



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

HIGH COURT CIVIL NO. 157 OF 2009

USHAGO DIANI INVESTMENT LIMITEDPLAINTIFF

VERSUS

JABEEN MANAN ABDULAWAHABDEFENDANT

RULING

1 The application under consideration in this Ruling is a Notice of Motion dated 18th March 2015.

2 By that application Jabeen Manan Abdulwahab the defendant seeks leave of the court to amend her defence.

3 The plaintiff Ushago Diani Investment Limited filed this suit on 29th May 2009 seeking permanent injunction to restrain defendant from selling property KWALE/DIANI/BEACH BLOCK/1463 (herein after called the property) and for an order that the defendant do transfer that property to the plaintiff.

BACK GROUND

4 The defendant together with two other people, namely Hassan Abdulwahab and John Bradley registered the plaintiff company each person holds 25 shares in the plaintiff company.

5 The plaintiff case is that the defendant's contribution to the capital of the plaintiff company was the property which is registered in her name. That the plaintiff company took possession of the property and proceeded to erect an shopping complex consisting of shops, offices, kitchen, a sports bar, food court, swimming pool and parking, thereon. That after that investment the defendant re-took possession of the title documents of the property and hence why this case was filed to restrain the defendant from selling the property.

6 According to the defendant as evidenced in her affidavit sworn on 3rd Mach 2010, she made her 25% share contribution in cash and not in the property. She therefore opposed the issuance of injunction as sought by the plaintiff.

NOTICE OF MOTION

7 By her Notice of Motion application dated 18th March 2015 the plaintiff seeks to amend her defence to deny the allegations made in the plaint and further to counter claim for rent of the property. In her very short and succinct affidavit the defendant deponed that at the time the summons and plaint were filed she was out of this jurisdiction. That she instructed her counsel to

both defend this suit and to file a counter –claim. However she later learnt the said counsel failed to file a counter–claim as instructed.

8 Indeed the defence on record filed on 25th January 2010 is based on mere denial of the plaintiff’s very detailed claim. The proposed amendment to defence and counter claim is far more detailed and responds to the plaintiff’s claim.

9 The application was opposed by the plaintiff. The main ground of opposition advanced by the plaintiff was that the defendant’s counter claim will be filed out of the limitation period provided under the Limitation of Action Act Cap 22, since the claim is contractual and as per Section 4 (1) (a) that the defendant should have filed her Counter Claim within 6 years from the year 2007. The plaintiff submitted that the defendant had failed to address the delay in filing her counter claim.

10 In my view the defendant explained why her defence did not have a counter. She stated that she instructed her then counsel to both defend this suit and to counter –claim. The defence filed by her then counsel did not have the counter.

11 Further in comparison the proposed amendment to the defence much more responds to the plaintiff than the defence on record. That defence on record as stated before contains mere denials.

12 Order 8 Rule 5 of the Civil Procedure Rules articulates the purpose of r allowing amendment to pleadings 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.”

It follows that for the purpose of determining the real question relating to the parties intention over the property it is necessary to allow the defendant to amend her defence which amendments responds to

the plaintiff’s claim. To allow that amendment would be in keeping with the present jurisprudence as stated in the case

EASTERN BAKERY VS CASTELINO (1958) E.A One of the holdings of the case was in the following terms:

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

(iii) the principles applicable to amendments of plaints are equally applicable to amendments of statements of defence.”

13 The plaintiff did not state what, if any, would be prejudicial to it if the amendment to the defence was allowed. In my view whatever prejudice the plaintiff may suffer it can be compensated by an award of costs.

My opinion is supported by the case of the Court of Appeal **CENTRAL KENYA LIMITED VS TRUST BANKKENYA LIMITED (2002) 2 E.A 365** where the court in part stated:

“.....all amendments or joinder should be freely allowed at any stage of the proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs- see Becco vs Alfa lava co. Ltd (1994) 4 AII E.R- 464 adopted.

- *Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend.*
- *The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.”*

14 Is the defendant’s proposed counter claim defeated by the provisions of the limitation of Action Act Cap 22? In my view, which view is supported by the Law and previous decision, the defendant’s proposed

counter claim is not defeated by Cap 22. Order 8 Rule 3 (2) of the Civil Procedure Rules provides:

“ (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (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 subrule if it thinks just so to do.”

This rule was applied in the case

15 In the **CAPITAL FISH (KENYA) LIMITED formerly FISH PRODUCTS (KENYA) LIMITED VS KENYA POWER AND LIGHTING COMPANY LIMITED (2007)eKLR** in the Judge referred to another case as follows:

“Lord Denning in his character said as follows in Mitchell v Haris Engineering co. (1967) 12 QB 703 at p.718 in this respect:

“Some of the judges in those cases spoke of the defendant having a “right” to the benefit of the Statute of Limitation: and said that “right “ should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the Defendant. It only imposes a time limit on the plaintiff. Take the statute here in question. It is section 2 of the Limitation Act, 1954. It says that in case of actions for damages for personal injuries for negligence, nuisance or breach of duty “the action shall not be brought” after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the plaintiff must issue his writ within three from the date of the accident. But there is nothing in the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute... in my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the defendant has no right to have it remain defective. The court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the court. It is a matter of practice and procedure.”

15 The above decision in my view sufficiently responds to the opposition raised by the plaintiff. The defendant by her proposed counter –claim alleges that the plaintiff owes her rental from the year 2007. That alleged rental relates to the property which the plaintiff has pleaded belongs to it. To allow the defendant to file the proposed counter- claim will in my view ensure that the parties are not involved in multiple suits. This will be in keeping with the overriding objective of the Civil Procedure Act Cap 21. That overriding objective as stated in Section 1A (1) of Cap 21 is:

“...to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

16 The application has merit and I grant the following orders:

(a) The defendant shall file and serve the amended defence and Counter Claim, as per the annexure to the Notice of Motion dated 18th March 2015, within 14 days of today's date.

(b) The plaintiff shall file a reply to defence and defence Counter Claim within 14 days of service.

(c) The plaintiff is awarded costs of the Notice of Motion dated 18th March 2015.

Dated and delivered at Mombasa this 30th day of July 2015.

MARY KASANGO

JUDGE

30.7.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

Court

The Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE