



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 440 of 2010

CATHOLIC DIOCESE OF HOMA-BAY (REGISTERED TRUSTEES)....PLAINTIFF

VERSUS

CHRISTINE N. OANDA.....DEFENDANT

RULING

The Applicant / Defendant herein has brought this application under Order 8 Rule 3 for Orders that :

- a) The Applicant be granted Leave to amend her Defence and file a Counter Claim against the Plaintiff.
- b) That Kshs. 1,296,589/= held by Nyaencha Waichari & Co. Advocates be deposited in Court.
- c) Costs of this application.

The application was premised on the grounds set on the face of the application and also on the supporting affidavit of *Christine Nyanchama Oanda*. Among the grounds for the application is that for the **Interest of Justice** the Applicant should be granted **Leave** to amend her **Defence** and file a **Counter Claim**. That the amendments sought will assist the Court to adjudicate on all the issues in dispute once and for all and that the Plaintiff will not **suffer any prejudice** if the Defendant is allowed to amend his **Defence** and file a **Counter Claim**. Further, that failure to file a Counter Claim was an oversight on the Counsel for the Defendant and that oversight should not be visited upon an innocent litigant.

The Applicant deponed that it is essential that the amendment sought are granted so that she can amend her **Statement of Defence** and include a **Counter Claim** for specific performances and general damages for **Breach of Contract**. The application was opposed. The applicant through Fr. Michael Odiwa filed a Replying Affidavit and averred that the proposed amendments are entirely different in character with the original plaintiffs cause of action. That furthermore, the amendment is brought in bad faith when the hearing of the Plaintiff **Chamber Summons Application** dated 21/9/2010 has been pending for hearing and determination.

The parties herein filed their written submission. The applicant reiterated that her application is brought in good faith and it is not an afterthought or abuse of the Court process. That the Defendant is not bringing a new cause of action against the Plaintiff and further the sought amendments are meant to assist the court adjudicate the issues in dispute. The Applicant further submitted that the plaintiff has not demonstrated

any prejudice it will suffer if the amendments and Counter Claim are allowed.

The applicant relied on the case of **Lahkmashi Khiji & Sons Ltd Vs Ajay Shantilal Shah & Sandeep Ratalal Shah**, where the Court held that unless there are any special reasons, amendments should be freely allowed. Applicant further contended that the Plaintiff has not demonstrated any special circumstances to deny the Defendant the amendments sought and the Counter Claim. The Plaintiff also quoted Mulla on Civil Procedure 14<sup>th</sup> Edition page 1005, where it is stated:-

*“ Leave to amend when given power to allow amendment should be liberally exercised. Hence a general will, Leave to amend will be granted to enable the real question in issue between the parties to be raised on the pleadings; where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by costs”*

The Applicant further relied on the case of **John K. Kabuchi Vs Sur Motor Co. Ltd Nairobi HCC A No. 390 of 2002**, where it was held... with a view to achieving the ends of Justice hence the power to grant Leave to amend is that all amendments should be freely allowed at any stage of the proceedings provided that amendment will not result in prejudice or injustice to the other party.

In their submissions, the Respondent submitted that the proposed amendments are brought in bad faith and the proposed amendments are an abuse of the courts process and the Plaintiff will suffer prejudice. The Respondent relied on the case of **Harrison C. Kariuki Vs Blue Shield Insurance Co. Ltd** where it was held that , application for amendments be denied on account of the fact that it had been made inordinately late such as to prejudice the Respondent.

This application also premised under Order 8 Rule 3 which provides that:-

*“ The court may at any stage of the proceedings on such terms as to costs or otherwise as many be just and in such manner as it may direct allow any party to amend his pleadings”.*

The above rule gives the Court discretion to allow or not allow any amendment to the pleadings. Having considered the rival submissions and the authorities quoted, I find that the guiding principle in an application to amend pleadings is that, it should be liberally and freely allowed unless prejudice and injustice will be occasioned to the opposite party which cannot be compensated by costs for any expenses and delay. This Court therefore will consider that the main reason for allowing amendments is that it will be in the interest of Justice that the amendment sought be permitted in order that the real question in controversy between the parties be determined.

I will also be guided by the case of **Central Kenya ltd Vs Trust Bank Ltd CC Appeal No. 222/1998 EA Law Report Page 368**, which outlined the reasons for allowing amendments. In the above case it was held that *“ all amendments should be freely allowed at any stage of the proceedings proved that the amendments or jounder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs”*

The Respondents opposed the application and relied on the case of **Harrison C. Kariuki Vs Blue Shield Insurance Co. Ltd**. In the above case, the parties had proceeded for full trial, witnesses had testified and parties were awaiting Judgement and that is when the plaintiff sought Leave to amend the Plaintiff. The Judge disallowed the application on the ground that the applicant would have taken advantage of admission made by the other party in the full hearing.

In the instant case, the suit has not been set down for the full hearing other than the hearing of Interlocutory application. The Respondents have not therefore demonstrated how they will be prejudiced if the application is not allowed.

I find that for the interest of justice and determination of all issues in controversy, I should allow the instant application. Consequently, the Court allows the applicant's application dated 15/7/2011 entirely.

However costs will be to the Respondent.

Dated, signed and delivered this 17<sup>th</sup> day of May, 2013

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

.....For the Plaintiff/Respondent

.....For the 1<sup>st</sup> Defendant

.....For the 2<sup>nd</sup> Defendant

.....Court Clerk

**L.N. GACHERU**

**JUDGE**