



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 112 OF 2018

FELICITA CONTE.....PLAINTIFF

VERSUS

ALFRED MUTUA.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated and filed herein on 27th June 2019. By the said application, Felcilita Conte (the Plaintiff/Applicant) prays for leave to amend her Complaint dated 21st May 2018. The application which is supported by the Plaintiff's own affidavit is premised on the grounds that: -

a) The Plaintiff filed the Complaint dated 21st May 2018 seeking an order of injunction against the Defendant/Respondent to restrain him from developing a water closet on his chalet which is adjacent to the dining section of the Applicant's chalet;

b) Though served with the pleadings and aware of the suit, the Respondent continued constructing the water closet upto completion;

c) The Respondent's actions have rendered the Plaintiff's suit useless as the prayers sought in the Complaint have been overtaken by events;

d) The Plaintiff seeks leave to amend the prayers in the Complaint as she continues to suffer the nuisance and health risks brought forth by the Respondent's water closet; and

e) The Plaintiff is apprehensive that she shall suffer irreparably if the orders sought herein shall not be granted.

2. The application is however opposed. In a Replying Affidavit sworn and filed herein on 11th October 2019, Dr. Alfred Nganga Mutua (the Defendant/Respondent) avers that he owns Chalet No. 13 at Karibuni Villas in Malindi and asserts that the entire suit herein is unmerited, misconceived and an abuse of the Court's process.

3. The Defendant avers that he purchased the suit property in 2013 and states that all approvals for construction, renovation, expansions and additions including the ultra-modern visitors toilet complained of were procedurally obtained from the relevant authorities. The Defendant further avers that the request to amend the Complaint to replace the order of injunction restraining the construction of the toilet with an order to compel him to adjust the plan and relocate the toilet has been brought too late in time as the renovations are now complete.

4. The Defendant accuses the Plaintiff of interfering with his right to quiet ownership, possession and enjoyment of his private property. He further asserts that the toilet does not violate the Plaintiff's rights of use and enjoyment of her chalet and hence the orders sought herein are unmerited.

5. I have perused and considered the Motion by the Plaintiff and the Defendant's response thereto. I have equally perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

6. The law as regards the grant of leave to amend, I think is now well-settled. 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. (*see Eastern Bakery –vs- Castelino (1958) EA 461*). In this respect, an amendment should not be allowed if it causes injustice to the other side.

7. In the matter before me, this suit was instituted by a Plaintiff dated 21st May 2018 wherein the Plaintiff is seeking an order restraining the Defendant from proceeding with the construction and or development of a water closet to his chalet which is apparently bordering the dining section of the Plaintiff's own adjacent Chalet No. 14 at Karibuni Villas in Malindi.

8. Filed contemporaneously with the suit was a Notice of Motion dated the same day 21st May 2018 seeking inter alia, temporary orders of injunction to restrain the construction. When the said application came up for hearing inter partes on 22nd May 2018, the parties withdrew the same by consent upon informing the Court that the renovations and constructions sought to be restrained had since been completed.

9. It is accordingly the Plaintiff's case that the Defendant proceeded to complete the constructions during the pendency of this suit. While the Defendant denies that accusation, it is clear to me as submitted by the Plaintiff that the substratum of the dispute has shifted somehow and that there is need to panel-beat the Plaintiff to bring the real matters in dispute before the Court for determination.

10. While the Defendant contends that the intended amendment is unmerited and misconceived as the Plaintiff had no case in the first place, I think that is an issue that can be determined at the trial. Otherwise it is clear to me that the application was brought within reasonable time and that the dispute between the parties remains unresolved.

11. Order 8 Rule 3(5) of the Civil Procedure Rules is clear that: -

“An amendment may be allowed under sub-rule (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.”

12. Having looked at the nature of the intended amendments, I am persuaded that the same shall not occasion any prejudice to the Respondent as the nature of the cause of action remains the same and the Defendant shall be afforded an opportunity to respond thereto and adduce evidence thereon.

13. In the premises, I am persuaded that there is merit in the Motion dated 27th June 2019. I allow the same with costs to be in the cause.

14. The Plaintiff is accordingly granted 14 days within which to file and serve an amended Plaintiff. The Defendants shall have a similar period after service to file and serve an Amended Statement of Defence if need be.

15. Orders accordingly.

Dated, signed and delivered at Malindi this 22nd day of January, 2021.

J.O. OLOLA

JUDGE