



REPUBLIC OF KENYA



KENYA LAW
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Reliable Electrical Engineers (M) Ltd v Fundi Island Resort Limited & 2 others (Environment & Land Case 66 of 2021) [2023] KEELC 16065 (KLR) (13 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 66 OF 2021**

**AE DENA, J
MARCH 13, 2023**

BETWEEN

RELIABLE ELECTRICAL ENGINEERS (M) LTD PLAINTIFF

AND

FUNDI ISLAND RESORT LIMITED 1ST DEFENDANT

SIDIAN BANK LIMITED 2ND DEFENDANT

THE LAND REGISTRAR KWALE 3RD DEFENDANT

((FORMERLY ELC. NO. 211 OF 2020 MOMBASA))

RULING

1. This suit is partly heard. The Plaintiff gave evidence through its director Manoj Shah on November 7, 2022 and closed its case. On February 9, 2023 the 1st defendant called Vincent Ochieng to give evidence in support of its case. The witness was duly cross examined and re-examined by counsels for the Defendants and his counsel respectively. Mr Obok counsel for the 1st and 2nd defendant was ready to proceed with his next witness. Due to time constraints the court noted it was not feasible to put another witness on the stand and was therefore inclined to adjourn the hearing to another date.
2. Mr Makuto appearing for the 3rd Defendant informed the court he had come across new evidence which was the existence of criminal case No 323 of 2021 Republic Vs Shabir Mohamed Haji which was in the day's cause-list for court No 3 at Kwale. That he got to know of the same through the Land Registrar who had been summoned as a witness in the case and who he had also placed on standby as his witness in the present proceedings. He told the court that he had a chance to speak to the investigation officer and upon perusal of the investigation file he discovered material evidence that he found necessary to produce in the present proceedings. He sought leave to file further list of documents and witness summons to issue to the investigation officer to produce the file and Mr Andrew IO Mandi



the advocate who is shown to have witnessed the sale agreement while working at the firm of Aminga & Co Advocates.

3. Mr Obok objected to the application pointing to the need for him to see the alleged documents and or investigation file to enable him respond to the application appropriately. He however did not have objection to the filing of the same. Mr Njoroge for the plaintiff did not have any objection if the same were going to assist the court in rendering justice. Subsequently the documents were filed vide 3rd Defendants Further List of Documents on February 22, 2023.
4. Parties pursuant to the court directions appeared before me on March 2, 2023 to make submissions on the application. Mr Makuto referred the court to page 30-31 and 32-34 statements by Mr Waweru and Mr Mandi both advocates, and whom he applied for summons to issue. The plaintiffs did not object for the same reasons cited earlier. Mr Obok on the other hand had no objections to this application. However, he sought for leave to file an application to amend aimed at introducing a counterclaim against the plaintiff and the firm of Mr Aminga. He submitted that the 1st defendants' case was hinged upon the fact that they purchased the suit property with benefit of counsel during the conveyance yet Mr Aminga was not being summoned. That the application had been triggered by Mr Makuto's application. Further that it was not his client's fault that the documents which are very grave to their case were being produced at this point.
5. Mr Njoroge objected to the application to introduce the counterclaim. He submitted that the documents filed by the 3rd Defendant did not depart much from what was already on record and the counterclaim should be addressed during the final submissions as the matter was also getting to being finalized. Mr Makuo left the matter to the court.
6. I reserved the matter for ruling on March 13, 2023 to allow for time to make a ruling with the advantage of having perused the bundle.

Determination

7. The application before me is an application to amend the Defence of the 1st & 2nd Defendant with a view to lodging a counterclaim against the 1st defendant and the 3rd Defendant. Ordinarily a formal application for leave was required which I dispensed pursuant to the provisions of order 8 Rule 8 to expedite the matter owing to the fact that some witnesses had already given evidence.
8. Order 8 Rule 3 of the [*Civil Procedure Rules*](#) provide for the amendment of pleadings as follows; -

Amendment of pleading with leave [Order 8, rule 3.]

- (1) 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 or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be



corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (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.

9. The above provisions clearly mandate the court to allow any party to amend his pleadings on such terms as may be just including a counterclaim. The Court of Appeal in *Central Kenya Ltd Versus Trust Bank & 5 Others [2000] eKLR* stated 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 properly be compensated for in costs.
10. From the above it does not matter that the Plaintiffs had already closed its case and part of the defence evidence had already been taken. In any case the entire suit case had not yet closed and even if it had, provision is also made for re-opening a case for justifiable reasons. While the Counterclaim is being sought to be introduced I do not find any prejudice or injustice that will be suffered by the Plaintiff or even the Land Registrar as long as the parties affected are allowed to respond to it appropriately as required under the rules including cross examining the defendant who will be a plaintiff for purposes of the counterclaim. It is also my view that the overriding objective should be for the just determination of the controversy between the parties.
11. The upshot of the foregoing is that I will re-open pretrial directions and allow the 1st Defendant to amend their statement of defence as applied to this court within 14 days of today's date and which shall be deemed as duly filed. The rest of the parties shall have to respond thereto within 14 days of service.
12. The mater shall be set down for further directions on May 9, 2023.

Orders accordingly.

Delivered and Dated at Kwale This 13th Day of March, 2023

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Obok for Applicant/1st & 2nd defendants

Mr. Njoroge for the Plaintiff

Mr. Makuto for the 3rd Defendant

Mr. Disiii- Court Assistant.

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