



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 4 OF 2016

NGONG BUTCHERS CO-OPERATIVE

SOCIETY LIMITED.....PLAINTIFF

VERSUS

PATRICK KABUE MUCHENE.....DEFENDANT

RULING

1. This is the Notice of Motion dated 19th October 2020 brought under section 1A, 1B and 3A of the Civil Procedure Act, order 8 rule 5 and order 51 rule 1 of the Civil Procedure Rules and Article 48 of the Constitution of Kenya.

2. It seeks orders:-

- 1. That this honourable court be pleased to grant leave to the defendant/applicant to amend its defence and counterclaim filed herein on 21st January 2016.***
- 2. That if prayer (1) is granted, the annexed draft amended defence and counterclaim be deemed as properly filed and served.***
- 3. That the defendant/applicant be also granted leave to file supplementary witness statements and documents***
- 4. That the costs of this application be provided for.***

3. The grounds are on the face of the application and are:-

a. The discoveries which have been made since the defence and counterclaim herein was filed on 21st January, 2016, make it necessary for the amendments proposed to be made so that all the matters in controversy may be canvassed before this honourable court.

b. The practice of the courts is as described in J. C. Patel –v- B.J. Joshi 19 EACA 42; in that case, it was stated by the Court of Appeal that:-

The rule of conduct of the court in such a case as this is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.

c. No injustice will be caused to the plaintiff/respondent herein.

d. That the law requires that leave to amend be sought before filing an amended defence.

e. That following the discoveries referred to in (a) above, it is in the interest of justice that the amendment be allowed to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit to reach a just determination.

4. The application is supported by the affidavit of Patrick Kabue Muchene, the defendant/applicant, sworn on the 19th October 2020.

5. The application is opposed. There are grounds of opposition filed by the plaintiff/respondent dated 3rd November 2020. There is also a replying affidavit by Moses Sironik Muraya, Chairman of the plaintiff/respondent sworn on the 3rd November 2020.

6. On the 26th November 2020, this court with the consent of the parties directed that the application be canvassed by way of written submissions.

7. The defendant's/applicant's submissions are dated 5th January 2021. It is his submission that the proposed amendments will not cause any prejudice or injustice to the plaintiff. He has relied on the cases of **Central Kenya Ltd vs Trust Bank Ltd [2000] 2 EA 365**; **Martin Wesula Machyo vs Housing Finance of Kenya Ltd & Another [2015] eKLR**; **Africa Safari Club vs Safe Rentals Ltd [2010] eKLR**. He prays that the application be allowed.

8. The plaintiff/respondent on the other hand contends that the application is an afterthought, calculated to cause delays in the hearing of the case so that the defendant can continue in possession of the disputed property drawing incomes, rents, mesne profits and other benefits.

9. Further that allowing the defendant's belated and unjustifiable amendment of the counterclaim will gravely prejudice the plaintiff's case. It prays that the application be dismissed with costs. Further that if the court is inclined to allow the application, the defendant/applicant ought to pay full costs of the adjournment of 21st October 2020 together with costs of this application.

10. I have considered the notice of motion and the supporting affidavit. I have also considered the replying affidavit and the grounds of opposition, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.

11. **Order 8 rule 3(1)** of the Civil Procedure Rules provides that

“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 of the Civil procedure Rules provides that:-

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.

2. This rule shall not have effect in relation to a judgment or order.

12. In the case of **Central Kenya Ltd vs Trust Bank Ltd [2000] 2EA 365** the Court of Appeal stated as follows:-

“that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”.

I am guided by the above authority.

13. I find that the defendant/applicant has made out a good case to warrant the amendments sought. The plaintiff/respondent has not demonstrated what prejudice it will suffer if these orders are granted.

14. In conclusion, I find merit in this application and grant the orders sought namely:-

a. That leave is hereby granted to the defendant/applicant to amend his defence and counterclaim.

b. That the annexed draft amended defence and counterclaim be deemed to be duly filed upon payment of requisite fees.

c. That the amended defence and counterclaim be served on the plaintiff/respondent within fourteen (14) days from the date of this ruling and that the plaintiff do file its reply thereto within twenty one (21) days upon service.

d. That the defendant/applicant do file supplementary witness statements and documents within twenty-one (21) days from the date of this ruling.

e. That the defendant/applicant do pay the full adjournment costs of the hearing of 21st October 2020 and to bear costs of this application.

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 17TH DAY OF JUNE 2021.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. P. K. Kamaara for the Plaintiff

Mr. Ndung'u for the Defendant

Phyllis - Court Assistant