



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 147 OF 2012

ANDREW WABUYELE BIKETI.....PLAINTIFF

VERSUS

CHINESE CENTRE FOR THE PROMOTION OF INVESTMENT

**DEVELOPMENT AND TRADE IN KENYA LIMITED.....1ST
DEFENDANT**

WARLEEN TRADERS (K) LIMITED.....2ND DEFENDANT

GEORGE KIMANI T/A

GEORGE N. KIMANI & Co. ADVOCATES.....3RD DEFENDANT

RULING

Leave to amend application

[1] The Plaintiff, in the Motion dated 1st July, 2014, seeks the leave of the court to amend his application dated 29th August, 2013. The Plaintiff submitted that he inadvertently omitted to indicate the relevant statutory provisions on which the said application is brought-this necessitated the filing of a further amended application dated 25th September, 2014. The application is expressed to brought under Order 8 rules 3, 4 and 5 of the Civil Procedure Rules, 2010, section 1A, 1B and 3A of the Civil Procedure Act Cap 21 laws of Kenya together with the Article 159(2)(d) of the Constitution. The application is premised on the grounds contained in the application and the supporting affidavit sworn on 1st July, 2014.

[2] The Plaintiff deposed that he entered into a six (6) year lease agreement with the 1st Respondent for lease of premises of 3079 sq. ft. at the China Centre. But, on 8th December, 2008, the 1st Respondent evicted the Plaintiff from the suit premises despite the Plaintiff's compliance with the terms of the lease agreement. According to the Plaintiff, the eviction prompted him to institute this suit through a Plaint dated 12th March, 2012. Since the eviction, the 1st Respondent let out the suit premises to a third party. It was further contended that, despite the changed circumstance, fixtures, items and partitions belonging to the Plaintiff are still in the suit premises and the current lessees

occupying the suit premises are utilizing and continue to use the said fixtures and partitions to the detriment of the Plaintiff. The Plaintiff further maintained that the application dated 29th August, 2013 was filed before the suit premise was leased out to third parties, therefore the circumstances that formed the basis of that application have since changed. Therefore, the Plaintiff believes that if the application dated 29th August, 2013 is heard in its current form without the proposed amendments to reflect the current events, it will lead to a miscarriage of justice and the entire suit will be rendered nugatory. The Plaintiff says that these amendments will not cause any prejudice to the 1st Respondent. Leave should, therefore, be granted.

[3] The Plaintiff submitted further, that, the application sought to be amended had been filed by another firm of advocates trading as Mwadumbo Amol, Ngome & Co. Advocates. But, the Plaintiff has changed advocates and his advocate is Koki Mbulu & Co. Advocates, who have advised him that the application should be amended to reflect the prevailing circumstances of the suit property. The Plaintiff appealed to the discretion of the court to allow the amendments to the application. The amendments are made in good faith and the Plaintiff stands to suffer irreparable damage if the orders sought are not granted. According to the Plaintiff, the damage is in the fact that failure to allow for amendments would automatically render the application dated 29th August, 2013 nugatory and hence a breach of the applicant's right to justice. It was further pointed out that the conduct of the 1st Respondent since the inception of the suit has been geared towards frustrating the applicant's right to acquire the tenant's fixtures as provided for in clause "n" of the lease agreement. That further, any delay caused in amending the application dated 29th August, 2013 was administrative and beyond the control of the applicant and therefore the consequences thereof should not be meted on the Plaintiff. The Plaintiff therefore urged the court to allow the application and grant the prayers therein.

[4] The 1st Respondent opposed the application and filed an affidavit sworn by Mary Catherine Nyaga, the 1st Respondent's property manager on 15th August, 2014. It was the Respondent's contention that the Applicant's Notice of motion dated 29th August, 2014 was filed in this court in vain; the orders being sought have been spent and therefore granting leave for amendment would be an exercise in futility. It was further deposed that the lease agreement in question under clause 4(n) specifically provided that after the expiry of the lease, all tenant's permanent fixtures and partitions would revert to the landlord at no costs. Further, vide a letter dated 9th May, 2012, the 1st Defendant's advocates advised the Plaintiff to collect all immovable items but the 1st Defendant elected to ignore the said advice. It was therefore the defendant's claim that the Plaintiff waived their claim of right to these items and subject to the lease agreement; the items reverted to the landlord. It was also the assertion of the 1st Respondent that no contractual relationship exists between the parties since the termination of the lease agreement and premise is now leased to two new tenants. The 1st Respondent was concerned that the application dated 29th August, 2013, was filed two years after the lease agreement had been extinguished and therefore any fixtures that were in the premises were already in use by the new tenants. Accordingly, it is moot for the Plaintiff to require the 1st Defendant to deposit any monies in court as he is no longer a tenant. The 1st Respondent also accused the Plaintiff of filing multiplicity of suits both in the High Court and Court of Appeal on this matter. Again, 1st Respondent stated that this suit was filed in 2012 and no action has been taken by the Plaintiff since then towards prosecution of the suit. Such indolent litigant should not be allowed to shift blame on administrative matter. Therefore the Court should strike out the application and dispense with the hearing of the main suit.

[5] The 1st Respondent submitted that it will suffer prejudice if the orders sought are granted since it exercised its rights under Clause 4 (n) of the lease agreement. In addition, the amendments being proposed by the Plaintiff have been overtaken by events and granting leave to amend will be an exercise in futility. They cited the case of *Kutima Investments Ltd –vs- Muthoni Kihara & Another (2006) eKLR* in support of its foregoing submission. In conclusion, the 1st Respondent urged the court to dismiss the Plaintiff's application with costs.

THE DETERMINATION

[6] Despite service of the application, the 2nd and 3rd Respondent did not file any response to the application. Nonetheless, I have considered the submissions made by both counsel and the affidavits filed by parties. Amendment of pleadings should be freely allowed at any time before delivery of a judgment. As a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. Leave to amend must always be granted unless the party applying was acting mala fide and where it is not necessary for determining the real question in controversy between the parties. The application to amend must be made bona fide and made in good faith. See *Mulla , The Code of Civil Procedure, 17th Edition Volume 2, at pages 333, 334 and 335*. See also *Odgers on Pleadings and Practice 20th Edition at page 170* that where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. However, if the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused. I would also refer to the case of *Eastern Bakery v Castelino [1958] EA 462 (CAU)*.

[7] This being an application for amendment of the Notice of Motion dated 25th September, 2014, I will utilize the general power of the Court to permit amendment of any proceedings as envisaged under Order 8 Rule 5. That Rule reads as follows:

“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.

(2) This rule shall not have effect in relation to a judgment or order.” (emphasis mine)

[8] I shall now turn to the merits of the application and apply the law. It is not in dispute that the amendments sought touch on the existence of the Plaintiff’s fixtures and partitions on the suit premises and the use of the same by other third parties after the Plaintiff was evicted from the suit premises. According to the Plaintiff, the application dated 29th August, 2014 was filed before the premises were let out to other parties, and so the amendment is only meant to reflect the current changes in the circumstances of the suit premises. On the other hand, the 1st Respondent opines that the amendment will have no effect on their claim as orders granted on the maintenance of status quo have since lapsed; and further, the lease agreement provided that all permanent fixtures and partitions would revert to the landlord at no costs on expiry of the lease. The 1st Respondent saw the Plaintiff’s application as a delaying tactic meant to derail the hearing of the main suit.

[9] As I stated earlier, the Court has discretion to Order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done *mala fide*, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs. I have considered the reasons advanced by the Applicant for seeking for amendment of the application. The amendments relate to the fixtures and partition in the suit premises that were put up by the Plaintiff before his eviction. These fixtures and partitions are now being used by other the new tenants in the suit premises. The said tenants occupied the suit premises after the instant suit was filed but after the status quo orders had lapsed. Therefore, careful pondering upon the circumstances of this case commends one path to take; i.e. not to grant leave to amend the application in question, and I will give ample reasons for the decision. First, the proposed amendments will not necessarily enable this court determine the real question in controversy between the parties, which is; whether the Plaintiff was wrongfully evicted from the suit premises for the alleged default of rent. Further, questions on fixtures and partitions in the suit premises can be adequately tackled and should be substantive matters for the

main trial. I have examined the Complaint dated 12th March, 2012; it does not contain these matters which form the basis of the proposed amendments. Essentially, allowing the amendments to the application dated 29th August, 2014, means amending the complaint through the backdoor. I say so because; the proposed amendments are to an interlocutory application and not to the complaint. An interlocutory application finds ground on the complaint which places the party's cause of action before the court. Therefore, the court is not being harsh to the applicant to state that such application is completely misplaced. The amendments are introducing substantive prayers for substantive order which are not in the complaint already. The Complaint should be amended first to lay basis for interlocutory relief like the one being sought herein. And as that has not been done, the application is reminiscent of the old age adage that the Applicant has put the horse before the cart. That is untidy way of doing things especially within the realm of adjudication of cases; allowing the amendment as sought will prejudice the law and the 1st Respondent. The proposed amendments lack a foot on which to stand and they must fail. This does not, however, mean that the proposed amendments lack merit when they are made in relation to the complaint. If they are proposed with regard to the Complaint dated 12th March, 2012, they will be considered on the scales of the law. The upshot is that the court declines to grant the application dated 25th September, 2015 and dismiss it with costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of February 2015

F. GIKONYO

JUDGE