



REPUBLIC OF KENYA



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Kihara v Gituma t/a Dona Snacks & 2 others (Environment and Land Case Civil Suit 1190 of 2013) [2022] KEELC 13326 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 13326 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1190 OF 2013
MD MWANGI, J
SEPTEMBER 30, 2022

BETWEEN

MICHAEL NGURURI KIHARA APPLICANT

AND

JUSTUS GITUMA T/A DONA SNACKS 1ST RESPONDENT

JOHN MWANGI MUHIA 2ND RESPONDENT

KENYA RAILWAYS WORKERS UNION 3RD RESPONDENT

(Ruling in respect of the Notice of Motion Applications dated the 14th June, 2022 by the 2nd Defendant and that of the 27th June, 2022 by the Plaintiff as well as a Preliminary Objection dated 27th June, 2022 by the Plaintiff)

RULING

Background

1. Before this court are two applications and a preliminary objection for determination. There is a notice of motion application dated the June 14, 2022 by the 2nd defendant and the plaintiff's notice of motion dated June 27, 2022 and a preliminary objection of even date.
2. I will deal with the plaintiff's preliminary objection alongside the 2nd defendant's application first since the preliminary objection is in response to the 2nd defendant's application.

2nd Defendant's Notice of Motion Application Dated 14th June, 2022

3. The 2nd defendant has moved this court seeking for orders that he be granted leave to amend his defence dated November 12, 2013 and raise a counter-claim. Further that the costs of that application be provided for.



4. The application is premised on the grounds that there was an oversight in the framing of the evidence on the defense and counter-claim. Further, that it is necessary to amend the defense and raise a counter-claim to allow the court adjudicate all matters fully and in their merits.
5. The application is further supported by the 2nd defendant's own supporting affidavit deposed on the June 14, 2022. He avers that upon changing his advocates to the current advocates on record, he has been advised that it will be necessary that a counter-claim be filed for the court to adjudicate all the claims by the parties at the same time.
6. The 2nd defendant deposes that failure to file the counter-claim was not intentional but a mistake of his former advocate which ought not to be visited on him. He asserts that the counter-claim has triable issues and no prejudice shall be suffered by any party if the prayers sought are granted.
7. The application was opposed by the plaintiff who filed a preliminary objection dated June 27, 2022.

Plaintiff's Preliminary Objection

8. The plaintiff's grounds of objection are that the intended amendments raise an entirely new cause of action. Further that the pleading is fatally defective as it is uncertain as to who is the intended defendant of the claim being introduced by way of the proposed counter-claim.
9. The plaintiff contends that the intended amendment will occasion undue delay in the finalization of his case, as the 2nd defendant is yet to draft and file all the documents that are required to accompany the counter-claim.
10. The plaintiff asserts that the 2nd defendant should file his own independent claim as against the 1st defendant. The draft counter-claim is not tenable as against a co-defendant, the 1st defendant.

Court's Directions

11. On the June 28, 2022, the court directed that the applications be dispensed with together and by way of written submissions. Parties requested for 14 days within which to comply. However, none of the parties complied with the said directions on filing submissions. The court therefore proceeded without submissions from both parties.
12. The 1st defendant despite being served with the applications, did not file his response on time. The court record confirms that the 1st defendant was actually represented by his advocate on the day that directions were given. However, on the August 18, 2022, the 1st defendant filed a replying affidavit deposed on the same day in response to the two applications. He also filed a notice of preliminary objection dated the August 18, 2022 in further response to the plaintiff's notice of motion application dated the June 27, 2022. The said responses were not only filed out of time but also filed without leave of court. The plaintiff and the 2nd defendant did not have a chance to respond to issues raised by the 1st defendant therein. The replying affidavit by the 1st defendant sworn on August 18, 2022 and the preliminary objection will therefore not be considered by this court. Consequently, they are hereby expunged from the record of the court.

Issues for Determination

13. The court is of the opinion that the issue for determination is whether the 2nd defendant should be granted leave to amend his defence dated November 12, 2013 and raise a counter-claim as proposed.



Analysis and Determination

14. The general power of the court to amend pleadings is based on section 100 of *Civil Procedure Act*. Parties to a suit have a right to amend their pleadings at any stage of the proceedings; so long as the same will enable the court to determine real issues in dispute between the parties.
15. Courts are usually liberal when it comes to allowing a party to amend his pleadings, unless, it is demonstrated that great prejudice will be caused to the other party, which prejudice cannot be remedied by an award of costs. In the case of *Eastern Bakery v Castelino* (1959) EA 461, the court held that: -

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs”.
16. Counterclaims on the other hand are provided for under order 7 rule 3 of the *Civil Procedure Rules* which provides: -

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”
17. The *Black’s Law Dictionary*, 11th edition defines a counter-claim as ‘a claim for relief asserted against an opposing party after an original claim has been made; especially a defendant’s claim in opposition to or as a set off against the plaintiff’s claim.’
18. *Halsbury’s Laws of England*, 4th edition, vol 42 on its part explains a counter-claim by giving a case scenario as follows: -

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”
19. It goes further to elaborate that,

“any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by a counter-claim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff’s claim. Thus not only claims for money but also other claims such as a claim for injunction or for specific performance or for declaration may be the subject of a counter-claim.”



20. The Supreme Court of India in the case of *Sh Jag Mohan Chawla & Another v Dera Radha Swami Satsang & Ors* on May 7, 1996, while interpreting the equivalent of our order 7 rule 3 of the *Civil Procedure Rules* couched in similar terms rendered itself thus: -

“...The counter-claim expressly is treated as a cross suit with all the *indicia* of pleadings as a plaint including the duty to aver his cause of action and also payment of the requisite court fee thereon. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in respect of any cause of action that has accrued to him even though it is independent of the cause of action averred by the plaintiff and have the same cause of action adjudicated without relegating the defendant to file a separate suit...”

21. The Court of Appeal in the case of *County Government of Kilifi –vs- Mombasa Cement Limited* [2017] eKLR citing the above Indian Supreme Court decision stated that

“...a defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action maybe different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on same or different cause of action between parties to the suit to enable a court to pronounce a final judgment in the suit both on the original claim and on the counter claim. However, order 7 rule 3 of the Civil Procedure Rules gives court a wide discretion such that, on the application of the plaintiff, the court may reject a counterclaim where it would not be convenient or where in the opinion of the court, the counterclaim ought not to be allowed. No doubt, that is a wide discretion and the reasons as to why a court would disallow a counterclaim would be many and varied to be decided on a case-by-case basis.”

22. A close scrutiny of the 2nd defendant’s draft intended ‘counter-claim’ discloses that it is not against the plaintiff rather it is a claim against Justus Gituma, the 1st defendant in this case. At paragraph 17 of the draft proposed counter-claim, the 2nd defendant avers that the 1st defendant who was a stranger to him, invaded and evicted him out of his premises destroying everything and felling away his construction materials and eventually taking over the said premises from him illegally. He therefore prays that the plaintiff’s for judgement against him for a sum of Kshs 2,400,000/=. He also prays for mesne profits.
23. Strictly speaking, a counter-claim can only be filed by a defendant(s) as against a plaintiff(s). it is a ‘cross-suit’ by the defendant against the plaintiff. It is a ‘counter-action’ or a ‘counter-suit’.
24. From the foregoing, it is evident that the 2nd defendant’s claim is not a counterclaim as defined above. It does not qualify as a cross-suit or a counter-action against the plaintiff either. The intended claim is a new and distinct claim against the 1st defendant. As correctly stated by the plaintiff, the 2nd defendant ought to file his own case as against the 1st defendant.
25. Since the 2nd defendant has not sought any other amendment in his defence other than raising the ‘counter-claim’ leave is hereby denied.
26. Accordingly, the application by the 2nd defendant dated June 14, 2022 is hereby dismissed with costs to the plaintiff.



Plaintiff's Application dated 27th June, 2022

27. The plaintiff on his part in his application dated June 27, 2022 prays that the court be pleased to grant him leave to amend his plaint, in terms of the draft amended plaint annexed thereto. The plaintiff further prays that once leave is granted, the draft amended plaint and the supplementary list and bundle of documents and written witness statement(s) be deemed as duly filed and served.
28. The application is premised on the grounds that some claims were not adequately pleaded in the plaint due to an oversight. He alleges that he realized this while preparing for the hearing. It is therefore necessary for leave to be granted to allow him to amend the plaint as some genuine reliefs founded on the same cause of activities could be locked out unless the plaint is amended as proposed.
29. The application is further supported by the supporting affidavit of the plaintiff, Michael Ngururi Kihara sworn on the June 27, 2022. The plaintiff restates the grounds on the face on the application. He depones that while preparing for the hearing of the case, he found out that some claims as they were, due to an oversight, had not been adequately pleaded in the plaint. He states that it is necessary that he amends the plaint for the court to adjudicate all the claims by the parties at the same time. That the intended amendments are necessary to enable the court to effectively and justifiably adjudicate upon and settle all the questions and issues involved in this suit.
30. The application was not opposed by the either party save for the 1st defendant who filed the responses on the August 18, 2022. The said responses have been expunged from the record of the court for the reasons earlier on stated. The application is therefore unopposed.

Issues for Determination

31. Having considered the plaintiff's application herein and the affidavit in support thereof the only issue for Determination is whether the plaintiff's notice of motion application seeking amendment of the plaint is meritorious.

Analysis and Determination

32. The law as regards the grant of leave to amend is well settled. The general rule on this subject, as stated above, 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. (See *Eastern Bakery vs Castelino* (1958) EA 461).
33. In the case of *Joseph Ochieng and 2 others Trading as Aquiline Agencies -vs- First National Bank of Chicago* (1995) eKLR, the Court of Appeal citing with approval from *Bullen and Leake and Jacob's Precedents of Pleading*, 12th Edition, restated the principles which courts must consider in an application for leave to amend pleadings as follows: -
 - a) the powers of the court to allow amendments is intended to determine the true, substantive merits of the case;
 - b) amendments should be timeously applied for;
 - c) power to so amend can be exercised by the court at any stage of the proceedings; (including appeal stages)
 - d) 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;



- e) the plaintiff will not be allowed to re-frame his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.
 - f) the exact nature of proposed amendment sought, ought to be formulated and be submitted to the other side and the court;
 - g) that adjournment should be given to the other side if necessary if an amendment is to be allowed;
 - h) that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed;
 - i) that the proposed amendment must not be immaterial or useless or merely technical;
 - j) that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed;
 - k) 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;
 - l) 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.
34. I have perused the draft amended plaint, I note that the amendment being proposed is on the amounts being claimed arising out of typographical errors on the additions. The plaintiff further prays for loss of anticipated profits, which although prayed for had not been particularized. the amendment seeks to include a prayer a claim for interest on both damages and on anticipated profits.
35. As held in numerous judicial precedents, a party may be allowed by the court to amend the pleadings any time before trial for the purpose of determining the real question in controversy. In the instant case, I do find that the applicant has reasonably explained the delay and justified the need for the amendments.
36. For the above reasons and having regard to the cited authorities on amendment of pleadings, and the unique circumstances of this case, this court will allow the plaintiff's application as follows: -
- a) The plaintiff is granted leave to amend its plaint.
 - b) The amended plaint to be filed and served within 7 days from the date of this ruling.
 - c) The defendants are granted corresponding leave to amend, file and serve an amended defence, if need be, within 14 days from the date of service of the amended plaint.
 - d) The plaintiff is at liberty to file the supplementary list and bundle of documents alongside the amended plaint.
 - e) The costs of the plaintiff's application dated June 27, 2022 shall abide the outcome of the main suit.
 - f) The 2nd defendant's application dated June 14, 2022 is dismissed with costs to the plaintiff.



It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF SEPTEMBER 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of: -

Ms. Wangari for Kihara for the Plaintiff

Ms. Waweru holding brief for Gachomo for the 2nd Defendant/Applicant

Ms. Mbaka for the 3rd Defendant

Ms. Awuor for the 1st Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE

