



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 89 OF 2008

MOHAMED ALI.....PLAINTIFF/APPLICANT

VERSUS

GREAT LAKES PORTS LTD.....DEFENDANT/RESPONDENT

RULING

1. The defendant vide his Notice of Motion dated 30th September 2014 brought under Order 51 rule 1, Order 8 rule 3 of the Civil Procedure Rules 2010 sought leave to be allowed to amend his defence in terms of the draft amended defence to include the counter-claim. The motion is supported by three grounds inter alia that the amendment is necessary for the effectual determination of this suit. Secondly that no prejudice will be suffered by the plaintiff as the case is still at a pre-trial stage. The motion is also supported by an affidavit of Ashok Doshi sworn on behalf of the defendant/applicant.

2. The application was opposed by the Plaintiff/Respondent who filed grounds of opposition. The grounds raised by the Respondent includes that this application has been brought after undue delay. Further that the applicant seeks to introduce a new and inconsistent cause of action. Finally that it is not possible to allow the amendments sought without occasioning severe prejudice to the plaintiff.

3. The advocates for the parties then made oral submissions for and against the application. Ms. Rajab submitted that Order 8 (3) allows the court to give leave to amend at any stage of the proceedings. Secondly, the issues raised in the counter - claim form part of what should be determined alongside the plaintiff's claim. Lastly she submitted that no prejudice will be suffered by the plaintiff if the amendment is allowed. She cited the case of **Mechanized Systems Ltd vs. Gaurdian Bank Ltd (2005) eKLR** in support of her submissions.

4. Mr. Taib cited the case of **Harison Kariuki vs. Blueshield Insurance Co. Ltd** in his opening submissions stating that the amendment would cause prejudice to the plaintiff for the following reasons;

- i. *There is a 7 years lapse in bringing this application.*

ii. *The extent of the proposed amendment is vast as it introduces a new cause of action.*

iii. *The injunctive orders obtained by the plaintiff were set aside on the basis of the contents of the defence on record.*

Mr. Taib also referred the court to the case of **Margaret Wangari Maina vs. HFCK Ltd (2005) eKLR** which stated that application for leave to amend should be made with promptitude.

5. I have considered the submissions made and case law cited. I have noted the general principles considered for granting leave to amend pleadings at any stage of the proceedings. From the record, the hearing of this suit is yet to commence. I have perused the pleadings filed and the record and note that the parties herein are yet to exchange documents and statements of witnesses in compliance with the provisions of order 11 of the Civil Procedure Rules. In the proposed amended draft defence annexed, it is true that the proposed amendment is extensive but I do not agree with the Respondent's submission that it introduces a new cause of action. A reading of the draft defence merely lays claim to the same piece of land the plaintiff is claiming. Given that parties are yet to exchange documents the plaintiff/respondent still has opportunity to reply to the proposed amendment and prepare for his case.

6. The two case laws cited by the Respondent are distinguishable as this case is still fresh in comparison to the amendments intended to be introduced after one of the plaintiff was heard. On the question of delay of 7 years, the Respondent did not assign the delay of the case not proceeding to have been occasioned by the applicant. Again since the hearing has not commenced, I do not consider the delay in bringing the present application as inordinate. I am convinced by the submissions of the applicant that the amendment is necessary to enable the court determine the matters in issue once between the same parties.

7. Consequently I find the present motion as merited and allow it. The Respondent can be compensated by an award of costs. The defendant be and is hereby granted leave to file an amended defence within 10 days of the date of this ruling. The plaintiff has a right of reply to the amended defence if need be. The cost of this motion is awarded to the Plaintiff/Respondent.

Dated and delivered in open court at Mombasa this 17th day of April 2015.

A. OMOLLO

JUDGE