



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 358 of 2010

LUCY WANGARI

NJOGU.....PLAINTIFF

VERSUS

**PETER LEONARD MWANGI.....1ST
DEFENDANT**

**CONSOLIDATED BANK OF KENYA LTD.....2ND
DEFENDANT**

**CYRUS GITARI KATHURI.....3RD
DEFENDANT**

**EQUITY BANK LIMITED.....4TH
DEFENDANT**

RULING

1. **CYRUS GITARI KATHURI** is named as the 3rd Defendant in the suit herein where he is sued with others for illegal alienation of the suit land to the detriment of the Plaintiff. The said 3rd Defendant has now taken out a Notice of Motion expressed to be brought under the provisions of Order 8 Rules 3 and 5 and Order 40 Rules 6 and 7 of the Civil Procedure rules as well as under sections 3 and 3A of the Civil Procedure Act. He seeks leave to amend his Defence and an Order directing the Plaintiff to deposit a sum of Kes. 10 million by way or security for damages pending the hearing and determination of the suit. The 3rd Defendant/Applicant seeks a further order, in the alternative, discharging the injunctive orders issued on 20th December, 2010. The application is grounded, in the main, on the basis that the amendment will enable the court to determine the real questions in controversy between the parties and no prejudice will be caused to the parties. That the application was brought without delay and the Plaintiff will have time to respond by amending her plaint if need be.

2. The Plaintiff opposed the application, filed grounds of opposition as well as a Replying Affidavit. The issues raised include delay in bringing the application, the incompetence of the application and that since the 3rd Defendant had already filed its amended defence without leave of court then he was taking the court for granted. That the application was incurably defective, mischievous and the amendment sought was inconsistent with the pleadings making such amendment untenable. The matters raised in the affidavit in support of the application were said to be argumentative. As concerns the deposit of security for damages in the sum of Kes. 10 million the Plaintiff/Respondent stated that that was a mischief aimed at dislodging the injunction already granted.

3. I have had occasion to consider the written submissions. Order 8 rule 3 of the Civil Procedure Rules allows for amendment of proceedings at any stage of the proceedings on such terms as to costs or otherwise as the court may deem just. An amendment of pleadings sought even after any relevant period of limitation current at the date of filing of the suit has expired will be allowed by the court if in the circumstances of the case the court thinks it just so to do. Rule 5 of Order 8 of the Civil Procedure Rules allows for amendments of pleadings notwithstanding that the effect of such an amendment is to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment. Authorities have held that amendments sought before trial should be freely granted if such amendments are necessary to put facts in dispute between the parties before the court for proper adjudication of the matter and further that there would be no injustice occasioned to the adverse party. Costs will ordinarily be adequate compensation. See **MACHARIA –VS- GUARDIAN BANK LTD & ANOTHER HCCC 938/2000**.

4. I have looked at the proposed amended defence and I find nothing outside the facts constituting the cause of action. Instead, I find that the proposed amendment places before the court the issues of dispute between the parties for the determination of the court. It would be, in my view, elevating technicality above substantive justice to find that the amended defence must be rejected merely because it was filed before requisite leave was obtained, now that that leave has been sought. The Plaintiff did not apply to strike out that defence for want of leave. In the premises I grant leave to the 3rd Defendant to amend his defence and further order that the Amended defence shall be deemed to have been filed within time.

5. The Applicant has laid no basis for the grant of an order for security for damages to the tune of Kes. 10 million or indeed any other amount. The authority of **CHATUR RADIO SERVICE –VS- PHONOGRAM LTD (1994) KLR 114** laid down the preconditions for the grant of an order for security for damages in the following words:-

“The object in insisting upon an undertaking as to damages is that if by misadventure through the judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the Defendant is entitled to some remedy in damages, thus, the Defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of such injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required when an interlocutory injunction is granted in order that the court granting such injunction may be able to do justice if the injunction was wrongly granted”

In the instance case it was not shown that the injunction was granted wrongly and in the circumstances it is not shown why at all the injunction should be lifted. It is necessary in this case to maintain the status quo until the suit is finally heard and determined. In the end the application to amend the defence is granted and the order for deposit for security for damages is refused as the same is not earned. The Plaintiff will have the costs of the application.

Orders accordingly.

**P.M. MWILU
JUDGE
17/10/2012**

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 17TH DAY OF OCTOBER 2012.

**P.M. MWILU
JUDGE**

In the presence of:-

Mr Machira- Absent - Advocate for Applicant

Mr Amadi - Advocate for 1st, 2nd and 3rd Defendant

Mr Macharia Holding brief for Mbugua - Advocate for 4th Defendant

Mr Koceyo - Advocate for 3rd Defendant

Anne - Court Clerk

P.M. MWILU

JUDGE