



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 229 OF 2018**

**WOOD STREET CLINIC AND NURSING HOME LIMITED.....PLAINTIFF**

**=VERSUS=**

**SAMUEL KARANJA THUITA.....1<sup>ST</sup> DEFENDANT**

**REDEMPTOR NYABOKE.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 28<sup>th</sup> July 2020 brought under Section 1A, 1B and 3A of Civil Procedure Act and Order 8 Rule 3, (1).
2. It seeks orders:-
  - (a) *That the plaintiff be granted leave to amend the plaint to seek appropriate relief against the 2<sup>nd</sup> defendant.*
  - (b) *That consequent upon such amendment the plaintiff be at liberty to file additional documents and witness statements.*
  - (c) *Costs be provided for.*
3. The grounds are on the face of the application and are:-
  - (i) *The plaintiff wishes to amend its pleadings to plead its entire case and appropriate relief against the 2<sup>nd</sup> defendant.*
  - (ii) *The intended amendments is necessary to bring before court the entire dispute for determination on the true and substantive merit of the case.*
  - (iii) *Unless litigated herein, the plaintiff may be barred from agitating the said grievances in another forum or by way of another suit.*
  - (iv) *More grounds at the hearing of this application.*
4. The application is supported by the affidavit of Amina Ali Adhan, a Director of the plaintiff company, sworn on the 28<sup>th</sup> July 2020.
5. The application is opposed. There is a replying affidavit sworn by Samuel Karanja Thuita the 1<sup>st</sup> defendant/respondent herein sworn on the 19<sup>th</sup> October 2020.
6. On the 21<sup>st</sup> October 2020, the court with the consent of the parties directed that the application be canvassed by way of written submissions.
7. I have considered the Notice of Motion and the supporting affidavit. I have also considered the replying affidavit, the written submissions filed on behalf of the parties and the authorities cited. The issue for determination is whether this application is merited.
8. **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.*

In the case of *Ann Muthoni Karanu vs La Nyavu Gardens Ltd [2015] eKLR* J L. Onguto, stated as follows:-

*“....The test for amendment of pleadings was perfectly put in Gobbold vs Greenwich LBC 9<sup>th</sup> August, 1999 (unreported decision): referred to in the notes to the White Book (Civil Procedure 2003 Edn) Vol. 1. At paragraph 17.35. Peter Gibson LJ is stated to have said:*

*.....Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendments can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed”*

*.... I shall say no more on the test save to add that locally the same test was adopted and approved in the case of Central Kenya Ltd vs Trust Bank Ltd [2002] 2 EA 365. The Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was affected and (iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.*

*.....Notwithstanding the Court of Appeal’s prolific holding and approach, it is apparent that the test is as was stated in Cobbold (Supra) and the overriding consideration was whether the amendments were necessary for determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs. Perhaps, I may also add that going by the Cobbold test as expounded in Central Kenya Ltd vs Trust Bank Ltd (ibid) the power to order or allow amendments or joinder of parties is discretionary and very wide”. [Emphasis mine].*

9. It is the Plaintiff’s case that the 1<sup>st</sup> defendant having signed the sale agreement frustrated the transaction by refusing to sign the transfer. The 1<sup>st</sup> defendant’s submission on the other hand is that the amendments sought should not be allowed as they have been brought too late into the case and further that the same is not made in good faith and if allowed inevitably prejudices the respondent which prejudice cannot be cured even by an award of costs.

10. I find that the 1<sup>st</sup> defendant has not demonstrated what prejudice he will suffer if these amendments are allowed. This suit has not been set down for hearing. The 1<sup>st</sup> defendant has also not demonstrated that the amendments will defeat the defendants’ defences.

11. All in all, I find that the amendments sought to be introduced are necessary for all the issues in this matter to be resolved.

12. I find merit in this application and the same is allowed on the following terms:-

*(a) That leave is hereby granted to the plaintiff to amend the plaint to seek appropriate relief against the 2<sup>nd</sup> defendant.*

*(b) That the draft amended plaint be deemed to be duly filed upon the payment of the requisite fees and the same be served on the defendants within twenty-one (21) days from the date of this ruling.*

*(c) That the defendants do have corresponding leave to amend their defences if need be within twenty-one (21) days from the date hereof.*

*(d) That the plaintiff be at liberty to file additional documents and witness statements within twenty-one (21) days from the date hereof with corresponding leave to the defendants to file additional documents and witness statements if need be.*

*(e) That costs of this application be borne by the plaintiff.*

It is so ordered.

DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 10TH DAY OF JUNE 2021.

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Achieng for Mr. Odhiambo for the Plaintiff

Mr. Botany for the 1<sup>st</sup> Defendant

No appearance for the 2<sup>nd</sup> Defendant

Phyllis - Court Assistant