



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 146 OF 2018

CLIFFORD GEORGE ROOKE.....PLAINTIF

VERSUS

- 1. RUTH NYAWIRA WAMBUI.....1ST DEFENDANT**
- 2. AHMED WALADI AHAMED.....2ND DEFENDANT**
- 3. NZAI KOMBE.....3RD DEFENDANT**
- 4. MARY GUMO MAPINNGU.....4TH DEFENDANT**
- 5. ZIRO BAHATI JOHNSON.....5TH DEFENDANT**
- 6. PETER JOSEPH GICHOYO MBUGUA.....6TH DEFENDANT**
- 7. OMAGWA ANGIMA t/a ANGIMA & COMPANY ADVOCATES.....7TH DEFENDANT**

RULING

This ruling is in respect of an application by the Defendant/Applicants dated 29th October 2021 seeking leave to amend the Defendants' Statement of Defence and Counterclaim dated 10th September 2018.

Counsel submitted that the same was necessitated by the Plaintiff's amendment of the Plaint dated 13th July 2018 and that no prejudice will be caused to the Plaintiff if the order for amendment is allowed.

The Plaintiff filed a Replying Affidavit opposing the application as the court had expunged the Amended Defence which had been filed without leave and urged the court to dismiss the application.

ANALYSIS AND DETERMINATION

The issue for determination in an application for amendment of pleadings is whether the amendment is made in good faith and that it will not prejudice the opposing party.

Under Order 8 Rule 3 of the Civil Procedure Rules, this court has a wide discretion to grant leave to amend pleadings at any stage of the proceedings.

Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled "amendment with leave time to amend" it states;

".....the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise."

Similarly in the case of **City Clock Limited v County Clock Kenya Limited & Another [2020] eKLR** the court referred to a Court of Appeal decision in the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 149 of 1991 [1995] eKLR** which was cited with approval in **St. Patrick's Hill School v Bank of Africa LTD [2018] eKLR** where the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings as follows:

- a) *The power of the court to allow amendments is intended to determine the true substantive merits of the case:*
- b) *The amendments should be timeously applied for;*
- c) *Power to amend can be exercised by the court at any stage of the proceedings;*
- d) *That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side:*
- e) *The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.*

Looking at the draft amended defence and Counterclaim, there is nothing that will prejudice the Plaintiff if the amendment is allowed. It will help in determination of the issues in the suit once and for all. The Plaintiff has also not stated what prejudice he will suffer if the amendment is allowed.

The court had expunged the defence and Counterclaim because it had been filed without leave of the court at the time. At the time the matter came up for hearing counsel was indisposed and counsel holding brief indicated that the parties were negotiating that is why counsel filed the amended defence and counterclaim late. Counsel did not make an application to deem the filed defence as properly filed before the court and therefore counsel for the Plaintiff urged the court to expunge it from the court record.

I have considered the application and find that the court has discretion in such applications which discretion must be exercised judiciously in the interest of justice. I therefore allow the amendment of Defence and Counterclaim. The Defendants to file the Amended Defence and Counterclaim with 7 days from the date of this ruling.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF FEBRUARY, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address

thereby waiving Order 21 [1] of the Civil Procedure Rules.