



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 144 OF 2000

MARY NANJALA MUHALYA.....PLAINTIFF

VERSUS

AMBROSE KIPRUTO (DECEASED).....DEFENDANT

AND

JANE CHELANGAT SINGOEL.....RESPONDENT

R U L I N G

1. The application before me seeks leave to further amend the plaint. The plaint has been amended once in the past and this amendment was followed by the filing of an amended defence and counterclaim.
2. The grounds on which the application is premised are at the foot of the application. They are, inter alia, that the trial of this suit has not commenced and that the intended amendment is designed to address the matters as they currently stand. It is further averred that the proposed amendment will not prejudice the defendant in any way. The application is supported by the sworn affidavit of the plaintiff dated 1/2/1018.
3. A copy of the first amended plaint shows that the orders of declaration that the plaintiff is the lawful owner of and is entitled to harvest the seed maize on the suit land and a declaration that she is the owner of the suit land were abandoned and a prayer for the refund of the purchase price was included.
4. The restructuring of the prayers appears to have followed the inclusion of facts at the new paragraphs 14A that the defendant had leased the suit land to a third party thus frustrating the agreement.
5. However in the new amended plaint the only amendments to the prayers appear to be aimed at referring to the "Estate of the defendant" rather than "defendant" and include a particularization of special damages of Kshs.443,327/- and Kshs.200,000/-. The duration of time on which interest is claim is also particularized.
6. According to the defendant the claim being substituted, that is the claim for Kshs.443,227/- accrued 18 years ago and it is clearly barred by the Limitation of Actions Act. It is also averred in opposition that the claim for Kshs.200,000/- was pursuant to a consent order made on 23/11/2000 and that the same represented the defendant's loss of user for 40 acres that the plaintiff had cultivated.
7. I have considered the rival submissions of the parties. I find that ***Order 8 Rule 3 of the Civil Procedure Rules 2010*** empowers` the court to allow a party to amend his pleadings at any stage of the proceedings as may be just and in such a manner as it may direct, subject to costs.

8. Order **8 Sub-rule (2)** also provides that the court may allow, if it thinks just to do so, an application for leave to amend a pleading notwithstanding that the same is brought after any relevant period of limitation current at the date of filing of the suit has expired.

9. The applicant has quoted a passage in the case of *Eastern Bakery -vs- Castellino [1958] EA 461* as follows:-

“..... amendments 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”. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

10. The applicant submits that nothing has been done by the respondent to demonstrate by way of evidence that the intended further amendment will either be prejudicial to the Estate of the defendant “or occasion it injustice”.

11. Further, the applicant avers that the grounds raised by the respondent are questions of fact that require evidence to be adduced during the trial and they cannot thus be considered at this interlocutory stage. He cites the case of *Chemelil Sugar Co. Ltd -vs- Phoenix of East Africa Assurance Co. Ltd 2014* as quoted in the case of *H. Young & Co. Ltd & Another -vs- James Mwangi & Another [2017] eKLR* where the court stated as follows:-

“By this application dated 15/6/2012 the applicant prays to be allowed to amend the plaint to include special damages.....The defendant has opposed the said application vide the grounds of opposition filed on 19/12/2012.

The basic argument is that the said suit first of all is time barred and by allowing this amendment this court would be going against the principles of limitation of time which the plaintiff was already in breach.....

The question whether the suit is already in breach of statute of limitation as argued by the respondent is really a matter of evidence. It is not at this juncture possible to determine the reality or otherwise of the defendants allegation.

This is an issue of evidence especially taking into consideration that there was an insurance contract between the parties herein. There is no prejudice in my opinion which the respondent stand to suffer.

In any event this suit is yet to start and for all issues in controversy to be spelled out it is necessary to allow the amendment. As stated above I do not see any prejudice the respondent stands to suffer.

Any argument raised by the plaintiff shall be countered if need be by the respondent. Beside this, Article 159 of the Constitution essentially provides that justice should not be denied to any party provided that no prejudice shall be suffered and as long as adequate space is provided for each of the interested parties to respond. In the premises the application is allowed”.

12. *Kisii High Court Civil Suit 183 of 2012 - H. Young & Co. EA Ltd and Another -vs- James Mwangi and Another (eKLR)* and *Nyeri ELC No. 626 of 2014 - Barnabas Kariuki -vs- Nyeri water & Sewerage Co. Ltd (eKLR)* were also relied on by the applicant.

13. On the other hand the respondent relied on *Iga -vs- Makerere University 1972 EA 65* for the proposition that the claims sought to be introduced by the applicant are barred by limitation hence barred by law and therefore no relief can be sought in respect thereof.

14. The respondent distinguished the decision in the Chemelil Sugar case (Supra) cited by the applicant by stating that in that case the suit itself was already time barred by the time of filing while in this case, the claims sought to be introduced are the ones objected to on the basis of limitation.

15. Regarding the ground that Kshs.200,000/- emanated from a consent and is not claimable, the defendant cited the case of **Board of Trustees, National Social Security Fund -vs- Michael Mwalo 2015 eKLR** for the proposition that a consent order cannot be interfered with by this court. That may be so.

16. However in my view, the grounds raised by the respondent do raise factual issues that may require proof by way of evidence. This is not the stage at which such evidence may be entertained. Secondly, this court is reluctant to bar the applicant from enjoying the liberty of amending his plaint at this stage for the reason that, first, the rules cited envisage that the court may at any stage in the proceedings allow amendments of pleadings as it deems fit.

17. Secondly, the respondent has a corresponding right to raise the very defences he raises in his grounds in an amended pleading filed in response to the plaintiff's proposed amendments. In my view the defendant would not suffer any prejudice if the orders of amendment were granted since the suit is yet to be heard.

18. I therefore grant the application dated **1/2/2018** as prayed. Further amended plaint shall be filed and served within 14 days of this order.

Dated, signed and delivered at Kitale on this 25th day of April, 2018.

MWANGI NJOROGE

JUDGE

25/4/2018

Coram:

Before: Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for respondent

Ms. Sitati for Mr. Wesutsa for applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

25/4/2018