



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC CASE NO. 30 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 476 of 2015}

ANGELINA CHEPNG'ETICH KIMAITI.....PLAINTIFF

- VERSUS -

TOM MONG'ARE NYARIKI.....1ST DEFENDANT

CHARLES KEMIGO KIMAITI.....2ND DEFENDANT

RULING

By an Application dated 13/10/20, the 2nd Defendant seeks leave to amend his Statement of Defence and Counterclaim. In the alternative, he seeks for an order that the annexed draft Defence and Counterclaim be deemed as duly filed and served upon payment of the requisite court fees. The 2nd Defendant further seeks leave to file further list of documents, list of witnesses and further Witness Statements.

The 1st Defendant supported this Application verbally in court but never filed anything in support. But the Plaintiff opposed the Application and filed a Replying Affidavit on 25/08/2021 and which was served upon the Applicant as was admitted in court. The same had been in the Applicant's domain since then and it is therefore not right for the Applicants to be seeking leave to file a further Affidavit after directions have been given by the court with timelines within which to file written Submissions and which deadline is over. Besides, the Plaintiff/Respondent has already filed her written Submissions which was done on 06/10/21.

In the aforesaid Replying Affidavit, the Plaintiff/Respondent depones that the amendments proposed are a delay gimmick and calculated to frustrate, delay and derail the expeditious disposal and determination of the matter in court. She also exclaims that whatever new discoveries the Applicant claims to have had are not substantiated and particularly when the material forming the substance of amendment came to the Applicant's attention and that a new cause of action would be introduced should the Application for leave to amend is granted and that the Land Registrar and County Surveyor have already made some recommendations that would lead to the determination of this matter. She also fears that granting the Application would confuse the real issues in dispute. Finally, the Plaintiff/Respondent opines that the Application before court is not made in good faith.

I have looked at the rival Submissions and 2 issues come out for consideration:

- 1. At what stage of the proceedings can a party be debarred from amending his pleading?**
- 2. Whether the intended amendments are statutorily time barred.**

As to the first issue, amendments of pleadings can be allowed at any stage before Judgment. But it is most ideal to allow pleadings before tendering of evidence starts in order to avoid the recalling of witnesses which may at times be inevitable particularly where the amendments introduced affect the evidence already tendered. The only amendments that can be allowed after the witnesses are put on the witness box are minor amendments, say those to do with clerical errors, correct spelling of people's names, places, anomalies in the dates, typographical errors, spelling mistakes, minor inaccuracies in measurements or quantities, slight inexactness in colours, impressions and such other minor things which do not substantially alter the substratum of the case. Such are excusable. But it would be an abuse of the process of the court to allow a party to amend his case after evidence has been adduced so that the amended pleadings suit the evidence on record. This, in my view, is not what the provisions of order 8 Rule 3 of the Civil Procedure Rules were meant to achieve. The purpose of amending pleadings was to ensure that nothing is left out of the case since should one not include all the causes of action in the suit, he cannot file another suit for the cause of action that ought to have been included in the suit. Such would be Res Judicata. Order 8 Rule (5) of the Civil Procedure Rules gives the court powers to allow an amendment notwithstanding that its effect will be to add a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a 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. The other purpose that was to be achieved had to do with the clerical mistakes such as I have mentioned above and inadvertent errors occasioned by the urgency attendant to drafting cases that have to be taken to court to forestall certain injustices or to beat certain deadlines such as limitation of actions.

Having said so, is the current Application excusable? Although the suit is fairly old but since no evidence has been tendered and the case has not even been certified ready for hearing, the amendments sought are not an abuse of the court process. On that ground they would be allowed.

Going to the second limb of whether the amendments sought would introduce an otherwise statutorily barred cause of action; save that the Applicant has introduced the particulars of fraud under paragraph 15 of the Draft amended Defence and paragraphs 2, 14A, 14B and 15, the court cannot see any other amendments proposed. Not even new prayers. Why do I say so? Under order 8 Rule 7 (2) of the Civil Procedure Rules, all amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.

On the issue of the amendment sought in order to include a remedy allegedly occasioned by fraud on the part of the Plaintiff, Section 26 of the Limitation of Actions Act provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. Neither in his Supporting Affidavit nor in the Draft amended Defence and Counterclaim does the Applicant indicate when he discovered the alleged fraud. However, in the case of **Justus Tureti Obara =vrs= Peter Koipeita Nengisoi (2014) e KLR** Justice Okong'o held as follows: -

“The proviso to Section 26(a) of the Limitation of Actions Act Cap 22 Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could with reasonable diligence have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”

As said above, it is not mentioned anywhere that the alleged fraud was discovered by the Applicant herein at such and such a time. Unless a matter is pleaded either in the Plaint or in the Defence and the same forms part of the statement of facts by the party wishing to rely on it, the same cannot be adduced as evidence in court. How then will the Applicant adduce evidence as to when he discovered that there was fraud?

Secondly, the Draft amended Defence and Counterclaim is poorly done. Other than the paragraphs I have mentioned above, there are no amended prayers introduced. What the Applicant has done is to introduce new prayers in place of the original ones. There is no striking through of the initial prayers followed by new underlined prayers as is the law but the old ones have been done away with and totally new prayers introduced. This is very poor draftsmanship which should not be entertained. It confuses everyone.

Having said so, I would however exercise my discretion in favour of the Applicant and allow the Applicant to amend his Defence and Counterclaim only limited to the title, paragraphs 2, 14A, 14B, and 15 of the Draft amended Defence and Counterclaim. The rest, including the amended prayers, would have been disallowed for want of form and poor draftsmanship. But in order to finalize all the issues in this matter I will allow all the other amendments in the draft amended Defence and Counterclaim as long as they are done in accordance with the law and properly numbered failure to which the same will stand struck out. The upshot of this is that the amended Defence and Counterclaim will have to be redrafted before being filed in order to be in conformity with order 8 Rules 3 and 7 of the Civil Procedure Rules. Any further documents that are necessarily to reflect this should be filed along the amended Defence.

The costs of this Application will be awarded to the Plaintiff in the sum of Kshs. 15,000/= payable within the next 15 days. The suit must be fast tracked and once the amended Defence and Counterclaim is filed in court within the next seven days, the Plaintiff and 1st Defendant will have 14 days within which to file their amended Plaint and Defence respectively if any. Thereafter parties will comply with Order 11 of the Civil Procedure Rules and then appear in court on 15/12/21 to confirm compliance and agree on a hearing date of the case. Since the 1st Defendant did not actively participate in the Application dated 13/10/20 he will not be awarded any costs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 28TH DAY OF OCTOBER, 2021

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa

Plaintiff: Ms. Shilwatso

Defendants: Mr. Omotto for the 2nd Defendant

N/A for the 1st Defendant