



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 440 OF 2016

FAIRVIEW ESTATE LIMITED.....PLAINTIFF

VERSUS

ANNE WANGARI KIRIMA.....1ST DEFENDANT

TERESIA WAIRIMU.....2ND DEFENDANT

(Both sued as the administratrix

of the estate of the Late Gerishon

Kamau Kirima)

MARIA NJERI.....3RD DEFENDANT

RULING

The application before the court is a Notice of Motion dated 29th June 2020 brought by the plaintiff and seeking the following orders;

1. That the plaintiff be granted leave to amend its plaint dated 28th April 2016 in terms of the draft amended plaint annexed to the application.
2. That the draft amended plaint annexed to the application be deemed duly filed upon payment of the requisite court fees.
3. That the defendants be at liberty to file and serve amended defence within 7 days from the date of granting leave and the plaintiff be at liberty to serve a reply to defence within 7 days from the date of service of the amended defence.
4. That the costs of the application be in the cause.

The application is premised on grounds set out on the face thereof and on the supporting affidavit of Leonard Oliver Kibinge sworn on 29th June 2020. In summary the plaintiff has contended that the main issue in dispute between the parties in this suit is the existence of an access road from the plaintiff's property to the main Kiambu Road through a parcel of land known as L.R No. 12685. The plaintiff has averred that there exists an easement registered at the Land Office as No. 143 of A1909 that allows and recognises the existence of the said access road from the plaintiff's property to Kiambu Road. The Plaintiff has averred that it wishes to amend the plaint to include and reflect the said registered easement and the right of way created. The plaintiff has averred that the proposed amendment will clarify and bring forth to court all material facts on the dispute between the parties. The plaintiff has averred further that the proposed amendment will not occasion any prejudice to the defendants.

The application is opposed by the 1st defendant through a replying affidavit sworn on 26th January 2021 by Anne Kirima. The 1st defendant has contended that the plaintiff's application is prejudicial to the 1st defendant in that it will occasion further delay in the hearing of the suit. The 1st defendant has contended further that the plaintiff is guilty of indolence and that the application has been brought after inordinate delay. The 1st defendant has termed the application frivolous, vexatious and an abuse of the court process.

The application was argued by way of written submissions. The plaintiff filed its submissions on 9th April 2021 while the 1st defendant filed her submissions on 11th May 2021. The plaintiff submitted that since the filing of the suit it had come across crucial facts and documents which it should be allowed to introduce in court to aid in resolving the dispute between the parties. The plaintiff has reiterated that the

proposed amendment will not occasion any prejudice to the defendants. In her submissions dated 11th May 2021, the 1st defendant contended that the amendment sought by the plaintiff does not embody a valid claim and that the plaintiff's application has been brought after inordinate delay. The 1st defendant reiterated that the proposed amendment would cause prejudice to her.

I have considered the application together with the affidavit filed in support thereof. I have also considered the 1st defendant's replying affidavit in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The principles upon which this court exercises its discretion on applications for amendment of pleadings are now well settled. In Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition that was cited in the case of Joseph Ochieng & 2 Others v First National Bank of Chicago, Civil Appeal No. 149 of 1991, the authors stated as follows:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided the costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

What I gather from the foregoing is that, applications for leave to amend pleadings should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs. See also, Central Kenya Ltd. v Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998. The law on amendments is that, parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid multiplicity of suits, provided, no inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.

From the foregoing, what is expected of an applicant for leave to amend a pleading is to satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties. The onus then shifts to the party opposing such amendment to show that the amendment sought would result in prejudice to him which cannot be compensated in costs and/or that the amendment sought would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him.

I have perused the affidavit in support of the plaintiff's application together with the draft amended plaint annexed thereto. I am satisfied that the amendment sought would enable this court to effectually and completely adjudicate upon and settle all questions in controversy in this suit. I am not persuaded that the proposed amendment will prejudice the defendants or that the same would cause them any injustice. I am also not satisfied that the application was brought after unreasonable delay. The other issues raised by the 1st defendant in my view go to the merit of the plaintiff's claim which cannot be determined in the present application.

For the foregoing reasons, I find merit in the plaintiff's Notice of Motion application dated 29th June 2020. The application is allowed on the following terms;

1. The plaintiff is granted leave to amend its plaint dated 28th April 2016 in terms of the draft amended plaint annexed to the affidavit in support of the application.
2. The amended plaint shall be filed within 7 days from the date hereof.
3. The defendants shall be at liberty to amend their respective defences within 14 days of service of the amended plaint.
4. The plaintiff shall be at liberty to file a reply to amended defence if any within 7 days of service of the same.
5. The costs of the application shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 17TH DAY OF MARCH 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Warui for the Plaintiff

Mr. Munge for the 1st Defendant

Ms. Wanjiru h/b for Mr. Mwenesi for the 2nd Defendant

N/A for the 3rd Defendant

Ms. C. Nyokabi-Court Assistant