



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C. NO. 370 OF 2013

HOPEWELL ENTERPRISE LTD PLAINTIFF

VERSUS

KENYA PORCELAIN FACTORY LTD DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated 15th November, 2013. It is taken out by **Hopewell Enterprise Limited**, the plaintiff, under **Order 8 Rule 3 and Order 51 Rule 1** of the **Civil Procedure Rules (2010)**. The application seeks the following orders *inter alia*:
 - (a) **That the Plaintiff be granted leave to amend the plaint dated 13th May, 2013 in accordance with the draft amended plaint annexed to the affidavit in support of this application.**
 - (b) **That provision be made for the costs of this application.**
2. The application is supported by the affidavit of **David Mwaniki Kinuthia**, a director of the plaintiff and is based on the grounds stated on the face thereof.
3. It is deposed that the Plaintiff instituted the suit by way of plaint against the defendant herein on 20th July, 2010. He relies on the advice of his advocate to aver that the plaint, as drawn, does not contain all the prayers pursuant to which he seeks corresponding orders against the defendant. That the subject matter are twenty two portions of land which are resultant plots following a subdivision of the suit land, Naivasha Municipality Block 2/620. That the plaint does not specifically identify the twenty two portions of land and hence the instant application for leave to amend the plaint.
4. The application is opposed vide the Defendant's Replying Affidavit dated 16th December, 2013. It is sworn by **Geoffrey Muhoro Mwangi**, who describes himself as the Managing Director, shareholder and a member of the defendant company.
5. **Mr. Muhuro**, contends that despite any amendment to the plaint, it shall not give life to the suit; that the description of the subject matter in the plaint and the proposed amended plaint are vague. Further he avers that that the suit is speculative and imaginative as no certificate of incorporation of the plaintiff or copies of the resultant sub-divisions are annexed to the application. He finally depones that the prayers sought in the proposed amended plaint are vague and superfluous. He urged that the application be dismissed with costs.
6. The matter was argued before me on 14th January, 2014 by the learned counsel **Mr. Okeke** for the Plaintiff/ Applicant and **Mr. P.K Njoro** for the Defendant/respondent.
7. At the hearing of this matter, **Mr. Okeke**, objected to the Replying Affidavit filed on 18th

December, 2013. He submitted that by **Order 51 Rule 14** of the **Civil Procedure Rules**, a Respondent who wishes to oppose any application should file and serve the response not less than three clear days before the date of hearing. He relied on the decision in **Titus Gatitu Njau V Municipal Council of Eldoret** (2007)eKLR where the Court ordered an application to proceed *ex parte* since enough time had been granted to the respondent to file a response. It was his submission that the application was filed on 15th November 2013. There is no justification for the delay in replying to it. He urged the court to rule that the application proceed *ex parte*.

8. **Mr. Okeke** submitted that the plaint does not contain the entirety of the Plaintiff's claim against the Defendant. It is a general precedent in law that all claims should be included in one suit rather than filing multiple suits. Counsel submitted that orders sought relate to specific plots excised from the main title. The amendment therefore seeks to clarify and make it easier for the parties to litigate. Further counsel relied on the case of **Eastern Bakery V Castelino** (1958) E.A in urging the court to follow the main principle of freely allowing amendments to pleadings unless it causes injustice to the other side. It was his submission that the respondent in its Replying Affidavit has not brought to the attention of the court any prejudice that would be occasioned upon them. He submitted that no new cause of action is being introduced by the proposed amendment nor does it alter the subject matter.
9. **Mr. Njoroge** in reply sought to rely on **Order 50 Rule 4** of the **Civil Procedure Rules** to submit that the period between twenty first day of December in any year and the thirteenth day of January in the year, next following, both days included, shall be omitted from any computation of time for doing any act. The Replying Affidavit was not filed outside the legal requirement of seven days. He further submits counsel for the applicant did not apply for more time to file a supplementary affidavit.

10. **Mr. Njoroge** further submitted that the proposed amended plaint does not contain the memorandum and Articles of Association or any evidence to show that the company exists. Moreover there was no resolution by the company authorizing the commencement of the suit as against the Respondent. He submitted that the plaintiff was speculative and it is not prudent to allow the application while the same is an abuse of the court process.

11. He further submitted that third parties who are alleged to have titles to the resultant plots are not parties to the suit. Neither is "Walkabout Limited and Lands Office" who are mentioned in the plaint but are not enjoined to the suit. This according to counsel shall lead to either subsequent amendments of the pleadings or render the final judgment of the court in vain. It was his submission that the orders sought cannot be issued against a person who is not party to the suit. The suit should be withdrawn and the plaintiff files a fresh suit which includes all the parties. **Mr. Njoroge** urged the court to strike out the application with costs.

12. In a brief rejoinder, **Mr. Okeke** submitted that **Mr. Njoroge** does not have audience of the court and his submissions should be expunged from court record.

13. In Further response, counsel submitted that to attack a plaint, a party needs to file a defence. He further argued that the documents to be annexed are required during trial and it is not mandatory that such documents be annexed at the time of filing the suit. Lastly counsel submitted that the third parties mentioned can be enjoined at any time if it shall be deemed necessary.

14. I have read and carefully considered the pleadings and submissions by the parties to this application. There are two main issues to be decided namely; whether the Replying Affidavit should be expunged from the court records and whether the plaintiff should be allowed to amend the plaint.

15. The rule on filing an affidavit requires a respondent who has been served with an application to file a replying affidavit or grounds of opposition and serve them not less than three days before the hearing date. In the instant application, it cannot be denied that the replying affidavit was served on the very day the application came up for hearing on 14th January, 2014. It is obvious that the Defendant ought to have served the replying affidavit on the applicant not less than three

clear days before 14th January 2014 as required by **Rule 14 (2)** of the **Order 51**. The argument by the Respondent on computation of days in respect to **Order 50 Rule 4** of the **Civil Procedure Rules** does not hold in the instant case. This because the application was filed on 15th November, 2013 which is a month to the exempted dates of computation of doing any act. Thus the respondent had about one month to respond to the application. However this delay in filing the replying affidavit is distinguishable from **Titus Gitau case** (supra) where the application had not attracted a response despite lapse of two years.

16. It is desirable in my view that the court has before it all the relevant facts and that every litigant is accorded opportunity to place before the court the version of his case. Despite this lapse, the applicant proceeded to argue his application. He did not seek an adjournment in order to file a supplementary affidavit. It is my considered view that the late service did not prejudice the applicant. It is therefore in the interest of justice that the replying affidavit be considered for purposes of hearing the matter inter parties and the determination of the issue before the court.

17. The courts have over time in various cases, allowed amendments of pleadings in almost all instances except where such an amendment would result to an injustice or prejudice to the other party which cannot properly be compensated for in costs (See **Beoco Ltd V Alfa Laval Co. Ltd** (1994) 4 All ER. 464). The power to order amendment of pleadings is discretionary power. Albeit wide, it is exercised upon defined legal principles. I wish to be guided by the decision in **AAT Holdings Limited V Diamond Shields International Limited** NBI HCCC No. 442 of 2013 where the court as follows:

“The general power of the court to amend pleadings draws from Section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 Rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in **Central Kenya Ltd V Trust Bank Ltd & 5 Others Civil Appeal No. 222 of 1998 as shown below:-**

- (i) That are necessary for determining the real question in controversy.**
- ii) To avoid multiplicity of suits provided there has been no undue delay.**
- iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.**
- iv) That no vested interest or accrued legal rights is affected; and**
- v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs**

18. Let me now examine the present circumstances with the above principles in mind. It is pleaded by the Plaintiff that the defendant herein surrendered the original title documents of **Naivasha Municipality Block 2/620** to the lands office to facilitate subdivision of the suit land and subsequent issuance of title to each resultant portion. In my view therefore, it is necessary to allow amendments to enable the court to determine the real questions in contention which relate to only the twenty two resultant plots. Equally, I am satisfied the amendments do not introduce a new cause of action. The amendments seek to specify the affected plots which are within the pleaded

cause of action. Though the plaintiff has not shown at this stage that the twenty two plots are curved from the original suit land, this can be visited upon during the full hearing when evidence is tendered in court for cross examination by the other party. In addition, by allowing the proposed amendments it will avoid multiplicity of suits for each of the resultant portions of the suit land.

19. The final principle is whether the Defendant shall suffer prejudice if the amendment is allowed? Prejudice can be looked at in both the wider sense and also the special sense. In the wider sense the consideration is the general position of the Defendant. There shall be no prejudice as the Defendant has not filed a defence and taken a general position on this matter. It is only then that the court would be able to state the prejudice he is likely to suffer in case of an amendment. The special sense refers to the specific claim that the amendments will defeat an accrued defence. As I have stated above no defence has been filed.

20. The upshot is that the application for amendment dated 15th November, 2013 is allowed. Cost shall be in the course.

Dated and Signed at Nakuru this 4th day of April 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr P K Njoroge for the defendant

Mr Okeke for the plaintiff

CC: Emmanuel Maelo

L N WAITHAKA

JUDGE