



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC NO. 67 OF 2018

MUGUMOINI FARMERS CO. LTD..... PLAINTIFF/ RESPONDENT

-VERSUS-

INSHWIL BUILDERS ENGINEERING LTD.... DEFENDANT/ APPLICANT

AND

EPHRAIM WAITHAKA RUITHA..... 1<sup>ST</sup> INTERESTED PARTY

CHARLES WANG'ONDU SAMSON..... 2<sup>ND</sup> INTERESTED PARTY

RULING

By a **Notice of Motion Application** dated **11<sup>th</sup> November 2021**, the Defendant/Applicant moved this Court for orders; -

**i. THAT the Honorable Court be pleased to grant the Defendant leave to amend the Statement of Defence dated 16<sup>th</sup> January 2020, in terms of the annexed Draft Amended Defence.**

**ii. THAT the costs for this application be costs in the cause.**

The application is premised on four  **GROUNDS**  stated thereon and the Supporting Affidavit of  **PATRICK GUKURA MURAYA** , who deponds that he is one of the Directors of the Defendant herein. It is the Applicant's disposition that the Statement of Defence dated  **16<sup>th</sup> January 2020** , is insufficient and it is prudent that the same be amended, so that this Court can determine real issues in controversy. Additionally, that the purported amendments will not be prejudicial to the Plaintiff/Respondent, as it will have an opportunity to file a response to the said amendments.

In response to the Application, the Plaintiff/Respondent through its Advocate,  **Salome M Beacco**  filed a Replying Affidavit opposing the said Motion. It is the Respondent's attestation that the matter was certified ready for hearing on  **14<sup>th</sup> December 2021** , and the Plaintiff has already called  **four**  witnesses to the stand and the Defendant has cross-examined them. That the proposed amendments are new and the Plaintiff/Respondent would be affected by their introduction, since the Plaintiff's witnesses were not examined on the contents thereof. That allowing the application will not only be costly to the Plaintiff/Respondent, but will also amount to abuse of the Court process and the resources. Further, the Plaintiff/Respondent contended that the Defendant/Applicant has not given sufficient reasons for the delay in amending the Defence at the earliest, and as a result, the proposed amendments will infringe on the Plaintiff's/Respondent's constitutional right to fair hearing and timely disposal of cases. The Plaintiff/Respondent also averred that facts and documents culminating into the proposed amendments were served on the Defendant/Applicant in 2018, and it cannot now feign ignorance. The Plaintiff/Respondent further averred on the unfairness that the proposed amendments will likely occasion it and that this Court should not allow the application.

The Interested Parties filed a response through a Replying Affidavit sworn by the 2<sup>nd</sup> Interested Party,  **Charles Wang'ondy Samson** , on behalf of himself and the 1<sup>st</sup> Interested Party. It is their position that the application should be granted for the ends of justice to be reached. That any prejudice that will occur as a result of the amendments can be cured by an award of costs.

The Defendant/Applicant filed a  **Supplementary Affidavit**  sworn by its Advocate  **Titus Kanyi Ndurumo** , in response to the Respondent's Affidavit. Counsel for the Applicant contended that the application was made before hearing of the Plaintiff's case, but counsel for the Plaintiff insisted on proceeding, service of the application notwithstanding. Further that the Applicant found the need to amend the Defence

while preparing for hearing.

Parties filed and exchanged their written submissions as directed by this Court. The Defendant/Applicant submitted that the Court has the powers to allow such an application as provided by **Order 8 Rule 3** of the **Civil Procedure Rules**. That the proposed amendments do not introduce a new cause of action or a counterclaim, but is in response to the Plaintiff. Further it is their submissions that the Plaintiff/Respondent will have an option of recalling witnesses if need be, as such there is no prejudice that it will suffer. Instead the Defendant/Applicant will be the one that will suffer since the Defence would be insufficient without the amendments sought.

The Plaintiff/Respondent in submitting against the said application gave a chronology of the times the Defendant/Applicant failed to inform the Court of its intention to amend its Defence. That the Applicant's conduct bends towards scuttling the hearing and determination of the suit, and the application is another attempt to derail the hearing of the suit. He pointed out that the principles that guides a Court in considering such an application were laid down in **Eastern Bakery vs Castelino{1958} EA 461**, where the trial Court held that application for amendments ought to be allowed freely where there is no injustice that will be occasioned on the adverse party and that the other party can be compensated with costs.

It was the Respondent's further submissions that the application comes after close of the Plaintiff's case and allowing the application will be prejudicial. The Court was invited to consider the holding in the case of **St Patrick's Hill School Limited vs Bank of Africa Limited(2018)eKLR**, where the Court when quoting other cases held that an application for amendments should be denied where its prejudicial to the rights of the other party. The Respondent also submitted that it will suffer prejudice in terms of costs and time, should they opt to recall witnesses. Further, the Respondent reiterated its averments and submitted that the Defendant/Applicant has not adduced enough reasons as to why this Court should allow the application. It relied on the case of **Abdul Wahid Al Abubakar vs Osman Abubakar t/a Osman Woodworks & 2 Others (2015)eKLR**, where the Court pronounced on application for amendments of pleadings where a matter is partly heard. The Respondent relied on a number of cases and submitted that it will suffer prejudice and importantly that the Defendant/Applicant will have an option of appeal if judgment will not be in its' favor.

The Interested Parties filed their submission in support of the application and invited this Court to consider the provisions of **Order 8 Rule 3 and 5(1)** of the **Civil Procedure Rules**, and urged this Court to find that the intended amendments raise real issues for determination. In submitting that amendments can be done at any stage of proceedings, reliance was placed on the case of **Eunice Chepkorir Soi vs Bomet Water Company Limited (2017)eKLR**. The interested parties also invited this Court to consider the objects of the amendments as was held by the Court in **Institute of Social Accountability & Another vs Parliament of Kenya & 3 Others (2014) KLR**. In the end, the Interested Parties invited this Court to consider the principles of leave to amend that were laid down in **Ochieng and Others Vs First National Bank of Chicago Civil Appeal No 147 of 1991**, and urged this Court be guided so in allowing the application.

The matter herein was filed in **2018**, and on several occasions when the matter came up for compliance, there were reasons given by either party for non-compliance. On **5<sup>th</sup> October 2021**, in the absence of the Defendant, the matter was eventually fixed for hearing on **16<sup>th</sup> November, 2021**. The instant application was filed on **16<sup>th</sup> November 2021**, before the matter proceeded for hearing. On said date, when the matter came up for hearing, counsel for the Defendant sought an adjournment on the ground that he had filed the instant application and he was bereaved. The Plaintiff through its advocate strongly opposed the application for adjournment and the Court directed that the matter proceeds for hearing as scheduled. The Plaintiff proceeded for hearing with **two** witnesses and the Defendant's counsel cross-examined them. Consequently, the matter proceeded for further hearing on **14<sup>th</sup> December 2021**, and the Plaintiff called **3** witnesses.

Thereafter, this Court directed that the instant application be canvassed by way of written submissions and gave the Plaintiff/Respondent **21 Days** to file a Replying Affidavit, with correspondence leave to the Defendant/Applicant to file a supplementary affidavit.

Having analyzed the pleadings and rival submissions by parties, the issues for determination by this Court are

- 1. Whether leave to amend should be granted**
- 2. Who should pay costs of the instant application**

**1. Whether leave to amend should be granted**

The law on amendments of pleadings is provided for under **Order 8** of the **Civil Procedure Rules**. **Order 8 Rules 3 & 5** provides:

**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.**

**3. (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.**

**(2) Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.**

**(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a**

genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

The applicable principles of amendments were settled in the Court of Appeal in the Case of **Joseph Ochieng & 2 others trading as Aquiline Agencies Vs First National Bank of Chicago [1995] eKLR**, and also echoed by the High Court in **Nairobi HCCC No 2715 of 1987 LAKHAMSHI KHIMJI SHAH & another v AJAY SHANTILAL SHAH & 2 others [2010] eKLR** that;

- i. The application should be made timely
- ii. The application should be made in good faith
- iii. The Court should examine the nature and extent of amendments
- iv. The Court must ensure there is no new or inconsistent cause of action
- v. That no injustice will be occasioned to the other party

In *Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1)* at paragraph 76, as quoted by the Court of Appeal in *Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR* state the following about amendments of pleadings: -

**“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”**. [Emphasis added].

The power donated above is discretionary and must be exercised with caution to avoid miscarriage of justice on either party. **Article 50** of the Constitution on the other hand provides for the right to fair hearing and which fair hearing includes the right for parties to amend their pleadings to advances their cases.

The Defendant/Applicant in support of the application avers that the need to amend the statement of Defence arose at the time it was preparing for hearing. The Statement of Defence was filed on **16<sup>th</sup> January 2020**, and almost two years later, the application for amendment has been preferred. While the law provides that such an application can be brought at any time before judgment, as is in the present case, the Applicant must sufficiently demonstrate that he is deserving of this Court to exercise its discretion in his favor.

The amendments sought by the Applicant as per the annexed Draft Amended Statement of Defence seeks to respond to the Plaintiff. Such amendments must have substantive merits to the Applicant's case, to the extent that it not only advances the Applicant's case, but helps the Court to appreciate the real issues in question. The Court has noted that the issues raised by the Defendant/Applicant in the intended amended Defence were issues within its knowledge, since the suit was filed and this matter has been in Court on numerous occasions. The Defendant/Applicant had not sought leave to amend its Defence until now when the matter was set down for hearing.

Further, this Court is of the view that the averments that the Defendant intends to introduce in the intended amended Defence are issues that could easily be dealt with at the hearing either during examination in chief, cross-examination and/ or re-examination. Unless the Applicant can demonstrate that the issues sought to be addressed on amendment were issues not within its knowledge at the time of **Pre-trial** or at the earliest, allowing such an application may result in an **injustice**, especially where one party has closed its case. The Defendant/Applicant has not attempted to demonstrate to this Court why the said amendments were not brought to Court at the earliest, yet upon perusal of the file, this Court notes that the Defendant/Applicant had made several applications all which have already been determined on merit.

It is suspicious that the Application dated **11<sup>th</sup> November 2021**, was only filed on **16<sup>th</sup> November, 2021**, when this matter was scheduled for hearing. The principles of equity dictate that **“he who seeks equity must do equity”** and to sit on this seat, the least the Applicant would have done was to file the application under a Certificate of Urgency so that the same could be brought to the attention of this Court at the earliest. Filing the application on the morning of the hearing date, portrays that the application was done in **bad faith** and in a **bid to stop** the hearing.

This Court agrees with the finding of the Court in the case of **Abdul Wahid Al Abubakar v Osman Abubakar t/a Osman Woodworks & 2 others [2015] eKLR** as rightly cited by the Plaintiff/Respondent in its submissions where the Court stated as follows;

**“Indeed, the law allows a party to amend his pleadings at any stage of the proceedings.**

**However, where a matter has been partly heard, the court ought to be slow in allowing an amendment to a pleading considering that such an amendment is likely to be prejudicial, especially where the opposite party has already tendered evidence.**

Indeed, one of the issues that the court considers when the matter comes up for pre-trial directions is whether any of the parties would wish to amend his pleadings before the matter can be confirmed for hearing.”

On whether the Plaintiff/Respondent will suffer prejudice, this Court has noted that **five witnesses**, have already testified in support of the Plaintiff’s case and the Plaintiff has closed its case. Counsel for the Plaintiff/Respondent informed Court on **14<sup>th</sup> December 2021**, that one witness has already died and most of its witnesses are old. Further, this matter was filed on **August 2018**, and the same was only set down for hearing on **November 2021**, over three years after filing. This Court cannot wish away the time that has already passed and the effect the proposed amendments will have on the case, including but not limited to re-opening of the Plaintiff’s case and recalling of witnesses. In the case of (*supra*) the Court held:

**.... It will not be in the interest of justice to allow the proposed amendments at this stage, because the process of filing pleadings by parties will have to be re-opened up with the concomitant result that the trial of those proceedings will be delayed”**

This Court could not agree more with the above findings and proceeds to find and hold that the proposed amendments if allowed will amount to a **great injustice** and/ or **prejudice** to the Plaintiff/Respondent. In relation to the above, this Court finds that the Defendant/Applicant has failed to demonstrate that it is deserving of the discretion of this Court to allow the proposed amendments. This Court therefore proceeds to **dismiss** the Defendant’s/Applicant’s application dated **11<sup>th</sup> November 2021**, entirely.

## **2. Who should pay costs of the instant application**

The discretionary power of this Court to award costs is donated **Section 27** of the **Civil Procedure Act**. It is also trite that costs shall follow event, unless the Court on its own discretion finds reasons not to grant the successful party costs. There is no reason why this Court cannot exercise its discretion in favor of the Respondent. Therefore, the Court proceeds to award costs of this application to the Plaintiff/Respondent.

The upshot of the foregoing is that the Application dated **11<sup>th</sup> November, 2021** is found not merited and the same is dismissed entirely with **costs** to the Plaintiff/Respondent. The main suit shall proceed for hearing of the Defence case.

**It is so ordered.**

**DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANG’A THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2022**

**L. GACHERU**

**JUDGE**

**Delivered online; -**

**In the presence of**

**Mrs Beaco for the Plaintiff/Respondent**

**Mr Kanyi Ndurumo for the Defendant/Applicant**

**Mr Kabu for the Interested Parties**

**Kuiyaki – Court Assistant**

**L. GACHERU**

**JUDGE**