



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 300 OF 2006

ROSE WARINU MUTHEMBA.....PLAINTIFF

VERSUS

JANE NJERI MUTHEMBA.....1ST DEFENDANT

DAVID MUNGAI MUTHEMBA.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Application before the Court is the Plaintiffs' Chamber Summons dated **10th April 2014** and filed on **11th April 2014**. It is expressed to be brought under the provisions of **Order 1 rule 10, Order 8 rules 3, 5** of the **Civil Procedure Rules and Sections 1A, 1B and 3A** of the **Civil Procedure Act**. The Application sought for one main order that this Court be pleased to grant leave to the Plaintiff to amend the Plaint dated 15th May 2006.

THE PLAINTIFF'S CASE

2. The application is based on the grounds set out therein and is supported by the Affidavit of the Plaintiff sworn on 10th April 2014. The Plaintiff also filed written submissions dated 31st October 2014 on even date in support of the application.
3. The Plaintiff's case is that the amendment seeking to add the 3rd, 4th and 5th Defendants as parties to this suit is necessary as the presence of the parties will enable the Court settle all the questions involved in the suit and will avoid multiplicity of suits.
4. The Plaintiff avers that she has only recently after intensive investigations come to learn some of the salient and critical facts concerning this case. According to the Plaintiff, the amendments to the Plaint will enable the court to determine the real issues in controversy between the parties.

THE DEFENDANTS' CASE

5. In opposition to the application, the 2nd Defendant filed the Grounds of Opposition dated 3rd June 2014 on even date as well as a Replying affidavit sworn by himself on 6th June 2014. The 2nd Defendant also filed written submissions dated 21st November 2014 on even date.

6. It is the 2nd Defendant's case that the issues the Plaintiff seeks to introduce in the amended Plaintiff have already been determined in Court. It is further his case that the Plaintiff seeks to introduce a new cause of action which is barred by limitation.
7. The 1st Defendant filed a list of authorities dated 10th June 2014 on even date in opposition to the application.

ANALYSIS

8. I have considered the application, the affidavits in support and opposition to the application as well as the written submissions by Counsel. Having done so, I take the following view of the matter.
9. The general rule is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment or joinder does not result in prejudice or injustice to the other party that cannot be properly compensated for in costs. In the case of **EASTERN BAKERY VERSUS CASTELINO (1958) EA** the Court held *inter alia* that:-

“...amendments to pleadings sought before hearing, should be freely allowed if they can be made without injustice to the other side and there can be no injustice if the other side can be compensated by costs...”

10. I will begin with the preliminary issue of res judicata as raised by the 2nd Defendant. The 2nd Defendants pleaded *res judicata* arguing that some of the issues raised by the Plaintiff in the Amended Plaintiff had been resolved in Court and Judgment entered. To this end, the 2nd Defendant attached a lengthy Judgment without taking a step to explain which issues had been resolved and that were now being introduced in the Amended Plaintiff. For that reason, the issue of *res judicata* is moot and is without merit as the Defendant has not substantiated the same before this Court.
11. The other main issue raised by the Defendants is that the Plaintiff is guilty of *laches* in bringing the current application and therefore the amendments will greatly prejudice them. This Court takes note that the amendment has been brought late in the day. However the delay has been explained by the Plaintiff and it is my view that it will not be in the interest of justice to deny the Plaintiff the opportunity to present her case only on the basis of the delay. In any event, any prejudice caused to the Defendants by the delay can be compensated by way of costs. This is a family dispute and it is only fair and prudent that all issues between the parties herein be resolved on merit.
12. As a result of the foregoing, this Court finds that the Defendants have not demonstrated how they will be prejudiced if the proposed amendments to the Plaintiff is allowed.

DISPOSITION

13. In the circumstances foregoing, the upshot of this court's ruling is that the Plaintiff's Chamber Summons dated **10th April 2014** and filed on **11th April 2014** is merited. The same is therefore allowed in the following terms:-
 - a. ***The Plaintiff is hereby granted leave to amend the Plaintiff herein in terms of the proposed Amended Plaintiff annexed to the current application.***
 - b. ***The proposed Amended Plaintiff annexed therein be deemed as duly filed and served upon payment of requisite filing fees.***
 - c. ***The Defendant is at liberty to file an Amended Defence if need be, within 21 (twenty one) days of service of the Amended Plaintiff.***
 - d. ***The Plaintiff to bear the costs of this Application.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Nagpal for Plaintiff

Mr. Maruti for 1st Defendant

Mr. Mayende holding brief for M/s Wambugu for 2nd Defendant

Teresia – Court Clerk