants are granted leave to file and serve amended statements of defence if need be within 14 days upon being served.

(c) The costs of the application be borne by the Plaintiff.

It is so ordered.

Dated and delivered at Machakos this 17th day of December, 2019.

D. K. Kemei

Judge