



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENT AND LAND COURT DIVISION

ELC CASE NO. 596 OF 2009

FLEUR INVESTMENTS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PERMANENT SECRETARY

MINISTRY OF ROADS.....1ST DEFENDANT/APPLICANT

ATTORNEY GENERAL.....2ND DEFENDANT/APPLICANT

RULING

1. The Plaintiff/Respondent herein Fleur Investment Ltd brought this suit by way of a Re-amended Plaintiff and sought for special damages of kshs.7,533,839,834/25 being the result of loss suffered by the Plaintiff after the demolition of all the developments constructed on the Plaintiffs property LR No. 25533/1 and 25535/2 despite court order issued in Misc Civil Suit No. 885/2004 stopping the said demolition.
2. The Plaintiff's suit was initially filed on 30th October, 2009 and Re-amended through a Notice of Motion dated 26/11/2012. The Defendant file their defence on 5th August, 2010. Thereafter the matter was set for hearing on several occasions, but was adjourned due to various reasons.
3. The matter was finally set for hearing on 21st January, 2013. On the morning of the hearing date, the Applicant/2nd Defendant filed an application dated 18th January, 2013 for Orders that the court do grant the Defendant leave to amend the Defence and introduce a Courter-Claim. Further they sought for leave to enjoin Wilson Gachanja and Adeita Company Ltd as 1st and 2nd Defendants to the Court-Claim. The Applicant (Defendant) sought for adjournment to argue that application. The same was vehemently opposed by the counsel for Plaintiff/Respondent herein.
4. The court declined to allow the adjournment on the ground that the application was not brought in good faith as it was aimed at delaying the matter. However the court directed that the application could be argued on a future date. The matter was set for mention on 15th May, 2013 so that directions could be given on the Notice of Motion filed by the Applicant herein on 21st January, 2013.
5. However, on 15th May, 2013 the Applicants herein through one Mr. Nguyo applied to have the entire Notice of Motion filed on 21st January, 2013 withdrawn. The said application for withdrawal was allowed on 17th May, 2013 with costs to the Plaintiff/Respondent. Parties were directed to take hearing dates in the Registry on priority basis.

I have noted from the court records that dates were taken in the presence of a representative for

Plaintiff's counsel and absence of the Defendant's a representative. However from the Respondent's annexure ATI, the Applicant (Defendants) counsel had been invited for taking of hearing date. The said invitation was received by State Law Office on 17th may, 2013.

Consequently the case was fixed for hearing on 8th & 9th July, 2013.

6. From the court records, the Applicant filed the instant application on 15th May, 2013. The instant application is similar to the application withdrawn on 15th May, 2013. The counsel for the Applicant (Defendants) urged the court to allow them argue the instant application before the main suit could proceed for hearing. The same was opposed by counsel for the Plaintiff/Respondent. However the court did allow the Applicant's/Defendant's application to be determined first before the suit could be set down for hearing.
7. In this application dated 15th may, 2013, the applicants have sought similar prayers to the application withdrawn on 15th May, 2013. These prayers are; -
 - i. **Leave be granted to the 1st and 2nd Defendants to amend the statement of Defence on record and introduce a Counter-claim.**
 - ii. **That leave be granted to the 1st and 2nd Defendants/Applicants to enjoin Wilson Gachanja and Adeita Company Ltd as the 1st and 2nd Defendant to the Counter-Claim.**

The application was supported by the grounds on the face of the application among them that the Counter-claim and joinder of parties is necessary in order to bring out the real issues in question between the parties to enable the court effectively determine the matter. The application was also supported by the affidavit of Gordon Ochieng, a Senior Lands Officer at the Ministry of Lands.

8. The application was opposed by the Plaintiff/Respondent. One Alex Trachtengber, the General Manager of the Plaintiff/Respondent deponed the Replying Affidavit, in opposition to the instant application. He deposed that the instant application is not brought in good faith and it is only meant to delay the hearing of this case.
9. I have now considered the rival arguments and I make the following findings: -

As I stated earlier, the Applicants herein had filed a similar application on 21st January, 2013. On 15th May, 2013 the applicants applied to withdraw the same. The court allowed the withdrawal on 17th may, 2013. Surprisingly, the Applicant filed the same application on 15th may, 2013, the same day the application dated 21st January, 2013 was withdrawn. No reasons for withdrawal were given to court. To say the least, this is an abuse of the court process.

However, is the instant application merited?

10. The application is premised under Order 8 Rule 3 and Rule 5 which states that; -

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

The granting of such order therefore is at the discretion of the court.

Order 8 Rule 5 states as follow: -

“An amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arise 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.”

11. The plaintiff herein has brought a suit claiming special damages. In the Counter-Claim, the Applicant alleges 'Fraud' and 'Misrepresentation' on the part of Plaintiff and the intended parties that are to be enjoined in the suit.

The facts of the new claims do not arise out of the same transactions and the facts are not the same.

The court finds that allowing the said amendment herein will be prejudicial to the Plaintiff as the facts of the two suits; (that is the main suit and Counter-Claim) are not the same. As was held in the case of *Eastern Bakery v Castelino (1958) E.A 46*,

“ Leave to amend will be refused where the character of the suit is changed or where it would be prejudicial to the rights of the parties existing at the date of the proposed amendments.”

Having found that the facts of the two causes of action are not similar, it would be prejudicial to the Plaintiff if this court allows the amendment sought.

12. As I stated earlier, this matter was filed in court in the year 2009. The Applicant only sought to introduce the amendments when the suit was finally fixed for hearing. Why was there such delay?

In the Case of *Mowa Publishers v Attorney General and another, Nairobi High Court and Case No. 886 of 1990 KLR 46* the court held that: -

“An application for leave to amend the pleadings must be made at the earliest opportunity at the right stage of the proceedings.”

The Applicants herein have not given a good explanation as to why there was such delay in bringing up this application for amendment of the Defence.

13. The Applicant has also sought to enjoin **Wilson Gachanja and Adeita Company Limited** as Defendants in this suit. Since court has already found that the application for amendment to include a Counter-Claim is not merited as the facts of the new cause of action are not similar and the same, would be prejudicial to the rights of the plaintiff/Respondent, then the court finds that the prayer for leave to enjoin the new parties is not necessary. The court declines to grant prayer No. 2 of the Notice of Motion dated 15th May, 2013 as the court has found it not merited.

14. In conclusion, the court finds that the Defendants'/Applicants' Notice of Motion dated 15th May, 2013 is an abuse of the Court process. A similar application was withdrawn on the same day that the instant application was filed. This application is only meant to delay the hearing of this matter. Consequently, the Notice of Motion dated 15th May, 2013 is hereby dismissed with costs to the Applicant.

Parties to set down the matter for hearing on priority basis and the same be determined on merit.

It is so ordered.

Date, signed and delivered at Nairobi this 23rd day of **August, 2013.**

L.N GACHERU

NVI.