



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 718 OF 2006

**ABDIRAHMAN MOHAMED ABDILE.....
PLAINTIFF**

VERSUS

**AHMED RASHID HAJI MOHAMED.....1ST
DEFENDANT**

ABDI ALI BASHIR.....2ND DEFENDANT

**THE KENYA POWER & LIGHTING COMPANY LTD.....3RD
DEFENDANT**

COUNTY COUNCIL OF WAJIR..... 4TH DEFENDANT

RULING

The 2nd defendant, **Abdi Ali Bashir**, has moved the Court by way of a Notice of Motion dated 20th April 2011 seeking an order that the Court be pleased to grant him leave to amend his Statement of Defence dated 11th August 2006 in terms of the annexed amended Defence and that the said draft be deemed as duly filed and served upon the payment of the requisite filing fees. The applicant also prays that the costs of the application be in the cause.

The basis upon which the application is premised upon the grounds on the face of the application and is supported by an affidavit sworn by **P M Gichuru**, the applicant’s advocate on 20th April 2012. From the said grounds and affidavit, it is the applicant’s contention that this suit was filed on or about 6th July 2006 and the 2nd defendant’s defence filed on or about 11th August 2006. It is further stated that the 2nd defendant’s contention is that he is the owner of Plot No. 158 which the plaintiff claims is part of LR No. 13607/225. Upon a keen and careful consideration of the 2nd defendant’s case, documents in support and the claim by the plaintiff it has become apparent that the Defence on record by the 2nd defendant does not afford a comprehensive foundation for the deliberation of all the issues touching on the instant matter. There is a need to effect amendments to the 2nd Defendant’s defence by *inter alia* introducing a counter claim in terms of the annexed draft. It is the applicant’s case that the failure to incorporate the proposed amendments was not deliberate but an oversight on the part of the advocate for which the advocates apologise. Further the proposed amendments will not prejudice the other parties to the suit but will enable the Court to make a proper and conclusive determination of all the issues between the parties. It is therefore in the interest of justice and fairness that the leave sought be granted to enable the applicant’s interests be fully protected and secured.

In opposition to the application, the plaintiff swore a replying affidavit in which it is deposed that the application is an afterthought and abuse of the process of the court which ought to be dismissed with costs. It is the plaintiff's position that the orders sought cannot be granted since the counterclaim is time barred by the law of limitations. The counterclaim, according to the plaintiff, is based on fraud and under section 4(2) of the Limitation of Actions Act, Cap 22 such an action cannot be brought after the end of three years from the date the cause of action accrued. It is the plaintiff's case that he was allotted the suit premises on 14th June 1999 by Wajir County Council and was issued with the title thereof on 15th October 2001. His earlier suit was struck out by the Garissa Senior Resident Magistrate's Court in 2004 for want of jurisdiction. Therefore since the plaintiff has all along been aware of the plaintiff's proprietorship of LR No. 13607/225 since 1999 without the applicant alleging fraud, a period of 13 years has now elapsed hence the applicant's claim is barred by limitation. Since the draft amended defence and Counterclaim is not supported by a verifying affidavit, it is the plaintiff's view that the application ought to be dismissed. It is the plaintiff's contention that pursuant to the provisions of section 24 of the Registration of Titles Act the prayers sought in the said counterclaim are incapable of being granted.

The application was prosecuted by way of written submissions. According to the applicant, under Order 8 Rule 3(1) and (2) of the Civil Procedure 2010, the power of the Court to grant leave to amend a pleading is discretionary and the court only needs to be satisfied that it is just to allow the amendment. Citing **Mechanised Systems Limited vs. Guardian Bank Limited Milimani HCCC No. 2 of 2005** it is submitted that provided that the application is made in good faith, without undue delay, amendments sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs. On the authority of **Amalo Company Limited vs. Investments & Mortgages Bank Limited [2005] eKLR** it is submitted that the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of true state of the facts which the parties really and finally intend to rely on or to claim. The powers of amendment are intended to make more effective the function of the courts to determine the true substantive merits of the case, to have more regard to substance rather than to form. It is submitted the effect of determination of this suit in the plaintiff's favour would in the circumstances be to dispose the 2nd defendant of his land without granting him the opportunity to ventilate the issue of possible fraud against him by the plaintiff and that it is with this background that the applicant seeks to introduce a counterclaim in his defence as he craves to advance his case against the plaintiff through the Counterclaim. Under Order 8 rule 3(1) the Court grants leave at any time while under subrule (2) such leave may be granted even where the period of limitation has expired where it considers it just to do so. Since the pre-trial procedure were just recently concluded it is submitted that it is just to allow the applicant amend his defence. The fraud, it is contended only came to the applicant's attention in 2011 hence the claim is not time barred by the statute of limitation. The absence of a verifying affidavit, it is submitted, is no ground for denying the applicant the amendment sought as technicalities are handmaidens to justice and ought not to bar the same. In any case the verifying affidavit will be filed with the amended Defence and Counterclaim. Citing **Kiplangat Arap Biator vs. Esther Tala Chepyegon [2006] eKLR** it is submitted that the applicant ought to be allowed to prove his case and that he is entitled to the remedies sought.

It is important to note that whereas the 3rd defendant did not file any affidavit, it nevertheless filed submissions in which it stated that it had no objection to the leave sought but contended that it is not privy to the issues of fraud alleged in the suit and it be struck out of the suit with costs.

On their part the plaintiff reiterated the contents of the replying affidavit that the proposed counterclaim is time barred and therefore an afterthought. It is further submitted that the 2nd defendant has not stated when the alleged fraud was discovered. Since the 2nd defendant has referred to the documents contained in his bundle of Documents filed on 21st April 2011, he ought to have been aware of the alleged fraud latest in the year 2002, if he would have exercised reasonable diligence. According to the plaintiff Order 8 rule 3(1) and (2) do not give powers to the court to allow amendment that is time barred. However, the rules of procedure under the Civil Procedure Act subject to the Acts of Parliament in this case the Law of Limitations. It is further submitted that as the 2nd defendant alleges fraud, under section 24 of the

Registration of Titles Act, his remedy lies in damages and not cancellation of the plaintiff's title. It is further submitted that the failure to annex a verifying affidavit renders the application defective. Lastly it is submitted that to allow the application will immensely prejudice the plaintiff as it will go against the spirit of Limitation of Actions Act.

The 2nd defendant also filed supplementary submissions. I have decided to attach little weight to the said submissions as it is an attempt by the 2nd defendant to adduce evidence by way of submissions. Submissions are not an avenue to fill in the gaps left in the affidavit. Submissions are simply meant to highlight the salient facts and elucidate the points of law involved in the application.

The principles guiding the grant of application to amend pleadings are now trite and the same can be summarized as follows:

- (a) The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See **Tidelsay vs. Harpic [1878] 10 Ch.D. 393 at 396.**
- (b) The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle. See **Eastern Bakery vs. Castellino [1958] EA 461.**
- (c) The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See **British India General Insurance Co. Ltd vs. G.M. Parmar [1966] EA 172**
- (d) The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. 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 and no injustice caused if the other side can be compensated by costs. See **British India General Insurance Case** (Supra).

It is important to note that since the year 2010, section 1A of the Civil Procedure Act provides for the overriding objective of the Civil Procedure Act and the rules made thereunder and states:

- “1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

Section 1B of the same Act, on the other hand provides for the duty of court and states:

- “(1). For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—**

- (a) **the just determination of the proceedings;**
- (b) **the efficient disposal of the business of the Court;**
- (c) **the efficient use of the available judicial and administrative resources;**
- (d) **the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- (e) **the use of suitable technology.**

It is therefore clear that in the exercise of the powers conferred upon the court under the Civil Procedure Act and the Rules thereunder, the Court is under a statutory duty to ensure that the overriding objective of the Act is attained. In so doing, there is a statutory duty imposed on the Court by section 1B aforesaid to ensure the just determination of the proceedings and the efficient disposal of the business of the Court. In my view these provisions require the court to adopt a more pragmatic approach in dealing with matters that come before it. More than ever before the justice of the case plays a central role in the interpretation of the Civil Procedure Rules including the discretion whether or not to allow amendments of pleadings.

In this case the plaintiff opposes the application principally on three grounds. The first ground is that the amendment proposes to introduce a counterclaim which is barred by limitation. Secondly, there is no verifying affidavit annexed to the said counterclaim. Thirdly the allegations made in the counterclaim are untenable in the light of section 24 of the Registration of Titles Act.

On the first issue, it is important to note that the mere fact that a pleading is amended does not give the claim the validity if it has none. The amendment of a pleading which introduces a claim is similar to the institution of suit and in my view, it does not disentitle the other party of this right to raise objections with respect to the validity of the claims thereby introduced. Therefore if the claims intended to be introduced by the counterclaim are time barred the mere fact that they are introduced by way of a counterclaim will not give them a new lease of life. It is for this reason that Order 8 rule 3(2) provides:

Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

Subrule (5) mentioned above provides:

An amendment may be allowed under subrule (2) notwithstanding that its effect will be 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.

In the instant case the 2nd defendant intends to introduce a cause of action and from the facts as narrated by both parties the facts giving rise to the counterclaim seem to have a bearing on the plaintiff's claim. Again the mere fact that the intended amendment will deprive the defendants of a defence has been held to be no ground to deny a party leave to amend. I wish to refer to the decision of **Ringera, J** (as he then was) in the case of **Macharia vs. Guardian Bank Limited & Anor [2002] KLR 271** where the learned Judge stated that an amendment to a pleading cannot be refused on the basis that it would have the effect of defeating an adversary's claim if the amendments are allowed since the plaintiff will be in no worse position than she would have been if the matters sought to be introduced thereby had been incorporated in the original statement of defence.

In the court's view a party should be allowed to present before the court all the material so that the court is in a position to effectually and finally determine all the issues in dispute between the parties. That, in my view, is what justice is all about.

On the second issue, it is true that under Order 3 rule 1(5) and (6) a Counterclaim is required to be accompanied by a verifying affidavit and the failure to do so may lead to the striking out of the said pleading. However, there is no express requirement that a draft counterclaim should similarly be accompanied by a verifying affidavit since a draft is not a pleading until leave is granted to file the same. The mere fact that the 2nd defendant has sought an order that the draft be deemed duly filed does not necessarily make the draft a pleading. If the court were to grant the prayers in the manner sought and the 2nd defendant were to fail to file a verifying affidavit at the time of paying for the counterclaim that would of course be another matter. Accordingly I find no merit in the second objection.

With respect to the last objection, the court cannot refuse an amendment simply because the claim is unlikely to succeed. To do so would amount to usurping the jurisdiction of the trial court. As I have stated above the mere fact that an amendment is allowed does not lend credence to the allegations made in the amended pleading. It will be upon the 2nd defendant to prove its claim when the time comes.

With respect to the 3rd defendant's prayer that its name be struck off from these proceedings, this is not the right forum to make such an application. If the 3rd defendant is so minded, it is at liberty to make appropriate application for the determination by the court.

I have said enough to show that I find merit in the application dated 20th April 2011 which I hereby allow. The 2nd defendant is hereby granted leave to amend his defence. The amended defence and counterclaim in terms of the draft amended defence and counterclaim to be filed and served within 7 days. A corresponding leave is granted to the plaintiff and the other defendants to amend their pleadings within 7 days from the date of service of the said amended defence and counterclaim should they deem necessary. The costs of this application will be to the plaintiff.

Dated at Nairobi this 16th day of October 2012

G V ODUNGA
JUDGE

In the presence of Ms Muthoni for Mr Ongegu for the 2nd defendant/applicant