



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

E L C NO. 166 OF 2013

MICHAEL KIMANI

KARIUKI.....PLAINTIFF/RESPONDENT

VERSUS

THE REGISTERED TRUSTEES OF THE CATHOLIC CHURCH, DIOCESE OF NAKURU & 22 OTHERS.....DEFENDANTS

RULING

By a plaint dated 28th March, 2011 the plaintiff Michael Kimani Kariuki, instituted this suit against the defendants, the Registered Trustees of the Catholic Church Diocese of Nakuru and others, seeking among other orders, a permanent injunction restraining the defendant by themselves, their agents, servants, employees and/or workers from remaining on, entering or re-entering into, carrying on any developments and /or in any way dealing with and/ or interfering with the plaintiff's possession, use and enjoyment of all that parcel of land known as L.R NO Molo Township Block 2/86 (Formerly Uns Residential plot B Molo Township), Damages, interest and costs.

The time within which to amend the pleadings without leave having expired, the applicants have brought the application dated 6th February 2013, seeking leave of the court to amend the plaint.

The application is supported by the affidavit of the applicant and is premised on the grounds that the proposed amendments forms the substratum of the suit, the valuation report proposed is largely on quantification and not on new prayers and is necessary for just determination of the suit herein and the respondents will not suffer any prejudice if the application is allowed as notice for the said amendments had been given in the pleadings.

In reply to the application, the respondents swore an affidavit through Fr. Peter Mucheru of St Mary's Catholic Parish Molo contending that the application is without merit, bad in law, inept, an afterthought, being brought five years after filing the suit and should be dismissed with costs: That it seeks to introduce major amendments that will change the substratum of the suit and the reliefs sought were not in the plaint.

When this application came up for hearing before me, counsels for the respective parties reiterated the contentions by their clients which contentions I have considered and the authorities relied upon. The sole issue for determination is whether or not the applicants have made up a case for granting of the orders sought.

Under Section 100 as read with Order 8(5) of the Civil Procedure Act and Rules respectively (Chapter 21 Laws of Kenya), for the purpose of determining the real question in controversy between the

parties, or of correcting any defect or error in any proceedings, a court may either of its own motion or on the application of any party, order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

In **Mbayo and another V. Sinani (2007) EA 306**, the Court of Appeal of Uganda held:-

“Amendment of pleadings is governed by section 100 of the Civil Procedure Act (Chapter 71). The provisions of this section give the court wide discretion to permit amendments to be made at any time of the proceedings. The purpose for the necessary amendments is to enable the court to determine the real matter in controversy between the parties. The discretion has to be exercised judicially. The application for amendment may be made orally or formally by chamber summons under the rules. Amendment of pleading is aimed at allowing a litigant to plead the whole of the claim he is entitled to make in respect of his/her cause of action.

Whereas the learned trial judge was right to criticise the appellant's counsel for making his application for amendment belatedly, he omitted to address his mind to the entire evidence on record and the principles that govern applications for amendment of pleadings generally.

The duty of the court when dealing with settlement of a dispute is to determine the rights of the parties and not to furnish them for mistakes they commit in the conduct of their cases. There is no error except a fraudulent one that cannot be corrected by the court if it can be done without causing injustice to the other party. The trial court was to disallow the proposed amendment in view of the affidavit evidence adduced and looking at the entire petition...”

From the affidavit evidence, it is clear that the applicant's rights and interest to the suit property is by virtue of being a registered owner. The applicant while in possession and occupation of the suit land had put up a perimeter fence and residential buildings for rental purposes. The respondents had sometime in 2007 entered into the suit land, ejected the plaintiff's tenants and demolished the plaintiff's buildings and structures standing thereon. It is this right of ownership, financial loss and damage as a result of the demolition that is the subject of amendment of the plaint. The applicants on the other hand have stated that the applicant's registration was fraudulent and have also denied the averment that the applicant was ever in actual, physical possession and occupation of the suit property.

The issue of ownership or otherwise, the actions of demolition, loss of use, possession, occupation and fraud are issues to be determined in the main suit. For now the issue to determine is whether the amendment sought will assist the court to determine those issues and fully determine the issues arising there from.

I am persuaded from the affidavit evidence, that the amendments sought are necessary for determining the real question in controversy between the parties and for assisting the court to fully and conclusively deal with the issue(s) arising there from. Notice had already been given in the plaint that **"the plaintiff will amend the plaint to specify these claims (damages) as soon as the same are quantified"** and I do not see what prejudice the respondents can possibly suffer that cannot be compensated for by an award of damages. I have perused the draft amended plaint annexed to the supporting affidavit. The amendment sought to be introduced merely qualifies the financial loss and damages already pleaded. It is not a fresh cause of action.

The upshot of the foregoing is that the application has merit and is allowed and leave sought is granted. The plaintiff may file an amended plaint within 14 days of delivery of this ruling. The defendants will have leave to amend their pleadings as may be necessary within 14 days of service upon them of the amended plaint.

Costs to be in the cause.

Dated, signed and delivered on this 21st day of August 2013.

L N WAITHAKA

JUDGE.