REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 446 of 2007

BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

MARTHA KARWIRA ANTHONY.....DEFENDANT

R U L I N G

1. Before me are two applications. The first application is a Notice of Motion dated 21st March, 2011 by the Defendant seeking orders that the Plaint dated 29th August, 2007 and the suit against the Defendant be struck out. The same is supported by the Affidavit of Martha Karwira Anthony sworn on 21st March, 2011. The second application is a Notice of Motion dated 15th February, 2012 and filed on the same day by the Plaintiff seeking leave of the Court to amend its Plaint in terms of the draft annexed to the application. In support of the application is the Affidavit of Paul Ogunde, the Plaintiff's Counsel, sworn on 15th February, 2012.

2. Reason would require that the court does determine the two applications in the order in which they were filed. However, given the nature of the applications, which are contradictory, it would be prudent to deal with the application for leave to amend the Plaint first and then the application for striking out to follow. This is the position taken in the case of **SALESIO M'ARIBU VS. MERU COUNTY COUNCIL CIVIL APPEAL NO. 183 OF 2002** wherein it was stated that:-

"….The procedure where a court is faced with an application for summary dismissal or striking out a pleading or faced with a preliminary objection to a pleading which seeks to dispose of that pleading, which the other party seeking to amend, is to have the application seeking leave to amend heard first and determined before hearing the application for summary dismissal or for striking out or an objection seeking disposal of the pleading. In that way, the court will ensure that all aspects of the matter are before it, before the application for summary dismissal or striking out or the objection seeking to dispose of the pleading is heard and determined."

3. In view thereof, I propose first to consider the Notice of Motion by the Plaintiff dated 15th February, 2012. In that motion, the Plaintiff seeks leave to amend the Plaint based on the grounds that the circumstances of the suit have radically changed after the Plaintiff failed to get interlocutory injunctions as sought when the suit was instituted. Through the affidavit in support of the application by Paul Ogunde sworn on 15th February 2012, the Plaintiff contends that the central question in the suit shall however remain, whether the Plaintiff was at all material times entitled to possession of the suit premises. According to the Plaintiff, the real issue in controversy can only be determined if the application herein is granted. It is further contended that the application will not prejudice the Defendant.

4. In its submissions, the Plaintiff contended that striking out a pleading or suit is a drastic and harsh step

that should only be available if the defect in the suit cannot be cured by way of an amendment. The Plaintiff further submitted that the claim herein is neither unconnected nor incongruent with the claim as filed and contends that it was unlawfully forced to cede possession by the Defendant thereby suffering loss and damage. The Plaintiff concedes that although it did not obtain an injunction with regard to the suit property, the Defendant did not however obtain orders for vacant possession and therefore resulted to coercive extrajudicial measures to gain possession. It was the Plaintiff's counsel's contention that the matter on possession has not been overtaken by events as alleged. Even though, a new course of action appears to be introduced by the amendment, the Plaintiff submits that, such a fact in itself cannot stop the court from allowing it as along as the other party is not prejudiced. The Plaintiff cited the case of **Kuloba –vs- Oduol (2001)1EA 101** in support of its argument. However, I do note that this decision was overturned by the court of appeal, hence the Plaintiff cannot rely on it in support of its assertions. The Plaintiff also contended that the Defendant has not demonstrated how it will be prejudiced if the Defendant's claim is amended as per the amended plaint. It was further contended that the issue on how possession of the suit property was obtained by the Defendant in addition to whether it entitles the Plaintiff to the reliefs alluded to in the draft amended Plaint have not been tested or determined by any court. Such a determination, according to the Plaintiff, can only be made if the application for amendment is allowed.

5. In opposition to the said application, the Defendant filed grounds of opposition dated 1st March, 2012 and a Replying Affidavit by Martha Karwira Anthony sworn on the same date. The Plaintiff stated that the application is incurably defective and should be struck out as the Plaintiff's Counsel is incompetent to swear an Affidavit on behalf of the Plaintiff in a contested matter such as the present suit. She further contended that the application is an abuse of the court process as there has never been any contractual relationship between the Plaintiff and the Defendant in respect of the suit premises or any other matter whatsoever, hence the proposed amendments are untenable and the same do not establish any cause of action against the Defendant.

6. Further, it was contended on behalf of the Plaintiff that at all material time when the suit was filed, the suit premises known as LR. No. 17589 Ongata Rongai was the subject matter of **HCCC No. 2043 of 2007 (formerly HCCC No. 1114 of 2006) COL. (RTD) HENRY MUTHEE KATHURIMA –vs- MARTHA KWARWIRA ANTHONY.**The matter involved a Sale Agreement dated 13th October 2006, between the registered proprietor of the suit premises and the Plaintiff for a price of Kshs. 3,000,000/- The suit was duly resolved and an Order made by this Court that the suit premises be transferred to and registered in the name of the Defendant. It was contended by the Defendant that the Plaintiff was not party to that Court Order. That when the said suit was filed, the Plaintiff was in possession of the suit premises by virtue of a Lease Agreement between the Registered owner of the suit premises and the Plaintiff, but subsequently vacated the same on 4th December, 2010 after losing a number of legal battles in this suit including an application for injunction against the Defendant.

7. The Defendant further contended that the proposed amendments seek to introduce a new cause of action which was not in existence at the time the suit was filed and that such a move amounts to introducing a fresh suit altogether. Moreover, it was stated that the proposed amendments do not demonstrate any cause of action against the Defendant. That there being no agreement between the Plaintiff and the Defendant in respect of the suit premises, the Plaintiff does not have an interest whatsoever in the suit premises to warrant the proposed amendments. The Plaintiff also contended in her affidavit that the amendments sought are an afterthought, as the application seeking those amendments was filed to defeat the hearing of her application dated 21st March, 2011 which prays for striking out of the entire suit. According to the Defendant the Plaintiff's entire suit and its Application have been overtaken by events and the same is therefore unmerited.

8. In its submissions, the Defendant contented that the application was incurably defective as the Plaintiff's Counsel is incompetent to swear an Affidavit on behalf of the Plaintiff in a contested matter. That an Advocate should not be allowed to depose on behalf of his client, on contentious matters, that this is contrary to Order 19 rule 3 of the Civil Procedure Rules. The Defendant relied on the cases of **EAST AFRICAN FOUNDARY WORKS (K) LTD –vs- KENYA COMMERCIAL BANK LTD (2002) 1 KLR 443** and **VIRGINIA WANGUI NGUU –Vs- STEPHEN KAHUKI KAMAU & ANOTHER**

(2004) eKLR in support of its submissions. The Defendant therefore urged the court to adopt the line of reasoning in the aforementioned decisions and strike out the Affidavit in support of the Application sworn by Paul Ongude and as a consequence, the entire application with costs to the Defendant. The Defendant also submitted that the application will be prejudicial to her considering the fact that the court had already ruled in her favour in a number of rulings arising from this suit and the fact that there exists no contractual relationship or obligations between herself and the Plaintiff.

9. After careful consideration of the Affidavits on record, submissions of Counsel and the authorities relied on, I propose to first determine the issue of the Affidavit sworn by Paul Ogunde on 15th February 2012 in support of the Application. The Defendant urged this court to strike out the same as it was incompetent and incurably defective given that it was sworn by an Advocate on behalf of his client in a contested matter. This, according to the Defendant, is contrary to Order 19 rule 3 of the Civil Procedure Act, 2010. I agree with this line of argument in principle and in law. I even take cognizance of the cases supplied by the Defendant in support of such a position. A closer scrutiny of the said supporting affidavit would reveal that whilst the Advocate is not deposing on statements of facts that the advocate had no personal knowledge of, the Affidavit contains averments as to the annexure of the proposed Amended Plaint. The Advocate states that the amendment would take care of the changed circumstances ever since the suit was filed. What are the changed circumstances? These are contained in the proposed amended Plaint itself. It is alleged that the Defendant, without having an order for vacant possession, had resorted to acts of intimidation including depositing building materials and discharge of sewerage effluent. Of course, the Defendants position is that the Plaintiff abandoned the suit property on its own volition. This being a contested issue, I think Mr. Ogunde could not have sworn an Affidavit to support the same. I say so notwithstanding the fact that the Defendant would have an opportunity of filing a Defence in answer thereto. Its importance at this stage is that the circumstances surrounding the Plaintiff's removal or abandonment of the suit premises constituted **"the changed circumstances"** that form the basis of the application to amend the statement of claim. Being of that opinion, I strike out Mr. Ogunde's Supporting Affidavit as being bad in law. Once a matter becomes contentious, an Advocate has no business stepping into the shoes of his client and swear any Affidavit. He can only do so on those matters that are merely procedural. This one is not.

10. With regard to the merit of the application, I must say that the law on amendment is well settled. The general rule is that amendments to pleadings sought before the hearing of a suit ought to be freely allowed if they can be made without injustice to the other party. If prejudice is alleged, the same must be that which is incapable of being compensated by way of costs. In the celebrated case of **Eastern Bakery -vs- Castelino (1958) EA 461,** the Eastern Court of Appeal held at page 462 that:-

"The court will not refuse to allow an amendment simply because it introduces a new case….. The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character …….. or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ……." (Emphasis supplied)

In the case before me, the Defendant opposes the application on the major ground that the amendments sought by the Plaintiff seek to introduce a new cause. The Plaintiff's position was that a new cause of action in itself cannot stop the court from allowing it as long as the other party is not prejudiced. the case of **TRIPLE EIGHT CONSTRUCTION COMPANY (KENYA) LIMITED (SUPRA)** Odunga J stated that:-

" On the issue that the intended amendments will introduce a new cause of action, it is clear both from a reading of Order 8 rule 3(5) of the Civil Procedure Rules and on authorities that the mere fact that the amendment is likely to introduce or substitute a new cause of action is no ground to deny a party leave to amend as long as the new cause of action was in existence at the time the original plaint was filed and it arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment." (Emphasis mine)

11. The question that then follows is whether the Plaintiff has met the parameters set out above. I have read the proposed amendments. The gist of it is that there was a previous case, namely **HCCC No. 2043 of 2007 (formerly HCCC No. 1114 of 2006) COL. (RTD) HENRY MUTHEE KATHURIMA –vs- MARTHA KWARWIRA ANTHONY** involving the suit property. The Defendant and the then registered owner of the suit property, one Col. (Rtd) Henry Muthee Kathurima, entered into a sale agreement which gave rise to a dispute that resulted in the aforementioned suit. While the suit was still pending, the Plaintiff and Mr. Kathurima entered into a Lease Agreement for a term of six years. The Defendant was not a party to the said lease. There was a Consent Order recorded between the Defendant and Mr. Kathurima in that suit which contained, inter alia, an order for specific performance of the Sale Agreement between them in respect of the suit property. No orders were made as to vacant possession. The suit premises was thus transferred to the Defendant as the registered proprietor. The Plaintiff had in the meantime, through its lease agreement with the former registered proprietor, constructed a mobile bank. Accordingly, the Plaintiff contends that even before the Defendant obtained orders for vacant possession, it forcibly evicted the plaintiff through alleged acts of intimidation. The Plaintiff contends that this constituted trespass and unlawful eviction. From the foregoing, it is clear that even though there maybe a new cause of action, the same seems to arise from substantially the same facts as those that existed when the claim was instituted by the Plaintiff before the amendment was sought. The proposed amendments cannot be said to be substantially different from the claim initially instituted by the Plaintiff. Thus, and if at all there will be a new cause of action, the same is permissible given the circumstances of this particular case.

12. Be that as it may, the Defendant submitted that she will be prejudiced if the court exercises its discretion and allows the amendments sought as the Plaintiff had already lost a string of battles in this suit including an application for injunctive orders, a stay of proceedings and even an appeal. However, I am of the opinion that those rulings are not binding on this court at this stage and will not adequately aid this Court in terms of deciding whether or not to allow the sought amendments. Further, I am of the view that most of the reasons advanced by the Defendant on the proposed amendments, including the issue as to whether or not a contractual relationship exists, the issue of possession and eviction of Defendant from the suit premises by the Plaintiff, is one which can and in a roper case should be ventilated at the trial for the simple reason that the Defendant will have the chance to respond to the issues raised in the Amended Plaint. In the court's view, a party should be allowed to present before the court all the materials relevant to its case, so that the court is in a position to effectively determine all the issues in dispute between the parties in order to do justice.

13. However, what concerns this court most is the timing of the application. The Defendant has complained that the present application is an afterthought and is meant to defeat her application dated 21st March 2011 which is aimed at striking out the Plaintiff's suit. It is trite law that an amendment will not be allowed to defeat a defence that has accrued to a party. At the same time however, an amendment will be allowed if it will save a pleading from being struck out. **See JOSEPH OCHIENG & OTHERS –Vs- FIRST NATIONAL BANK OF CHICAGO eKLR**. My view is, as at 1st March, 2011, any claim the plaintiff had in relation to the suit property was extinguished vide Hon. Ang'awa J's ruling of that date. The present application was not filed immediately after the alleged wrongful eviction of the Plaintiff in September, 2010. The failure or delay to make the application immediately after the said September, 2010 was never explained by the Plaintiff. I will echo the words of Hon. H.P. Waweru J in **HARRISON C. KAMAU –VS- BLUE SHILED INSURANCE CO. LTD 2006 eKLR** where he stated:-

"The amendments of pleadings .....(is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided:-

(i) There (has) been no undue delay,

(ii) No new inconsistent cause of action (is) introduced,

(iii) No vested interest or accrued legal right (is) affected,

and

(iv) The amendment (can) be allowed without injustice to the other side.....” (Emphasis supplied)

The alleged eviction took place in September, 2010. Hon. Ang’awa J delivered her decision on 1st March, 2011 granting the Defendant certain rights over the suit property. The application for amendment was not made until 15th February, 2012. To my mind, there was undue delay in making the application. Further, it is my view that the Defendant’s vested right as against the former registered proprietor, on the strength of whom the Plaintiff had lodged this suit, will be affected. Accordingly, the Plaintiff’s application is for dismissal as I hereby do.

14. I now turn to the Defendant’s application dated 21st March, 2011 that seeks the striking out of the Plaintiff’s suit. The main ground is that the suit was based on a lease between the Plaintiff and one Henry Muthee Kathurima which by virtue of the ruling of Hon. Ang’awa J of 1st March, 2011, was no more. The Defendant contended that as at the time the suit was filed, the Defendant was not the registered proprietor of the suit property, that Hon. Okwengu J had in her ruling of 29th February, 2008 doubted the legality of the lease agreement between the Plaintiff and the then registered proprietor for want of registration, that since the Defendant was not privy to the Lease Agreement under which the Plaintiff had brought the suit, the Plaintiff cannot possibly have any cause of action against the Defendant.

15. On the part of the Plaintiff it was argued that the orders being sought were drastic and draconian in nature, that an amendment could cure any deficit in the Plaintiff’s suit, that the Plaintiff was still interested in pursuing the suit and that justice demanded that the issues in dispute be ventilated and resolved at the trial. Counsel for the Plaintiff urged that I should dismiss the application.

16. The principles applicable to an application for striking out a pleading are well settled. In the celebrated case of **MUCHINA –Vs- D.T. DOBIE (K) LTD (1982) KLR** 1 at page 9 the Court of Appeal held:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of the case before it.”*(Emphasis mine.)*

17. From the foregoing, it is clear that a court **MUST** be very careful not to determine litigants’ disputes before trial. The power to summarily terminate a pleading is one to be exercised sparingly, only in very clear and hopeless cases. This is so because legal disputes are for settlement after full evidence has been presented and tested through cross examination and not otherwise. Be that as it may, howsoever draconian that power is, it is to be exercised in deserving cases so as to free the Courts from hopeless cases.

18. In the case before me, the suit was filed on the basis of a Lease Agreement between the Plaintiff and the registered owner of the suit property, one Henry Muthee Kathurima. That Lease Agreement was for a period of 6 years. The same was entered after the said Kathurima and the Defendant had entered into a Sale Agreement. When a dispute arose between the latter two, the said Henry Muthee Kathurima filed HCCC No.1114/06 later ELC HC No.2043 of 2007 against the Defendant. However, by a ruling delivered by Hon. Ang’awa J of 1st March, 2011, the Court directed the said Henry Muthee Kathurima to specifically perform the said Agreement and transfer the suit property to the Defendant. With that, in my view, any interest or right the Plaintiff may have had with the suit property evaporated. Indeed, the court found as a matter of fact that if the Plaintiff was still interested in the suit property, it should wait until the Defendant had been registered as the proprietor before entering into a Lease Agreement in respect thereof.

19. It would seem, however, that the Plaintiff would not wait for that. In September, 2010, it vacated the suit premises. On vacating the suit premises as aforesaid, the Plaintiff never sought to plead afresh its case against the Defendant. It waited until the Defendant had filed the current application before it sought to amend its original Plaint and claim trespass and damages. I have already dismissed that application for reasons already given. As the case stands, the original injunction application was dismissed by Hon. Okwengu J in or about 2008. The claim in the original plaint was for a permanent injunction and a declaration to recognize the lease agreement between the Plaintiff and the said Henry Muthee Kathurima. Those prayers in my view have no basis in view of Hon. Ang'awa J's orders of 1st March, 2011. In any event, that Lease Agreement of 28th December, 2006 may have by now expired. Surely, there cannot be any claim, that is sustainable in the circumstances. It remains frivolous and an abuse of the Court process.

20. Accordingly, the upshot of it is that the application dated 21st March, 2011 is hereby allowed. The Plaintiff's suit is hereby struck out with costs of both the applications and the suit to the Defendant.

DATED and DELIVERED at Nairobi this 22nd day of February, 2013.

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A. MABEYA

JUDGE