



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 21 OF 2020

GATHUTHI TEA FACTORY COMPANY LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

DUNCAN NDEGWA WAMBUGUDEFENDANT/RESPONDENT

RULING

1. By its Notice of Motion application dated 19th April, 2021 as filed herein on 22nd April, 2021, Gathuthi Tea Factory Company Limited (*the Plaintiff/Applicant*) prays for an order that this Honourable Court be pleased to grant it leave to amend its plaint dated 11th June, 2020 and to let the draft amended plaint attached to the application be deemed as duly filed upon payment of the requisite court filing fees.

2. The application which is supported by an affidavit sworn by the Plaintiff's advocate on record Geoffrey Manyara Mokuia is based on the following grounds:

(i) *That the Applicant wishes to amend its plaint to reflect the correct title number for the suit property;*

(ii) *That the correct title for the suit property is Parcel Number Thegenge/Gathuthi/753 and not Thegenge/Gathuthi/752 as currently stated in the plaint;*

(iii) *That the said amendment is necessary to place the correct parcel number and the correct information and facts before the court; and*

(iv) *That the ends of justice will best be served if the orders sought are granted.*

3. Duncan Ndegwa Wambugu (*the Defendant*) is however opposed to the application. In a Replying Affidavit sworn on 7th June, 2021 and filed herein on 9th June, 2021, the Defendant avers that the prayers sought in the application lack merit and that the same ought to be dismissed. The Defendant further avers that the error being sought to be amended is not a mere typographical error as the title No. Thegenge/Gathuthi/752 is clearly captured in the Plaintiff's pleadings.

4. The Defendant further asserts that the Plaintiff has supplied the court with documents to substantiate its position that the correct

parcel number is 752 and the allegation that the proper parcel number is 753 is not supported by any documents. The Defendant further avers that the two properties are different and that the proposed amendment will therefore substantially change the nature of the cause of action herein to the extent of amounting to a fresh cause of action.

5. I have perused and considered the application by the Plaintiff and the response thereto by the Defendant. The principles to be considered in an application to amend pleadings were long set out in the case of **Eastern Bakery –vs- Castelino (1958) EA 461** where Sir Kenneth O'Connor opined thus:

“It will be sufficient ... 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 there is no injustice if the other side can be compensated by costs ... the court will refuse to amend where the amendment will change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment ... The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

6. This suit was filed by the Plaintiff on 1st July, 2020. It is the Plaintiff's case that having changed their advocates in the cause of time, they

went through their pleadings and documents afresh and noted the need to amend the plaint to correct the reference to the title for the suit property. It is their case that it is necessary to effect the amendment in order to bring the correct facts on the dispute before the court.

7. As it were, this is a matter that is merely a year old. The parties are yet to go for pre-trials and to set down the suit for hearing. While the Defendant contends that the amendment shall introduce a totally different cause of action different from the current one herein, it is clear to me that he shall have a chance to equally amend his pleadings and even to cross-examine the Plaintiff on the changes at the trial.

8. Indeed as was stated in **Triple Eight Construction Company (Kenya) Limited -vs- City Finance Bank Limited & 2 Others (2010) eKLR:**

“On the issue that the intended amendments will introduce a new cause of action, it is clear both from a reading of Order 8 Rule 3(5) of the Civil Procedure Rules and on authorities that the mere fact that the amendment is likely to introduce or substitute a new cause of action is no ground to deny a party leave to amend as long as the new cause of action was in existence at the time the original plaint was filed and it arises out of the same facts or substantially the same facts as the 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. From my perusal of the draft annexed plaint, it is apparent that the Plaintiff merely seeks to amend the parcel number for the suit property and that the cause of action arises out of the same set of facts and are substantially similar to the circumstances out of which the Plaintiff has claimed relief in his original pleadings herein.

10. In the premises, I am persuaded that there is merit in the Plaintiff’s application dated 19th April, 2021. The same is allowed with the direction that the Plaintiff has 14 days from today to file and serve the amended plaint upon the Defendant. The Defendant shall equally have 14 days from the date of service to file and serve an amended statement of defence, if need be, upon the Plaintiff.

11. The costs of this application shall be in the suit.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021.

In the presence of:

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J. O. OLOLA

JUDGE