



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL SUIT NO.365 OF 1999

ROSEMARY MUTHONI MSAFIRI..... PLAINTIFF

VERSUS

ELIZABETH MSAFIRIDEFENDANT

R U L I N G

The application before the Court is brought by the Defendant and is dated 14.1.2001. It seeks leave to amend the defence herein with a view to add a counterclaim. The draft amended pleadings were annexed to the application . It is on the record that the pleadings in this suit started in 1989. They relate to plot NO.1556 Mikindani in Mombasa. The plot was allocated by the Mombasa Municipal Council to the applicant/Defendant. Perusal of the pleadings would suggest that the plot was developed sometimes before 1990 either by the Plaintiff's husband who is now deceased, alone or jointly with the Defendant who is still the registered owner. There is an issue as to whether or not the Defendant/Applicant sold the plot to the plaintiff's deceased husband sometimes between 1988 and 1989.

The plaintiff's husband however , took possession and occupation of the developed premises before 1990 and resided therein with his wife the Plaintiff herein with their children until he died in 1994, leaving plaintiff in possession. This continued until this suit was filed in 1997. There is no dispute that in 1999 under an application dated 5.10.99 brought by the plaintiff the Defendant was also allowed by this Court besides the plaintiff, to file an amendment to the defence, within 30 days, of the service upon her of the amended Plaintiff. The records confirm that the Defendant after being served with the amended plaintiff did not file any amendments thereto, either because she may have found such leave for amendment unnecessary or because she was negligent or reckless about it. Whatever were her reasons for her failure to file such amendments, however, she now seeks for leave to amend her defence to include a counter claim for a declaration that the plaintiff holds the suit premises on trust for her own husband's estate as well as for the defendant, in equal shares, in which case the defendant would also be entitled to half the proceeds of sale if the property is sold, which relief the defendant also seeks to include in the draft amended defence.

The Plaintiff/Respondent's answer to this application is that the draft amendment issues to be raised in the intended counter-claim would be timebarred since they are contractual and are being asserted after a period of six years since 1994. She asserted further, that under those circumstances, an independent application to file the counter claim should have been filed. She also asserted that even if it were not time barred as within the limitations of Actions Act, the application is faced with the difficulty of inordinate delay since the suit was filed in 1997. And she finally also raised the issue that the defendant was given leave to amend under the application dated 5.10.1999 and she cannot again come for an independent leave to amend. The Court understood this to mean that what the defendant ought to have done is to seek for an extension of the leave granted under the orders of 7.12.1999 under the said application of 5.10.1999.

In answer to the plaintiff's objections the Defendant argued that the contract in question was one concerning land and the development thereof, whose time limitation is not six years but 12 years which by calculation would not arrive until 2006 from 1994 when the dispute between the parties herein arose.

I have considered the arguments put forward by the counsel of both parties, Mr. Muinde for the applicant and Mr. Muraya for the Respondent. I have also perused the pleading and other related documents in the record. It is my finding that this is a suit concerning land. The contract allegedly entered between the Defendant and the Plaintiff's husband before the latter died, concerned a piece of land known as Mikindani NO.1556, in Mombasa. The plaintiff claims that the Plot was sold to her deceased husband at Ksh.50,000/= sometimes in 1987 or 1988. The deceased's husband took possession of and developed the same. He then occupied it with the Plaintiff and their children. All these facts, without making a finding on them, are indicative of some arrangements or agreement between the Defendant and the plaintiff's husband. It may or may not be correct to say that the defendant had sold the plot to the plaintiff's husband or that she had agreed with the plaintiff's husband to develop the Plot jointly. Whatever may have been the agreement, and this awaits to be proved by evidence during the hearing of the main suit, was an agreement related to land and the limitation period would be not 6 years, but 12 years from the time the cause of action arose.

It is not in dispute also that this Court has an unfettered judicial discretion to grant or refuse leave to amend pleadings. The discretion and power of this Court to allow any amendments, particularly under Order 6A is meant or intended for the Court to determine the real question in controversy between the parties in order to enable the Court decide the rights of the parties fully and conclusively. The Court will accordingly, where it is not barred by law, in its wide discretion, allow such necessary amendments sought by either party, with a view to prevent the likely failure of justice due to procedural errors, mistakes and defects arising from the acts of the parties so long as such errors, mistakes or defects are not fraudulent and/or may not bring injustice to the other party who can be compensated in costs. While the Court will wish that parties must obey the procedural rules and will in most cases insist on obedience of the same, it will nevertheless, where it has discretion such as in under O.6A of the Civil Procedure Rules, override the rules and decide in favor of granting leave to amend for the sake of deciding matters in controversy, and in such cases, the Court is really not exercising any favour to any party but being dictated by and for the ends of justice. Indeed it becomes a party's right and not a favour to him, to be given leave to amend if such amendment will appear to establish the really issues in controversy between the parties and that such amendments will not lead into injustice to the other party and can be compensated in costs.

Under Order 6A aforementioned Rule 3(l), such amendments can be allowed at any stage of the proceedings. This, in my view, would include before, or at or after the trial and even after judgment or on appeal, as asserted by the Court of Appeal in DANIEL MWIGI NJAI VS VIEW FARM LTD & ANOTHER – C.A.NO. 139 OF 1989 (UR). I have examined the contents of the intended amendments. If allowed they will bring before this Court squarely the issue as to whether or not the applicant herein sold the suit premises to the Respondent's deceased husband. They will also establish whether the applicant contributed towards the development of the Plot and if so, how much and towards what end. Indeed, in the draft amended defence, the Defendant for the first time during the pleadings appears (without deciding) to admit that the developed suit premises is or should be held in equal shares, which does not appear in the original defence. This means in one way, the amendment if allowed, will not prejudice the Respondent/Plaintiff, subject to payment of costs by the applicant/Defendant to compensate the plaintiff. The application to amend has been brought very late in the day, even after the suit had once been set down for a hearing on 19.7.2000. This raises the issue as to whether or not the Defendant/applicant's intention to amend was genuine or on second thought. Be that as it may, I have decided to allow this application on the terms following.

ORDER:

- 1. The application for leave to amend is hereby allowed and the draft defence is hereby deemed to be the amended defence/and counter claim subject to payment of the necessary court fess within 7 days.*

2. *The plaintiff shall file his defence to the counter claim within 14 days of this order.*

3. *The Defendant shall file a Reply if any, within 7 days after the service to her of the said Reply.*

4. *The Defendant shall pay the plaintiff her costs of this application on throw-away basis, to be agreed upon or taxed before the final determination of this suit.*

Dated and delivered at Mombasa this.....day of August, 2002.

D.A. ONYANCHA

JUDGE

Delivered in the presence of:

.....- **for Applicant/Defendant**

.....**for Respondent/Plaintiff.**