Mumwanjesyi Development Ltd v Ali (Environment & Land Case 60 of 2016) [2022] KEELC 13816 (KLR) (5 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13816 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 60 OF 2016

M SILA, J

OCTOBER 5, 2022

BETWEEN

MUMWANJESYI DEVELOPMENT LTD .... PLAINTIFF

AND

MBARAK MOHAMED ALI .... DEFENDANT

RULING

(Application seeking leave to amend the defence and file counterclaim; no draft amended pleading annexed; though there is no explicit provision that leave to amend cannot be granted if the draft amendment is not annexed, it is always good practice for a draft to be annexed, or the nature of the amendment be sufficiently disclosed, so that the court can make an assessment of whether or not it would be appropriate to grant leave; no draft amended pleading annexed in this case and court not persuaded to grant leave without first being in the know on the nature of amendment sought; application dismissed)

1. The application before me is dated 25 November 2021 filed by the defendant. It is an application seeking orders for leave to amend the defence to include a counterclaim.

2. The history of the case is that the plaintiff filed this suit on April 7, 2016 alleging that she is the registered proprietor of the land parcels subdivision No 8011/I/MN and 8012/I/MN (the suit properties). She claimed that the defendant had illegally entered into the suit properties and was carrying out construction. The defendant opposed the allegations *vide* a defence filed on May 11, 2016. He pleaded that the original plot number for the suit properties is plot No 624/I/MN (Plot No 624). He denied carrying out construction on the suit properties and alleged that the whole of the plot No 624 has over 300 permanent houses including the subject house which he claimed to have bought from one Grace Mutindi Mutisya. He pleaded that the owners of the house pay ground rent to the owners of the land. He thus denied trespassing onto land owned by the plaintiff.

3. The application to amend is supported by an affidavit sworn by the defendant. In it he repeats that he purchased an already built house. He deposes that he wishes "to file a counterclaim claiming prescriptive rights over the parcel of land allegedly encroached."

4. The plaintiff has opposed the application *vide* grounds of opposition. She contends that the application is incompetent and lacks merit as the defendant has not annexed a copy of the draft amended defence and counterclaim, hence the application ought to be struck out.

5. I directed parties to canvass the application by way of written submissions, which were duly filed.

6. Mr Kenzi, learned counsel for the defendant, first quoted a paragraph from the defence, "The defendant states that the entire plot No 624/I/MN has over 300 permanent houses, including his house which have always been there in a village layout and have been there with the fullest knowledge of the plaintiff." He then submitted that the amendment would enable the court to deal with the real issue in controversy. Counsel further submitted that there is no law that an applicant should annex a copy of the amendment. He maintained that the defendant has indicated the nature of the proposed amendments in his supporting affidavit. He relied on the case of *Housing Finance Company of Kenya Ltd v Rose Wairimu Githedu*, High Court at Nairobi, Civil Case No 40 of 2002.

7. Mr Kiarie, learned counsel for the plaintiff, referred the court to order 8 rule 3 and 5(1) of the *Civil Procedure Rules*, and submitted that the court has wide discretion to grant leave to amend pleadings at any stage of the proceedings if it does not occasion injustice or prejudice to the other party. Counsel submitted that an applicant should annex the draft amended defence and counterclaim, so as to notify the parties and the court of the nature and extent of the amendments sought to be effected, and whether they could occasion injustice or prejudice. To put emphasis on his claim, counsel cited the case of *Garley Enterprises Ltd v Agriculture Finance Corporation & Another (2018) eKLR* where the court (Nzioka J) dismissed an application to amend inter alia on the ground that there was no draft amended pleading annexed.

8. I have considered all the above and take the following view.

9. Applications to amend pleadings where leave is required are covered by order 8 of the *Civil Procedure Rules 2010*. order 8 rule 3 and rule 5 are particularly instructive and provide as follows :-

   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."

   Order 8 rule 5(1)

   "For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

10. As seen from order 8 rule 3 and rule 5 aforestated, the object of amendment of pleadings is to enable the parties present their case so that the real question in controversy is determined.The grant of leave is in the discretion of the court and how the court will move to exercise its discretion will depend on the circumstances of each case. At times the court may allow leave to amend without having seen a draft of the amendment and at times the court will need to see a draft before granting leave. There is actually no explicit provision in the rules which obligates a party to annex the draft amended pleading. Indeed,

the court can, even on its own motion, order an amendment, in which case there would have been no draft pleading before the court grants the leave. In such instance however, the court would know beforehand what it is that needs amendment. It is indeed rare for the court to give a blanket order to amend without first knowing what it is that is going to be amended.

11. The classical dictum on the exercise of the court's discretion in relation to amendment of pleadings was made by O'Connor J, in the case of *Eastern Bakery v Castelino* (1958) EA 461, where the judge stated as follows at p462 :-

> " It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v Harper (10 (1878), 10 Ch D 393*; *Clarapede v Commercial Union Association (2) (1883), 32 WR 262*. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v Murdoch (3) (1875), 1 Ch D 42*. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v Maung Po Hnaung (4) (1921), 48 IA 214; 48 Cal 832*. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v Goschen (5), [1898] 1 Ch 73, 81*; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v Neal (6) (1887), 19 QBD 394*; *Hilton v Sutton Steam Laundry (7), [1946] KB 65*. The main principle is that an amendment should not be allowed if it causes injustice to the other side".

12. From the above, it will be seen that though the court is generally liberal when it comes to amendments, there are some types of amendments which the court may decline. Thus, it is good practice to include a draft of the proposed amendments in an application for amendment so that the court may make an assessment of whether or not the amendment sought is one that is suitable for the case. Where the application to amend is being made orally, then it is also prudent that the applicant does disclose to the court what it is that is going to be amended so that the court can be well appraised of the nature of the amendment before granting leave. The reason is to avoid more delays in the prosecution of the case for the other party may apply to strike out the amended pleadings on the same grounds that would have made the court decline to allow the amendment if the same had been disclosed prior to the grant of leave. It also gives the court comfort that it is aware of what it is that it has given permission to be done.

13. For the case at hand, I do not know what it is that is sought to be amended. I hesitate to grant permission for something that I do not know. Though the defendant states that he wishes to file a counterclaim for prescription, it is not disclosed what land it is that he wishes to file a counterclaim on, and we cannot even tell if it is for the same land that the plaintiff claims herein. I am not therefore persuaded that his affidavit sufficiently discloses to this court the nature of the amendment to enable this court exercise its discretion in his favour without first having seen a draft of the amendment. Surely what was so hard in simply annexing a copy of what is sought to be amended so that the plaintiff and the court may be fully appraised of the nature of the amendment ? In the case herein, I do not wish to give leave when I am in darkness as to the effect of the grant of permission to amend.

14. For the above reasons, I decline to grant leave to amend defence based on the subject application. The result is that this application is dismissed with costs.

15. Orders accordingly.

DATED AND DELIVERED THIS 5TH DAY OF OCTOBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA