



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NUMBER 73 OF 2009

STEPHEN ODDIAGA T/A STEPHEN ODDIAGA

& COMPANY ADVOCATESPLAINTIFF/APPELLANT

VERSUS

BARNABAS A. KIPRO.....DEFENDANT/RESPONDENT

RULING

The Application before me comes by way of notice of motion dated 8th August, 2011. It is premised on Order 8 Rules 3 and 8 of the Civil Procedure Rules. It seeks order as follows:

“1. That this honourable Court grant leave to the Defendant to amend the defence herein to include a counter claim in terms of the Draft Defence. Annexed to the Affidavit of Mr. Barnabas A. Kiprono sworn in support of this application.”

The Applicant’s grounds for the amendment are that it is necessary so as to enable the court to effectively and completely adjudicate all the matters in issue.

In essence, the Applicant avers in his Affidavit that the plaintiff, as his counsel in land a transaction was guilty of negligence and or breach of professional and fiduciary duty leading to the Respondent being defrauded of Ksh.10, 000,000/-; that the Respondent induced the Applicant into being sold a non-existent property; and that the Respondent had agreed to make a refund to the Applicant but issued refund cheques which were returned unpaid.

The applicant has annexed a draft amended defence incorporating a counterclaim. He also requests the court to make such consequential orders as it deems fit and to provide to costs of the application.

The parties agreed through a consent recorded in court on 7th November, 2011 that the Motion be disposed off by written submissions. The Defendant’s submissions were to be filed within 7 days, and the Respondent’s submissions were to be filed within 7 days after service of the Applicant’s submissions.

The Applicant filed his submissions on 11th November, 2011. The Respondent did not file any written submissions. The Application is, however, defended because the Respondent had, on 21st September, 2011, filed a Replying Affidavit deponed by himself on that date, opposing the motion.

In his Replying Affidavit, the Respondent sets out a blow by blow account of how the Applicant

appointed him to act in a land transaction; how the Applicant introduced him to the vendor of the land in issue; the drawing of the Agreement; how while in the process of acquiring consent, the Applicant demanded all the completion documents including the titles; and that he released all such documents as he had to the Applicant who completed the registration process. In paragraph 11 he states:

“11. That the defendant/applicant has not demonstrated that he is merit to granted leave to defend his defence and include claim after this matter has been filed in the year 2009 and came up for hearing on several occasions.”

Ignoring the grammar, the Respondent’s objection to the application is that it is coming too late in the day; two years after the filing of the suit and after the suit had been fixed for hearing on 26th September, 2011.

As earlier stated the Application is made under Order 8 Rules 3 and 8 of the Civil Procedure Rules. Rule 8 allows the application to be made orally. Rule 3 provides as follows:

“ 3. Subject to Order 1 Rules 9 and 10; Order 24 Rules 3, 4, 5 and 6 and the following Provisions of this Rule, the Court may at any stage of the proceedings, on such terms as to costs for otherwise or may be just and in such manner as it may direct, allow any party to amend his pleadings.”

The Applicant has relied on several authorities, not all of which I need to review. However, I mention the leading ones:

(1) **Eastern Bakery vs Castelino (1958) EA 461**, the acclaimed authority on the principles upon which amendment will be allowed. There the Court of Appeal held that:

“amendment 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.”

(2) **Central Kenya Limited and Trust Bank Limited, Trust Finance Limited, Floriculture International Limited, First National Finance Limited, and Registrar of Titles Civil Appeal 111 of 1998** (unreported) in which it was held that:

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed, and at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be compensated for in costs.”

It is also trite law, and restated in the above cases, that the discretion given to a judge to grant or deny leave to amend, will not generally be interfered with by the appellate court, unless it appears that in reaching his decision he has proceeded upon wrong materials or upon a wrong principle.

The Applicant’s draft defence seeks to include a counterclaim against the plaintiff, and incorporates a claim for special damage. That does not raise any complications, on which Order 1 Rule 9 and 10 need to be invoked; nor does it touch on anything under Order 24.

The Respondent’s only objection is that the application is made late and is not merited. The answer to these concerns is clearly that an application to amend may be made at any stage of the proceedings, and is merited by virtue of the majesty of the law and on account of the fact that the Respondent raises no concerns about prejudice.

Given the foregoing, I have no hesitation in granting the Applicant leave to amend the claim, and he shall file and serve the same within seven (7) days of the date hereof. Consequently, the Respondent is also hereby granted leave to file a defence to the counterclaim within seven (7) days of being served with the counterclaim. The Applicant shall bear the costs of this application.

Dated and delivered this ...29thDay of ...November,2011.

R.M. MWONGO

JUDGE OF THE HIGH COURT

Read in open court

Coram:

1. Judge: Hon. E. Muriithi

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d).....