



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 294 OF 2012

EDERMANN PROPERTY LIMITED PLAINTIFF

VERSUS

THE REGISTERED TRUSTEES OF THE KENYA

RAILWAYS STAFF RETIREMENT BENEFIT SCHEME.....1ST DEFENDANT

KENYA RAILWAYS CORPORATION.....2ND DEFENDANT

RULING

By a Notice of Motion dated 12th June, 2012, the Plaintiff has applied for leave to amend its Notice of Motion dated 23rd May, 2012 under Order 8 Rule 3 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The grounds upon which the application is being made are set out in the body of the motion. The motion was also supported by the Affidavit of Ze Yu Yang sworn on the 12th June, 2012.

The Plaintiff contended that due to the urgency involved at the time of the filing of the Notice of Motion dated 23rd May, 2012, certain particulars in respect of Land Reference Numbers were left out, that the Plaintiff also wished to include a prayer to the effect that if the matter be referred to arbitration, the subject matter of the suit be preserved pending arbitration and that the amendments sought will bring clarity to the properties the subject matter of the suit.

Mr. King'ara, learned Counsel for the Plaintiff submitted that the LR Numbers were discovered by the Plaintiff after the suit was filed, that due to the objection raised by the 1st Defendant on the entire proceedings it was imperative to bring the Notice of Motion dated 23rd May, 2012 under the ambit of Section 7 of the Arbitration Act, that since the prayer for reference of the matter to arbitration had been included in the Amended Plaint it cannot therefore be objected to at this stage. Counsel urged that for the interests of justice, the application be allowed.

The 1st Defendant filed Grounds of Opposition which were ably canvassed by Mr. Millimo. Relying on the excerpts from **Mulla's code of Civil Procedure 16th Edition**, Mr. Millimo submitted that although he rarely opposes applications for amendments, this was a peculiar one and he was constrained to oppose it. That the application is misconceived as it has invoked the wrong provisions of the law, that Order 8 Rule 3 applies to pleadings and a Notice of Motion is not a pleading under Section 2 of the Civil Procedure Act, that to that extent the application was fatally defective, that the application sought to introduce contradictions between the Plaintiff's own Replying Affidavits and the ruling already made,

that the Replying Affidavit of 6th June, 2012 was in respect of 11 properties whilst the new prayer in the Notice of Motion it sought to introduce 31 properties, that Prayer Nos. 8 and 9 of the intended amended Notice of Motion sought to introduce matters that were subjudice since there was a pending application for reference of the matter to arbitration. To Mr. Milimo therefore at best, the application was speculative, that the orders given in the nature of attachment before judgment must collapse as on amendment the orders will not be anchored on any Notice of Motion, that if the amendments are granted the orders subsisting must be discharged. Counsel referred to the text on Mulla on Civil Procedure Act in support of that proposition. It was therefore urged that the application be dismissed.

The 2nd Defendant filed Grounds of Opposition dated 25th June, 2012. These were adumbrated by Mr. Miller, learned Counsel for the 2nd Defendant. Mr. Miller associated himself with the submissions of Mr. Milimo and submitted that the amendments sought to delete/cancel the properties known as K6-K21 on the order of 8th June, 2012, that the amendment would lead to automatic discharge of the order of 8/6/12, that the application was misconceived and fatally defective as it was brought under Order 8 Rule 3 instead of Order 45 for review, the amendments would not be able to amend the order of 8th June, 2012 as the Plaintiff has to return to court for review of that order thereby being in abuse of the court process. Mr. Miller referred to the cases of **Muleya –vs- Common Market for Eastern and Southern Africa and Another (2003), 1 EA 73** on the proposition that a party cannot seek to amend the form and subject matter of an order and therefore the order of 8th June, 2012, **Hunker Trading Co. Ltd –vs- Elf Oil (2010) e KLR** on the proposition that when a party comes to court under the wrong principle as well as law, the court should not exercise its discretion in its favour, **Eastern Bakery –vs- Castellino 19(1958) EA 461** on the proposition that the court has no power to allow an amendment that will change the subject matter to that of a complete different nature and finally, **Kyalo –vs- Bayusuf Brother Ltd (1988) KLR 229** on the proposition that amendments that are inconsistent with the previous pleadings in the same suit cannot be allowed. Counsel therefore prayed that the application be dismissed.

Mr. King'ara, learned Counsel for the Plaintiff in a rejoinder submitted that the applicant was not bringing in any new cause of action, that the Affidavit of Ze Yun had stated that the application was clarifying the Land Reference numbers the subject of these proceedings, that the application did not seek to review the order of 8th June, 2012. As regards Order 8 Rule 3 of the Civil Procedure Rules Mr. King'ara submitted that order 51 Rule 10 cures the anomaly and in any event the application is brought under Sections 1A and 1B of the Civil Procedure Act, that the prayer for preservatory orders can still be brought notwithstanding an application under Section 6 of the Arbitration Act pending, that the amendments sought cannot collapse the orders of 8th June, 2012 as what was being sought was not a new claim, that prayer No.3 in respect of the 1st Defendant's assets have not been touched. Counsel therefore urged that the application be allowed.

I have carefully considered the Affidavit on record and the submissions of counsel. I have also considered the authorities relied on.

The principles applicable when considering an application for amendments are well known. In the case of **Eastern Bakery –vs- Castellino (1958) EA 461** the Eastern Court of Appeal held at page 462 that:-

“It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs 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”

The main principle is that an amendment should not be allowed if it causes injustice to the other side.”
(Emphasis mine)

In the Kenya Court of Appeal case of **Joseph Ochieng & 2 Others –vs- First National Bank of Chicago CA. No.149 of 1991**, Shah J.A (as he then was) held:-

***“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the Plaintiff’s claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.*”**

These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our Order VI A Rule 3 sets out all such principles which have been gone into on many previous occasions.”

From the foregoing cases, it would seem that the guiding principle when dealing with amendments is to guard against any prejudice being caused to the opposite party. That if costs can compensate the opposite party there would be no injustice in those circumstances.

The Plaintiff’s motion is based on the grounds that the amendments sought are to clarify the Land Reference Numbers of the parcels of land to be preserved and a prayer for preservatory orders in the event the dispute between the parties is referred to arbitration.

The first objection is that the application is bad in law as it has been brought under wrong provisions of the law, that Order 8 Rule 3 applies to pleadings which a Notice of Motion is not. I agree with the Defendant’s submissions that Order 8 of the Civil Procedure Rules applies to amendment of pleadings. Section 2 of the Act has defined pleadings to mean principal documents of claim or defence of litigants. It has not included interlocutory applications. The question that arises is whether by not providing for amendment of applications, no application can be amended. Was it the intention of the legislature and the Rules Committee that applications cannot be amended? What if there is a slight mistake on an application, is the only remedy available to such an applicant to withdraw such an application and file a fresh one? My view goes contra to that. Taking such a course will be contrary to the overriding principle of the Act under Sections 1A and 1B of the Act which require that civil disputes be resolved expeditiously and proportionately. Withdrawals and refiling of applications will not only lead to delays but also unnecessary expenses. Courts are there to dispense justice not to be overly concerned with technicalities that do not inhibit substantive justice. In any event, Section 3A of the Civil Procedure Act was enacted to fill those areas where there is a lacunae, or where if there is strict application of the rules, there would be an injustice. In my view, if in the instant case the court rules that a Notice of Motion cannot be amended because it is not a pleading, it will cause an injustice as that will lead to delays and expense contrary to the spirit of the double “O” principle contained in Sections 1A and 1B of the Civil Procedure Rules. Accordingly, I reject that contention.

The second objection is that the application should have been brought under Order 45 of the Civil

Procedure Rules. According to the 2nd Defendant, the Plaintiff wants to introduce information that was inadvertently left out, and that since the same has just been discovered the applicant should have applied to review the order of 8th June, 2012. That the ruling of 8/6/12 is to be reviewed once the amendment sought is granted. My view is that Order 45 does not apply. The Plaintiff is not seeking to amend the order of 8th June, 2012, but rather to amend their Notice of Motion dated 23rd May, 2012. If they had intended to have the properties to be included in the order of 8th June, 2012, that is when in my view they would have been required to make an application under Order 45. To my mind therefore, the application being one to amend the main application, the Plaintiff's intention is that at the hearing of the same the prayers sought to be included may be considered. I therefore do not see how Order 45 of the Civil Procedure Rules comes in and I reject this contention.

The next objection is that the amendments sought will introduce contradictions, that the same will contradict the Plaintiff Replying Affidavit sworn on 6th June, 2012 which indicated that the Plaintiff was only interested on 11 properties and the ruling of 8th June, 2012. That prayer number 3 of the intended amended Notice of Motion has 21 properties.

I have seen the Replying Affidavit of Ze Yun Yang sworn on 6th June, 2012 in opposition to the pending application by the 1st Defendant to refer this matter to arbitration. In paragraph 13 thereof, the deponent states:-

“13. THAT I have looked at the First Defendant’s annual returns for the year 2009. Annexed on pages 80 to 103 of my previous affidavit dated 22nd May, 2012 and hereby note the values assigned to the various assets listed therein and I verily believe that our claim herein can be met by the preservation of the following assets listed therein”.

The deponent then sets out a total of 16 properties that he says he would want placed under the preservatory order and states that, he does not mind the rest of the properties being left out.

I have also seen paragraph 3 of the proposed Amended Notice of Motion. This paragraph relates to the properties of the 1st Defendant. The Plaintiff's application has not touched on or has not proposed to amend this particular paragraph of the motion. There is no addition whatsoever that is being introduced in this paragraph relating to the 1st Defendant's properties. In the premises, I do not see how the amendment sought would contradict the Plaintiff's Replying Affidavit sworn on 6th June, 2012 or the ruling of 8th June, 2012 as is contended by the 1st Defendant. To that extent, the 1st Defendant's objection on this ground has no basis and it accordingly fails.

What the Plaintiff has sought is to amend prayer number 5 of the Motion dated 23rd May, 2012 that relate to the properties belonging to the 2nd Defendant. The 2nd Defendant has contended that there was inconsistent allegations in that, completely new properties were being introduced whilst those that were there previously were being struck out or cancelled and new ones introduced. Mr. Miller gave the example of the property known as Kileleshwa K6 – K21 which was in the the original motion as well as the order of 8th June, 2012. To the 2nd Defendant, the striking out of these properties and introduction of new properties constituted introducing a new subject matter into the suit. That the properties that were restrained by the order of 8th June, 2012 were substantially different from those to be brought in by the proposed amendments. The case of **Eastern Bakery –vs- Castellino** was cited as an authority. Mr. King'ara for the Plaintiff submitted otherwise.

I have looked at the original Notice of Motion dated 23rd May, 2012 which is sought to be amended. Prayer number 5 thereof contains properties that are identified by way of their position on the ground, that is, where they are situated e.g.

Area	Units	Class
Kileleshwa K6-K21	3	II

Kiambere Road	3	II
Hamza Road	18	III
Makadara stn	30	VI - VII
RTI	34	IV, VI, VII

The question that arises is, in law when properties are identified as such, can it be said that they have been properly identified? Can an order restricting the dealing of any such property on such identification be registrable at the Lands registry against the property in question? I doubt if it is possible. My recollection of land law is that each property has a unique and particular identification by number. I do not believe that the above noted system of identification is sufficient in law.

At paragraph 3 of his Supporting Affidavit, Mr. Ze Yun Yang has sworn that:-

***“2. THAT the Plaintiff wishes to amend the notice of motion dated 23rd May, 2012 to insert and cite the accurate Land Reference Numbers of the properties which had been left out in prayer 5 of the application*”**

It is clear from the foregoing that the intention of the Plaintiff is to introduce and cite the accurate Land Reference Numbers of the properties. This deposition made on oath was never controverted nor challenged. As I understand it, when a deposition is made on oath and is not denied and or controverted, it is deemed to be the truth. It is therefore expected and presumed that what the Plaintiff has sought to do by its application is to replace the unintelligible identification of the properties that were wrongly identified at the time of filing the suit or application with the proper identification that is known in law and that can be traced back to the register at the lands office. That being the case, I do not agree that the Plaintiff is seeking to introduce a new subject matter. I also do not agree that the dictum in the case of **Muleya –vs- Comesa (2003)** cited by the 2nd Defendant is applicable. In that case, the court was dealing with a situation where the applicant sought to introduce in his suit a new cause of action for damages whilst his original cause of action was for reinstatement to his employment. The court held that under the rules of that court, such an amendment could not be allowed. That case is distinguishable for the reason that it was not demonstrated that the Rules of procedure of the Comesa Court is similar to our rules and/or that the circumstances of that case were similar to the present case.

The case of **Kyalo –vs- Bayusuf Brothers Ltd** is also not applicable to the application before me because, in that case the Defendant sought to amend a Defence which had admitted that the named driver was its employee and that the motor vehicle the subject matter of the accident was at the material time owned by the Defendant. Evidence had been tendered and the statement of the alleged driver had made similar admissions. In the proposed amended Defence, the Defendant sought to state that the alleged driver was not in its employment and that the subject motor vehicle was not in its ownership at the time of the accident. That was not only a somersault of the earlier defence but the same clearly contradicted the already evidence on record. In the application before me, there is an affidavit on record which has not been controverted to the effect that the properties being introduced are the one and the same as they were in the original motion only that they are being properly identified in an intelligible manner. I reject the 2nd Defendant’s objection on this ground.

The other objection is that the intended prayer nos. 8 and 9 seeks prayers in respect of arbitral proceedings which matter is sub-judice. That since there is a pending application under Section 6 of the Arbitration Act, which seeks to stay the proceedings, the amendments sought cannot be granted. That Section 7 only applies where a party has already submitted itself to arbitration which is not the case with the Plaintiff. To my mind, amendments are meant to bring before the court all matters that are in dispute between the parties for determination at once. Those prayers are proposed to be sought in the alternative. I see no legal ground to object to the application on this ground. I do not see the prejudice to be suffered by the Defendants for the reason that the said prayers are proposed to be included in the main motion by the Plaintiff.

The last objection was that the motion of 23rd May, 2012 cannot be amended on the ground that there are subsisting orders, that it will lead to the amendment of the order of this court made on 8th June, 2012 because those orders were made in the nature of attachment before judgment. The Defendants relied on the text of **Mulla on the Indian Civil Procedure Act at page 3683**. My view is that the order of 8th June, 2012 was not made entirely in the nature of attachment before judgment. To my mind, the order was made on an application under Order 40 Rule 4 of the Civil Procedure Rules for variation of an injunction order made on 23rd May, 2012. Even if it was made in the nature of attachment before judgment, which I have found it was not, can it be a bar to an application for amendment. I think not.

From the principles set out in the Court of Appeal cases I referred to above of **Eastern Bakery vs. Castellino** and **James Ochieng and Others vs. First American Bank of Chicago**, amendments will be refused where they will cause an injustice or prejudice to the opposite party. I have not seen any injustice or prejudice that the Defendants will suffer if the proposed amendments are allowed. Any prejudice in my view can be compensated by an award of costs. Mr. Miller submitted that his client will suffer prejudice because it is expected to obey orders that are different from the prayers sought. That goes as far as that. Mr. Millers client did not file any affidavit to deny the averments of Ze Yung that the properties in the original motion, and therefore in the order of 8th June, 2012 are the same as the ones whose Land Reference numbers are being sought to be introduced by the proposed amendment. In any event, the 2nd Defendant is at liberty to apply to carry those orders in view of the amendments to the Motion. I am also not persuaded by this objection and I accordingly reject the same.

Accordingly, I find that the Plaintiff's Notice of Motion dated 12th June, 2012 is meritorious and I allow the same. The Plaintiff is to file and serve an Amended Notice of Motion in terms of the draft Motion annexed to the application within 3 days of this order.

The costs of the application are awarded to the Defendants in any event.

It is so ordered.

DATED and Delivered at Nairobi this 23rd day of July, 2012.

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A. MABEYA
JUDGE