



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI - MILIMANI

ELC SUIT NO. 394 OF 2011

TERESIA NJERI NJUGUNA.....PLAINTIFF

-VERSUS-

VERONICA WANJIKU GITONGA.....1ST DEFENDANT

EMBAKASI RANCHING CO. LIMITED.....2ND DEFENDANT

RULING

Notice of Motion Application dated the 31st May, 2021

seeking leave to amend the Plaintiff's case)

Background

1. The Application for determination before this Court is the Plaintiff's Notice of Motion dated the 5th October, 2021 under certificate of urgency seeking for Orders that:-

- 1) ***The Plaintiff be granted leave to amend the Plaintiff in terms of the Draft Amended Plaintiff annexed to the Application.***
- 2) ***The Amended Plaintiff be deemed as duly filed and served upon the Defendants upon payment of the requisite fees.***
- 3) ***The Defendants be at liberty to amend their defences within seven (7) days upon filing of the Amended Plaintiff.***
- 4) ***That costs of the Application be in the cause.***

2. The Application is supported by the Affidavit of Teresia Njeri Njuguna, deponed on the 5th October, 2021 and premised on the grounds, inter alia;

- a) ***That the Plaintiff filed this suit with the facts and issues prevailing at the time of filing the suit.***
- b) ***That the Plaintiff suit was partly heard but the 1st Defendant applied for leave to amend the Defence and raised new issues in the said Amended Defence.***
- c) ***That the 2nd Defendant was equally granted leave to file a statement of Defence out of time and has filed on record two separate statements of Defence.***
- d) ***That the 2nd Defendant has introduced a title to the subject property which was not in existence at the time of filing the suit and/or at the time of the hearing of the Plaintiff's case.***
- e) ***That in view of the new developments, it is necessary to amend the Plaintiff to capture the new issues which have been introduced to enable the court determine all the issues between the parties at once.***
- f) ***The Plaintiff's Application has merits.***

3. The 2nd Defendant never filed any reply in opposition to the Application despite having been served with the application.

1ST DEFENDANT'S REPLYING AFFIDAVIT

4. The 1st Defendant opposed the aforesaid Application by way of a Replying Affidavit sworn on the 25th October, 2021 by **Veronica Wanjiku Gitonga**.

5. The 1st Defendant contends that the Plaintiff instituted this suit sometime back in 2011 claiming ownership of Plot No. N83 Ruai. That on her part, she filed her Statement of Defence denying the allegations in the Plaint and confirmed that her Plot on the ground is Plot No. 1157 on which she has even developed permanent structures. That she subsequently sought leave to amend her Defence, which leave was granted. The 2nd Defendant was equally granted leave to file its Defence in the year 2019. The Plaintiff then filed an amended reply to defence thereby responding to the new issues that may have been raised in the Amended Statement of Defence.

6. Subsequently, the case proceeded to hearing with the Plaintiff testifying and closing her case. It is the 1st Defendant's case that it is therefore too late for the Plaintiff to seek to amend her Plaint at this point in time. The 1st Defendant avers that the Plaintiff is introducing a new claim and cause of action thereby reopening her case yet she has not sought an order to that effect.

7. The 1st Defendant argues that litigation has to come to an end and a party should not be allowed to keep on introducing new claims in the middle of the hearing. In conclusion she avers that she stands to suffer prejudice if the application is allowed.

Court's Directions

8. The Court directed that the parties canvass the Application by way of written submissions. The parties complied and filed their respective submissions.

ISSUES FOR DETERMINATION

10. In this Court's opinion, the only issue for determination is; -

A. Whether the Applicant's Notice of Motion for amendment is merited.

WHETHER THE APPLICANT'S NOTICE OF MOTION FOR AMENDMENT IS MERITED

11. The law as regards the grant of leave to amend is well settled. The general rule on this subject is that 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 party can be compensated by costs.

12. A wider footage on the issue was given in the case of **Ochieng and 2 others v First National Bank of Chicago (1995) eKLR**, where the court of Appeal clearly set out the principles upon which Courts may grant leave to amend pleadings. The same is 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; and

e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

13. The above mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. What that means is that the court has a very wide berth in granting leave to amend. This position was stated in the case of **St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** cited by the Plaintiff/ Applicant in her submissions.

14. A perusal of the Draft Amended Plaint indicates that the proposed amendments are that;

'10(a) The Plaintiff states that while the suit was pending, the 1st Defendant together with the 2nd Defendant, processed and procured a title to the dispute property and the 2nd Defendant got the same transferred to the 1st Defendant.

10(b) The sole purpose of the Defendants was to defeat the proceedings before this Court and in total contravention of the doctrine of lis pendens.

10(c) The Plaintiff states that the said Lease and the Certificate of Lease issued due to the aforesaid illegal acts ought to be cancelled and/or be ordered to be transferred to the Plaintiff.'

15. It is evident from the Court record that the 1st Defendant amended her statement of Defence after the Plaintiff had closed her case. The Application to amend her defence was made orally in Court. The 2nd Defendant on the other hand filed its Defence and a List of Documents after the Plaintiff had closed her case.

16. The 1st Defendant/Respondent contends that this application has departed from the original pleadings and introduced a new claim in the middle of the hearing. That she stands to suffer prejudice.

17. On the other hand, the Applicant contends that the amendment should be allowed for the purposes of determining the real questions in controversy between the parties in this case. The application does not introduce any new claim as the amendment has been informed by the developments that have occurred while the suit was pending. That no prejudice will be suffered by the Defendants. It is actually the Plaintiff who would be occasioned substantial injustice if the amendment is not allowed.

18. It is clear from the principles discussed above that an amendment of pleadings in general may be allowed before the final judgement is delivered. The instant case is still at its hearing stage. Although, the Plaintiff has closed her case, the defence hearing is yet to commence.

19. Even if the Defendants had closed their respective cases, which they haven't, the provisions of **Order 18, rule 10 of the Civil Procedure Rules** provides that:

'The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.'

20. Further **Section 146 (4) of the Law of Evidence Act** provides that:

"The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross –examination and re – examination respectively."

21. Therefore, based on the above legal provisions, it is evident that no prejudice will be suffered by the 1st Defendant. She has an opportunity to recall the Plaintiff for cross-examination if need be

22. This court has the responsibility to ensure that litigants are given ample opportunity to ventilate and make their presentations in respect of all the issues arising in their case.

23. I do not see how the 1st Defendant/Respondent will be prejudiced by allowing the Plaintiff leave to amend her Plaintiff. The 1st Defendant will have a chance to even further amend her own pleadings if necessary. For the purpose of determining the real questions in controversy between the parties herein, this court will allow the Plaintiff's Application to amend the Plaintiff.

24. Accordingly, this court makes the following orders: -

a) ***The Plaintiff is granted leave to amend her plaintiff.***

b) ***The amended plaintiff to be filed and served within 7 days from the date of this ruling.***

c) ***The Defendants are granted corresponding leave to amend file and serve an amended defence within 14 days from the date of service of the amended plaintiff.***

d) ***The costs of the application shall abide the outcome of the main suit.***

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

None appearance by parties

Court Assistant: Hilda

M.D. MWANGI

JUDGE