



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 549 of 2008**

**ZAVERCHAND RAMJI SHAH.....PLAINTIFF**

**VERSUS**

**UNIVERSAL BANK LIMITED .....1<sup>ST</sup> DEFENDANT**

**PARAMOUNT UNIVERSAL BANK LIMITED.....2<sup>ND</sup> DEFENDANT**

**KURWA LIMITED.....3<sup>RD</sup> DEFENDANT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. By way of Notice of Motion dated 26<sup>th</sup> October, 2012 the 3<sup>rd</sup> Defendant (hereinafter referred to as “the Applicant”) seeks the leave of the court to amend the Defence and include a counterclaim. The Applicant also wants the Court to give an Order for the Plaintiff to grant immediate access to a Valuer appointed by the court with a view to assessing LR No. 209/6/13 (“the suit property”) and ascertain the mesne profits for purposes of assessment of damages. The Applicant further sought that the matter be fixed for pre-trial directions on a priority basis. The Grounds for the application are that the amendments sought will enable the court to determine the real issues in controversy, the Plaintiff is a trespasser and is therefore liable to pay mesne profits to the Plaintiff as the registered owner of the suit property, that the Plaintiff has delayed the prosecution of the suit and has not paid any rent to the Applicant as the Registered Owner of the property since 8<sup>th</sup> July, 2008. The Motion is supported by the Affidavit of Simon K. Kuria, sworn on 26<sup>th</sup> October, 2012.

2. In the Affidavit the Applicant contended that the 3<sup>rd</sup> Defendant has been entitled to possession of the suit property since 8<sup>th</sup> July, 2008 and has been deprived of monthly rent and/or mesne profits at the rate amounting to Kshs. 180,000/= which should be paid monthly in advance until vacant possession is given, that the Plaintiff is liable for damages for trespass in the form of mesne profits and that it is on this basis that the Applicant seeks an Order of the Court have a Valuer carry out a rental assessment of the suit property to assist the court in the assessment of damages. The Applicant further contends that no orders were made to the effect that the Plaintiff was to enjoy the suit property rent free, that therefore the Applicant has been denied the opportunity costs of developing the property to further enhance its rental value since 2008. Due to this state of affairs the Applicant contends that the cost of construction and borrowing has since escalated and is thereby entitled to claim damages. In the foregoing, it is the Applicant’s contention that the Plaintiff urgently needs to vacate the premises to enable the Applicant re-develop the suit property. The amendments sought will therefore allow the court in arriving at a just and fair decision based on the law.

3. The Plaintiff, on his part, vehemently opposed the motion by filing a Replying Affidavit sworn on 5<sup>th</sup> December, 2012. The Plaintiff contends that the 3<sup>rd</sup> Defendant has no locus to apply for the orders it seeks as there is a challenge as to the validity of title it acquired on the suit property. That if the Court grants the orders sought, allowing the Defence to be amended and include a counterclaim for vacant possession and rent, the court will in effect have determined the Plaintiff's suit at its interlocutory stage. That the intended amendments have the direct effect of altering the nature and the character of the suit, that there has been inordinate delay in bringing the application as the same has been made five years since the filing of the Defence. That further, the Applicant is not entitled to the Orders sought and the amendments are only meant to delay the prosecution and determination of the suit and are therefore made in bad faith. The Plaintiff additionally alleged that the orders sought in the intended Counter Claim and the once sought in the instant application are inconsistent. Moreover, it is contended for the Plaintiff that the Applicant stands to suffer no prejudice if the instant application is disallowed as the sum equivalent to the purchase price it paid for the suit property is in custody of the 1<sup>st</sup> and 2<sup>nd</sup> Defendant pursuant to the Orders of this court. It is further contended that the amendment sought will only serve to complicate the proper management of the suit. The cases of **Phillips Harrisons & Cross Field Ltd –vs- Kassam (1982) KLR 450, Patel –vs- Amin (1988) KLR 689 and D.T Dobie (K) Ltd –vs- Muchina (1982) KLR1** were relied on by the Plaintiff. The Plaintiff further contended that the application was a collateral attack on the court. The Plaintiff therefore urged that the application be dismissed with costs.

4. I have carefully considered the Affidavits on record and the arguments advanced both for and against this application. I have also considered authorities relied on. The issue for determination is whether or not to allow the proposed amendments to the Statement of Defence as sought. The law on amendments is well settled. This was summed up in the case of **Central Kenya Limited –vs- Trust Bank Limited (2000) EALR 365** where the learned Court of Appeal Judges held that:-

***“The Amendment of Pleadings is aimed at allowing a litigant to plead the whole of the claim he is entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits provided (i) there has been no delay, (ii) no new or inconsistent cause of action is introduced, (iii) no vested interest or accrued legal right is affected, and (iv) the amendment can be allowed without injustice to the other side .....The overriding considerations are, whether the amendments are necessary for the determination of the suit and whether the delay is likely to prejudice the opposing party beyond compensation in costs.”***

Earlier in the case of **Eastern Bakery -vs- Castelino (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.”***

How then do these principles apply to the application before me? Against these principles, has the applicant brought itself within its parameters?

5. The first issue is that of delay. The Plaintiff contended that there was inordinate delay on the part of the Applicant as the application has been brought five (5) years since the filing of the defence. I agree that amendments should be sought at the earliest opportune time, so as to enable parties know the nature of the case they are to face. However, amendments are allowed at any stage provided that a party seeking leave for amendment of a pleading, can demonstrate sufficient reason of any delay, if any. In this case,

the suit was filed in or about 2008. Parties seem to have taken too long to litigating on the injunction application. Pretrials have not been undertaken. Can it in the circumstances be said to be too late? In my view, the suit is still in its preliminary stages as pretrials are yet to be concluded, let alone being commenced. In any event, my view has always been that for it to be a ground of refusal to grant an amendment, it must be demonstrated that such delay is likely to prejudice the opposite party beyond monetary compensation in costs. In this case, the Plaintiff has failed to demonstrate to this court how the delay by the Applicant in bringing the application shall prejudice him in a manner that cannot be compensated by way of costs. In the foregoing, I reject the Plaintiff's contention that the delay in bringing the instant application is fatal to the application.

6. The Plaintiff has also argued that the effect of the suggested amendments will be to determine the suit by the introduction of the counterclaim. I have looked at the prayers sought. Through the counter Claim the 3<sup>rd</sup> is seeking to introduce prayers for mesne profits and vacant possession of the suit property. It is the Plaintiff's contention that the said counter claim, fundamentally alters the character of the suit and if the Court proceeds to allow the amendment, it will at this stage of the suit determine the Plaintiff's suit. Counsel for the Applicant, however opposes this argument by his submission that there is no dispute as to the ownership of the suit property as the 3<sup>rd</sup> Defendant is now the registered proprietor. That further to this, the interlocutory injunction in place only prohibits possession of the property by the 3<sup>rd</sup> Defendant pending hearing and determination of the suit. It is therefore the 3<sup>rd</sup> Defendant's contention that the question of possession shall be determined during trial and not at this instance. I have looked at the said draft amended Defence annexed to the application. My own assessment of the proposed amendments is that they simply bring out a clearer perspective on the issues in controversy, which is the acquisition of the suit property, its ownership and effect thereof. That to my mind is not a new cause of action, nor does it fundamentally alter the character of the suit. I do not find the proposed amendments to be inconsistent with the nature of the suit as pleaded. It is consequent of the suit itself. It may be safely concluded that the amendment sought seeks to fully lay out the 3<sup>rd</sup> Defendants claim against the Plaintiff. In the case of **CENTRAL KENYA LTD (supra)** the Court of Appeal stated that:-

***“It is also trite law, that as far as possible, a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action ...otherwise, the court will not later permit him to reopen the same subject of litigation...because they have from negligence, inadvertent or accidentally omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviolate this.”***

Thus, if the 3<sup>rd</sup> Defendant does not plead the matters it seeks in the proposed amendments which seem to naturally flow from the suit, at what point will it do so? I think it is now otherwise it will be estopped from doing so at a later date.

7. I should also state that I am not persuaded that the vested or accrued rights of the Plaintiff shall be affected by the proposed amendments. Besides, it is my view that the questions raised by the Plaintiff on whether it is proper for the 3<sup>rd</sup> Defendant to ask for mesne profits and the counterclaim being a challenge to the injunction issued on 29<sup>th</sup> January 2009 should not be deliberated at this phase, as the Plaintiff will have the chance to respond to the issues raised in the counterclaim by way of a defence and at the trial.

8. The Plaintiff has also attacked the application on the ground that the 3<sup>rd</sup> Defendant lacks locus standi to bring the application on the ground that its title is challenged, that the application is made in bad faith for the delay in bringing the same. As I have already stated, the issue of whether the 3<sup>rd</sup> Defendant obtained title legally or otherwise is an issue to be decided at the trial. I do not think that the mere challenge to its title would deny the 3<sup>rd</sup> Defendant the opportunity to plead matters it thinks it is entitled to. Whether or not the title is lawful, it is an issue for trial not for amendment. On the issue of bad faith, I agree that there has been delay of five (5) years in bringing the suit but having in mind that there were other interlocutory matters being dealt with by the parties and for the fact that discovery has not been concluded or commenced, I am unable to see any bad faith on the part of the 3<sup>rd</sup> Defendant.

9. The other grounds of attack were that the amendments will complicate the suit and that the application

is a collateral attack on the authority of the court. I did not understand Mr. Oriaro well on this ground. I do not see how an amendment whose prayers that are sought to be pleaded flow as a natural consequence of the already filed pleadings can complicate a suit. Since the 3<sup>rd</sup> Defendant claims to be the registered owner of the suit property, though challenged is it not natural for it to claim mesne profit and counterclaim possession thereof at the trial if successful? I think so. On the issue of attach on the injunction already granted, I do not think there is any other way the 3<sup>rd</sup> Defendant can protect its interest other than seek at the trial the orders it seeks to include by virtue of the amendments. I see no attack on the authority of the court.

**10.** The Plaintiff also contended that the 3<sup>rd</sup> Defendant will suffer no prejudice if the amendments are not allowed as the sum equivalent to Kshs. 24 M being the sum paid by it as purchase price was deposited in court by a court order. To my mind, that was only a condition for the grant of the injunction. It did not prevent the 3<sup>rd</sup> Defendant from making any allegations or claims it wishes to make over the suit property, if it wishes. Provided it is able to prove the same at the trial. The determination of the injunction application, in my views, did not at all determine the issues in dispute between the parties, I therefore do not think that that ground was well founded.

**11.** I have also looked at the 3<sup>rd</sup> Defendant's request on the Court to compel the Plaintiff to grant access to a Valuer appointed by it for the purpose of inspecting the suit premises and carrying out a rental assessment, to assist the court in its assessment of damages. I note that the Applicant's request is based on the fact that there are injunctive orders in place prohibiting it from accessing the suit property. I have agonized over this prayer. It is true that it is nearly five (5) years ever since the suit was commenced and injunction granted and that the value of the property may have changed greatly. The Applicant contends that the order will enable it value the property and ascertain the amount of mesne profits to be claimed. The agony this prayer has caused the court is that there is an injunction in force against the Defendants from interfering with the Plaintiff's quiet possession. It is true that the 3<sup>rd</sup> Defendant may need to assess the value of the suit property for purposes of fixing the rate of mesne profits. But to allow that prayer would amount to a partial discharge of the injunctive order force. That would be an affront to that order yet there is no application before this court for variation of that order under Order 40 Rule 7 of the Civil Procedure rules. Further, I believe that there are still other ways of fixing mesne profits when it comes to assessment and the 3<sup>rd</sup> Defendant can still be able to do so without necessarily causing any violence to the injunctive order that is in force. For this reason, I will decline that prayer.

**12.** From the foregoing, I am convinced that the ends of justice will be met for all parties involved in this matter, and the issues in controversy will be properly addressed before this court, if the amendments sought are allowed. As such, I do allow the application in terms of prayer Nos. (2), and (4) thereof. The 3<sup>rd</sup> Defendant is hereby directed to file and serve its Amended Defence and Counter-claim within 14 days of today's date. The Plaintiff is at liberty to file and serve his reply within 14 days of such service. Parties to commence pretrials forthwith after service of the Reply by the Plaintiff. Costs of this application are awarded to the Plaintiff in any event.

Orders accordingly.

DATED and DELIVERED in Nairobi this 20<sup>th</sup> day of December, 2012.

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**A. MABEYA**

**JUDGE**