



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 32 OF 2020

PRISCILLA KAGWIRIA MUGAMBI

RUTH KIENDI MUGAMBIPLAINTIFFS/RESPONDENTS

VERSUS

DORIS KACHE KAINGI.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 16th June 2021 by the Defendant/Applicant seeking the following orders:

- a) *That the court be pleased to grant leave to the Defendant to amend the statement of defence dated 21st September 2020 as per the draft amended defence and counter-claim dated 16th June 2021 to the Supporting Affidavit and marked "DKK-1"*
- b) *That costs of the application be provided for.*

Counsel agreed to canvas the application vide written submissions as the application was opposed by the Plaintiff /Respondent.

The application was supported by the annexed affidavit of Doris Kache Kaingu who deponed that the Plaintiffs leased the suit premises vide a lease agreement dated 20th December 2017 at a monthly rent of Kshs. 100,000/ and that since 2018, the Plaintiffs have not paid the agreed monthly rent which has accrued to Kshs. 4,400,000 which issue was not brought out in the defence dated 21st September 2021.

Counsel relied on Order 8 rule 5 of the Civil Procedure Rules 2010 which in part states that;

...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.

To buttress the issue of the courts power of amendment of pleadings, counsel relied on the cases of **Diamond Trust Bank v Tchui Data Limited & 3 Others [2006] eKLR**, **Samera Aziz (Suing as the Administrator of the Estate of Mohamed Bashir Merajdin Ahmed Bux) v Douglas Mwangi Muteru & others [2020] eKLR**

Counsel submitted that the amendment sought does not alter the nature of the claim and will not prejudice the Plaintiff as she will also have an opportunity to respond to the defence and counterclaim.

Counsel relied on the case of **D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority [2017] eKLR** where the court held that a party alleging prejudice to a fair trial must prove it and urged the court to allow the application as prayed.

The Respondent filed a Replying Affidavit whereby she deponed that the lease dated 20th December 2017 was nullified hence replaced by the agreement for sale dated 5th March 2018. Counsel submitted that there was undue delay in filing the application as it is meant to obstruct the proceedings and relied on the case of **KASAM B BANK OF BARODA (KENYA) (2002) eKLR**. Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the application for amendment of defence has merit. This is a matter that has not yet gone for pre trials to set the motion for the hearing of the main suit.

Order 8 Rule 5 (1) of the Civil Procedure Rules gives the court a wide discretion on amendment of pleadings which the court can do suo moto. If an amendment is allowed, the opposing party will also have an opportunity to respond to the amended pleadings. In this case no prejudice will be occasioned by the amendment of the defence as per the draft defence exhibited.

In the case of **Consolidated Bank of Kenya LTD & Another [2016] eKLR** where the Court of Appeal expressed itself thus: -

"As regards the law, the High Court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously, it accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments."

It should be noted that such applications should be made timeously and in good faith as was held in the case of **DAVID JONATHAN CRANTHAM & ANOTHER-VS- NATIONAL SOCIAL SECURITY FUND [2007] eKLR** where it was held that.

"...amendment should be timeously applied for (sic); power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); that as a general rule however late the amendment sought to be made should be allowed if made in good faith provided costs can compensate the other side..."

I find that the application was made without undue delay as this matter has not yet gone for pretrial conference and made in good faith. The application is hereby allowed as prayed. Defendant to file and serve the amended defence and counterclaim within 14 days. Plaintiff granted leave to file a response with 14 days upon service.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 10TH 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 Rulingt has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.