



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ELC CASE NO. 1623 OF 2007

RULING:

SHEVA HOTELS LIMITEDPLAINTIFF

VERSUS

SHAIBU SOSHI FAMAU & 8 OTHERS.....DEFENDANT

RULING:

1. By a Notice of motion dated 19th December, the Plaintiff/Applicant has sought for various orders. The application is premised under ***Order 8 Rule 3 of the Civil Procedure Rules and Section 1A, and 3A of the Civil Procedure Act.*** The applicant has sought for :-

- a. Leave be granted to the plaintiff to amend the plaint in this matters in terms of the draft amended plaint attached to the application.
- b. That the amended plaint be filed and served within such time as this court may direct.
- c. That cost of this application be in the cause.

2.The application was premised on the grounds stated on the face of the application notably,

(i) The plaintiff desires to make amendments to its plaint.

(ii)The suit property is located in an area which at all material time was governed by the land titles act which fact has a bearing on the issues in controversy in this case.

(iii)That this act was not pleaded in the plant as filed.

(iv) That the amendment is necessary for purposes of determination of all the matters in controversy in this suit.

The application was also supported by the annexed affidavit of VittorioVenezani, the Managing Director of the Plaintiff herein.

3.The application is opposed by the 6th defendant herein.The 6th Defendant averred that the application lacks merit and it is gross and blatant abuse of the court process.He further alleged that the 6th defendant is no longer a party to this suit by the fact that the plaintiff filed a Notice of Withdrawal of this suit against the 6th Defendant wholly on 26th January, 2009.Further, that there is no evidence that plaintiff has

reinstated the suit against the 6th Defendant and the same is prejudicial to the 6th defendant who has proceeded to prepare a bill of costs as directed by the Plaintiff. That the Plaintiff has not discovered something new to warrant the present application and the orders sought herein.

4. The parties herein canvassed the application orally in court on 20/5/2013. The court has now considered the instant application, the submissions and the law.

Order 8 Rule 3 of the Civil procedure Rules states as follows:-

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

5. The Court therefore, has discretion to allow such an order with or without condition. The applicant herein alleges that he now wishes to amend the plaint since the suit property is located in an area which at all material times was governed by the Land Titles Act which fact has a bearing on the issues in controversy in this case. The 6th Defendant alleges that applicant had withdrawn the suit against it and it has not indicated which new facts to warrant the present application. Indeed the applicant had withdrawn the suit against the 6th Defendant. In the amendment sought, the applicant has not sought to reinstate the suit against the 6th Defendant.

However, there is a lot of amendments sought by the applicants. Since the applicant did withdraw the suit against the 6th Defendant and has not sought to reinstate the said suit, the court will allow the applicant to amend the suit but without inclusion of 6th defendant since suit against it has not been reinstated.

7. I will be guided in my findings by the findings in the case of **Eastern Bakery Vs Castelino (1958) EA 46**, where the Court held:-

“Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side. However, leave to amend will be refused if it would be prejudicial to the rights of the parties existing at the date of the proposed amendment”.

8. The suit against the 6th defendant stands withdrawn. It has not been reinstated. If the court allows the amendment as it is now without the suit being reinstated against 6th Defendant that would be prejudicial to the 6th Defendant. Order 8 Rule 3 empowers the Court to allow amendment on such terms as may be just and on **such manner as it may direct**”.

The Court therefore, allows the amendment of the Plaint as sought by the Plaintiff save that the amendment relating to 6th Defendant are refused until such time when suit against it is reinstated.

9. In conclusion, the court allows the Plaintiff's Notice of Motion dated 19th December, 2012 but orders that the amendment that relates to the 6th Defendant should be left out for now until suit against it is reinstated. The Plaintiff to serve the Defendants with the amended Plaint within the next 14 days from the date of this Ruling. Defendants are at liberty to file their amended Defence or reply to the amended Plaint within 14 days after service of the amended Plaint. Costs in the cause.

It is so ordered.

Dated and signed this 2nd day of **September**, 2013.

L.N. GACHERU

JUDGE