



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CASE NO 61 OF 2016

KENYA ELECTRICITY

GENERATING COMPANY LTD.....PLAINTIFF

VERSUS

1. ABDULRAHMAN M. AHMED

2. DIRECTOR OF SURVEYS

MINISTRY OF LANDS & PHYSICAL PLANNING

3. DIRECTOR OF PHYSICAL PLANNING

MINISTRY OF LANDS AND PHYSICAL PLANNING

4. CHIEF LAND REGISTRAR

5. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By this Notice of Motion dated 19th December 2019 as filed herein on 22nd January 2020, Abdulrahman Mohamed Ahmed (the 1st Defendant/Applicant) urges this Court to strike out the undated Further Amended Plaintiff filed herein on 25th November 2019 as well as the Amended Plaintiff filed herein on 2nd October 2019.

2. The application which is supported by an Affidavit sworn by the 1st Defendant's Advocate on record Yusuf M. Aboubakar is premised on the grounds that: -

i) Having sued only one Defendant and the pleadings having closed, the Plaintiff ought to have made a formal application for leave to join the other Defendants and for amendment of the Plaintiff;

ii) The Defendant was never served with any application seeking to join the 2nd to 5th Defendants and or to amend the Plaintiff;

iii) It is an abuse of the Court process to join the parties to a suit without leave of the Court;

iv) The Defendant/Applicant shall highly be prejudiced if the Further Amended Plaintiff and the Amended Plaintiff are not struck out as the Plaintiff is introducing new causes of action against him.

3. But by Grounds of Opposition dated 26th October 2020 as filed herein on 27th October 2020, Kenya Electricity Generating Company PLC (the Plaintiff) is opposed to the application on the grounds: -

1. That the 1st Defendant's Notice of Motion (is) unmerited and an abuse of the process of this Honourable Court and (it) ought to be dismissed with costs.

2. That the pleadings have not closed and the Defendants particularly the 1st Defendant is yet to comply with pre-trial requirements pursuant to Order 11 of the Civil Procedure Rules. The matter has not been certified ready for hearing.

3. That pursuant to the order of the Court dated 2nd October 2019, the parties were granted leave to file amended pleadings.

4. That despite service of mention notices to the Defendants and particularly the 1st Defendant requiring them to attend Court, the said parties have failed to attend Court and comply with the Court's directions on case management conference.

5. That in any event, the joinder of the 2nd and 5th Defendants is necessary for the effective determination of the real issue in question in order to enable the Court completely adjudicate upon and settle all questions involved in the suit.

6. That this being the Plaintiff's suit and noting that the pleadings have not closed, the Plaintiff has the right to enjoin the parties in the interest of justice as the determination of the issues in controversy will require the participation and/or presence of all parties in Court.

7. That it is in the interest of justice that the 1st Defendant's application be dismissed with costs.

4. I have considered both the 1st Defendant's application and the grounds filed in opposition thereto by the Plaintiff. I have similarly perused and considered the oral submissions made before me by the Learned Advocates for the parties.

5. Order 8 Rule 1(1) of the Civil Procedure Rules provides thus: -

"A party may, without the leave of the Court, amend any of his pleadings once at any time before the pleadings are closed."

6. Order 8 Rule 2(a) and (b) of Civil Procedure Rules on the other hand provides that: -

"Where an amended Plaint is served on a defendant-

(a) If he has already filed a defence, the defendant may amend his defence; and

(b) The defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended Plaint whichever is later."

7. It is therefore clear that the law gives a party the right to amend any of its pleadings without leave once before the close of pleadings. As to when those pleadings close, Order 7 Rule 1 of the Civil Procedure Rules provides as follow: -

"Where a defendant has been served with a summons to appear, he shall, unless some other or further order be made by the Court, file his defence within fourteen days after he has entered appearance in the suit and serve it on the Plaintiff within 14 days from the date of the filing of the defence and file an affidavit of service."

8. Arising from the foregoing, pleadings close some fourteen (14) days after filing of the defence and service of the same upon the Plaintiff. This suit was filed on 16th March 2017 and upon its service upon the 1st Defendant, he filed a Defence and Counterclaim herein on 21st April 2016. The Plaintiff on its part filed a Reply to Defence and Counterclaim, on 19th May 2016 effectively bringing the filing of the pleadings herein to a closure.

9. Subsequently and by an application dated 15th March 2016, the Plaintiff sought orders of injunction to issue restraining the sole Defendant from interfering with its quite possession of the suit property. Those orders were granted on 2nd May 2017 after which nothing much happened in these proceedings for some two years.

10. On or about 19th March 2019, when this matter came up in Court, none of the parties was in attendance. Taking note of the time the matter had remained unprosecuted in Court, this Court on its own Motion issued a Notice to Show Cause to the parties to appear before it on 30th May 2019 and Show Cause why this suit should not be dismissed for want of prosecution.

11. From the record, none of the parties again attended Court on the said 30th May 2019 and this Court proceeded to dismiss the suit. However, aggrieved by the said orders, the Plaintiff filed herein an application dated 27th August 2019 seeking to set aside the dismissal order of 30th May 2019. It further sought an order as follows: -

d) That the Plaintiff/Applicant be granted leave to amend its Plaint as per the annexed Draft Amended Plaint.

12. On 2nd October 2019 when the said application came up for hearing, it was allowed by the consent of the parties subject to the payment of some Kshs 30,000/- described as "thrown away" costs to the Defendant. The parties also agreed by the said consent that the Plaintiff be at liberty to amend its pleadings within 14 days and that the Defendant files his own amended Defence if need be within 14 days of service. The parties further agreed to subsequently appear before the Deputy Registrar of this Court on 25th November 2019 for pre-trial directions.

13. On the very 2nd October 2019, when the consent was recorded, the Plaintiff filed an Amended Plaintiff dated 31st July 2019 wherein it sought to enjoin the Director of Survey, the Chief Land Registrar and the Honourable the Attorney General as the 2nd, 3rd and 4th Defendants herein.

14. It was not apparent from the record when this Amended Plaintiff was served upon the 1st Defendant. There was indeed no response from the 1st Defendant thereto. It was however clear that on 25th November 2019 when the matter came up for pre-trial, the Plaintiff filed a Further Amended Plaintiff dated 20th November 2019 with four additional Defendants respectively named therein as the Director of Surveys, the Director of Physical Planning, the Chief Land Registrar and the Honourable the Attorney General.

15. When the matter was placed before the Deputy Registrar for pre-trial on that date, the 1st Defendant was absent. A perusal of the record reveals that the Plaintiff had by then served the additional Defendants and it sought 30 days to be able to serve a fresh and file a Return of Service. The matter was subsequently adjourned to 23rd January 2020. However, on 22nd January 2010, the 1st Defendant moved to Court and filed the present application before the Court.

16. I think the law as regards amendment of pleadings is 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*). The Courts will however not permit an amendment that is inconsistent with the original pleadings and entirely alters the nature of the defence or Plaintiff (*see Abdul Karim Khan –vs- Mohamed Roshan (1965) EA 289. (CA)*).

17. Taking those principles into consideration, it is apparent to me that by the consent recorded herein on 2nd October 2019, the 1st Defendant consented to the introduction of the new parties as sought under Prayer ‘d’ of the Motion dated 27th August 2019 filed by the Plaintiff as mentioned hereinabove. The Draft Amended Plaintiff annexed to the Supporting Affidavit of David Mwangi, the Plaintiff’s Legal Manager as annexure DM-2 clearly indicated the Plaintiff’s intention to join the Director of Surveys, the Chief Registrar of Lands and the Honourable the Attorney General as parties in this suit.

18. The 1st Defendant accepted their introduction and cannot be heard now to state that it is being prejudiced by their entry. It is also clear that following the consent, the Plaintiff served the new Defendants and by the time the Further Amended Plaintiff was filed on 25th November 2019, the three additional Defendants and even the 1st Defendant were yet to file anything in response. The only other addition in the Further Amended Plaintiff is the office of the Director of Physical Planning within the Ministry of Lands and Physical Planning and I did not think that the 1st Defendant was prejudiced in any way by the introduction of this party given the identity of the other Defendants.

19. Indeed, all those new Defendants have since filed a Joint Statement of Defence filed herein on 21st February 2020 and it was clear to me that as at the time of the filing of the amended pleadings by the Plaintiff, the parties had granted themselves more time and the pleadings were yet to close.

20. In the premises, I find no merit in the 1st Defendant’s application. I dismiss the same with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021.

J.O. OLOLA

JUDGE