



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 37 OF 2009

KENYA ANTI-CORRUPTION COMMISSION..... PLAINTIFF

-VERSUS-

ALI BUNOW KORANE & 6 OTHERSDEFENDANTS

RULING

(Application to strike out part of a reply to defence which provided particulars of fraud; suit having been filed by plaintiff originally against 4 persons for recovery of what the plaintiff alleges to be public land now under private title; plaint later amended to include the applicants since the disputed land was sold to them; applicants filing defence; plaintiff subsequently filing reply to defence and pleading particulars of fraud against the applicants; applicants contending that this pleading should be struck out and arguing that such particulars cannot be pleaded in a reply to defence; Order 2 Rule 4 allowing such pleading; no prejudice to applicants as joinder of issue under Order 2 Rule 12 would still apply; particulars in pleading not restricted only to plaint pursuant to Order 2 Rule 10; no inconsistency in the pleadings and thus no violation of Order 2 Rule 6; application dismissed)

1. What is before me is an application dated 24 September 2019 filed by the 5th, 6th and 7th defendants. The application seeks orders that paragraphs 6 (a) to (bb) of the Plaintiff's Reply to Defence be struck out and expunged from the court record. The application is based on the grounds that :-

(a) The law does not permit the plaintiff to plead and make allegations of fact and to raise new ground of claim inconsistent with its previous pleading.

(b) Paragraph 6 (a) to (bb) of the Plaintiff's Reply to 5th, 6th and 7th Defendants' defence dated and filed on 13th August 2019 is at variance and is inconsistent with the contents of the Amended Plaint.

(c) The Amended Plaint in its entirety does not contain any particulars of fraud against the 5th, 6th and 7th defendants yet in utter departure from its original pleadings the plaintiff introduced particulars of fraud against the said defendants thereby introducing a new cause of action which was never pleaded in the amended plaint.

(d) Pleadings close after Reply to Defence is filed and there is no other pleading known in law which the defendants can file.

(e) By pleading particulars of fraud in the Reply to Defence and after the 5th, 6th and 7th defendants had filed their statement of defence, the plaintiff denied the said defendants an opportunity to defend themselves against the allegations of fraud and thereby denying the said defendants a fair hearing opportunity.

(f) The particulars of fraud pleaded in the Reply to Defence were in reaction to the plaintiff's application to strike out this suit against them for failing to disclose reasonable cause of action against them.

(g) By pleading particulars of fraud in its reply to Defence which such particulars were not pleaded in the Amended Plaint, the plaintiff is amending the Plaint and curing the defects therein through the back door.

(h) It is only in the interest of justice that this application is allowed.

2. The application is supported by the affidavit of Anish Doshi, a director of the 5th defendant. The same is opposed.

3. The background is that this suit was commenced by way of a plaint which was filed on 17 February 2019 against four persons namely, Ali

Bunow Korane, Adroit Developers Limited, Barclays Bank of Kenya Limited, and Wilson Gacanja, as the 1st to 4th defendants respectively. The plaintiff filed suit in order to recover what it considered to be land set apart for Moi International Airport with the land being vested upon the Kenya Airports Authority. It is pleaded that the land set apart was 1,183 acres. It is its case that part of this land was fraudulently excised to create the plot MN/VI/3746 (the suit property) with title being issued to the 1st defendant, Ali Bunow Korane. The 1st defendant subsequently transferred his interest to the 2nd defendant, Adroit Developers Limited. The 2nd defendant charged the title to the 3rd defendant, Barclays Bank. At the time the title was issued, the 4th defendant, Wilson Gacanja, was the Commissioner of Lands. The plaintiff thus wished to have the title cancelled. There was an application filed to strike out Adroit Developers Limited and Barclays Bank from the case, which application was allowed on 11 October 2012 by Ibrahim J (as he then was).

4. Subsequently, the plaintiff moved to amend the plaint on 20 September 2018 to now add Rainydays Limited, Ashok Labshanker Doshi, and Mahesh K. Doshi, as the 5th, 6th and 7th defendants respectively. They were sued because the title had by now been transferred to the 5th defendant and the 6th and 7th defendants are its directors. The plaintiff contended that this transfer to the 5th defendant was a sham. There were particulars of fraud pleaded in the original plaint against the 1st and 2nd defendants and particulars of abuse of office pleaded against the 4th defendant. These were retained in the Amended Plaint. However no particulars of fraud were added in the Amended Plaint so as to plead the same against the 5th, 6th and 7th defendants/applicants. The applicants entered appearance and filed a joint defence on 29 July 2019. They more or less justified their title. Together with the defence, they filed an application dated 10 July 2019, seeking that they be struck out of the suit on the grounds that the suit does not disclose a cause of action against them. Part of the grounds upon which this application was based was that no particulars of fraud have been pleaded against the applicants in the Amended Plaint. I heard that application and dismissed it through my ruling of 6 February 2020.

5. It will be recalled that the applicants had filed their defence on 29 July 2019. The plaintiff filed a reply to defence on 13 August 2019. That reply to defence now contains particulars of fraud and illegality against the 5th, 6th and 7th defendants. These particulars are contained in paragraphs (a) to (bb) within paragraph 6 of the reply to defence. It will be observed that it is these paragraphs that the applicants now want expunged.

6. The main contention of the applicants is that the pleading of particulars of fraud in the reply to defence is irregular. They point out that there is no other pleading known in law which they can file to traverse these particulars hence their prayer that the same be struck out or expunged. The plaintiff filed Grounds of Opposition to oppose the motion. Inter alia, it is averred that they raise serious, specific, lawful and admissible factual issues against the applicants. It is said that the applicants are raising technical legal issues contrary to the provisions of Order 2 Rule 14 and Section 1A, of the Civil Procedure Act.

7. I directed counsel to file written submissions and I have taken note of the submissions of Mr. Oluga, learned counsel for the applicants, and Mr. Makori, learned counsel for the plaintiff. I have considered the matter and take the following view.

8. It is apparent that the applicants consider as offensive the reply to defence in so far as it pleads particulars of fraud against them. They contend three main issues; firstly, that the reply to defence is at variance or is inconsistent with the amended plaint; secondly that the applicants will not have a chance to respond to the allegations of fraud and illegality; and finally that the plaintiff has acknowledged the irregularity in the reply to defence by seeking to amend the plaint.

9. The known pleadings where a suit is commenced by way of plaint (and there is no counterclaim) are a plaint, a defence and reply to defence. The main question before me is whether a party is at liberty to plead particulars (such as particulars of fraud, misrepresentation or illegality) in a reply to defence. I have gone through the law especially the law regarding pleadings in Order 2 and I see no bar. In fact, it is explicitly permissible under Order 2 Rule 4 (1) which provides as follows :-

4 (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality –

(a) Which he alleges makes any claim or defence of the opposite party not maintainable;

(b) Which, if not specifically pleaded, might take the opposite party by surprise; or

(c) Which raises issues of fact not arising out of the preceding pleading.

(emphasis mine)

10. It will be seen from the above, that a party is certainly given leeway to plead particulars, such as fraud, subsequent to a plaint. Indeed, he is allowed to plead this so as to demonstrate that any claim or defence of the opposite party is not maintainable. That to me, is exactly what the plaintiff has done in this case. It has proceeded to plead particulars of fraud so as to show that the defence of the applicants is not justifiable. There is nothing wrong with this; as I have shown above, it is permitted by the rules. The reasoning for this is not far to find. When filing defence, the defendant may raise issues and defences which may not have been anticipated by the plaintiff when he filed the plaint. The only way for the plaintiff to traverse them is by filing a reply to defence and provide particulars that would vitiate the defence raised. If this was not the case, then the plaintiff would need to always amend the plaint so as to respond to the issues raised in the defence and particularise them.

11. It is not the position that particulars of a claim can only be made in a plaint. Order 2 Rule 10 (1) provides inter alia that “every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing –

(a) Particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading

relies ; and

(b) Where a party pleading alleges any condition of mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

12. The above rule applies to every pleading, not just a plaint.

13. Mr. Oluga in his submissions, urged that there would be no opportunity for his client to traverse the reply to defence, given that it is the last pleading. It is true that the reply to defence would be the last pleading unless the court directs otherwise, but it is incorrect to say that the applicants are prejudiced because they cannot file a pleading in reply to it. There is relief under Order 2 Rule 12 which addresses joinder of issue. It provides as follows –

12. Denial by joinder of issue

(1) If there is no reply to defence, there is a joinder of issue on that defence.

(2) Subject to subrule (3) –

(a) there is at the close of pleadings a joinder of issue on the pleading last filed; and

(b) a party may in his pleadings expressly join issue on the immediately preceding pleading.

(3) there can be no joinder of issue on a plaint or counterclaim.

(4) A joinder of issue operates as a denial of every material allegation of fact made in the pleading on which there is a joinder of issue unless, in the case of an express joinder of issue, any such allegation is excepted from the joinder and is stated to be admitted, in which case the express joinder of issue operates as a denial of every other such allegation.

14. As noted above, a joinder of issue operates as a denial, and under subrule 2 (a) above, there is implied a joinder of issue on the pleading last filed, so long as that pleading is not a plaint or counterclaim. In other words, one must file defence to a plaint or to a counterclaim, if he wishes to deny the claim. But to other pleadings, as I have mentioned, a joinder of issue is automatically implied. So even in our case, and since the applicants have denied the plaintiff's claim, there is implied a joinder of issue on the last pleading, which is the reply to defence sought to be impugned. It doesn't matter that there may not be opportunity to the applicants to file a further pleading, because they are adequately protected by subrule 2(a) above. Again the reasoning for this is apparent, otherwise parties would continue to file pleadings *ad infinitum*, addressing each and every point that they think is new in the last pleading. The implication of joinder of issue cures this. It is not therefore correct that there will be prejudice to the applicants if the reply to defence is allowed to stand. Having said that, nothing stops a plaintiff from amending the plaint to make additional pleadings, for the application of the joinder of issue rule, is without prejudice to the right to amend as provided in subrule (2) above.

15. It is of course the other argument of the applicants that the pleadings sought to be struck out are inconsistent with the plaint, thus offending Order 2 Rule 6. Order 2 Rule 6 provides as follows :-

6 (1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.

(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

16. The above rule can be said to be a rule against inconsistency; that is, where a party pleads a new ground to support his claim, which is inconsistent with his previous pleading. There can be many inconsistencies in pleadings and I cannot exhaust all of them. Let me just use one example to explain the issue, that of capacity. A plaintiff may plead that he has filed suit in his capacity as an administrator of an estate of a deceased person. If in a subsequent pleading, read a reply to defence, he now claims that he is not suing as administrator but on his own behalf, then this would be a pleading that is inconsistent with the pleading in the plaint. In such case, the remedy would be to amend the plaint to now plead that he is suing in his own capacity and not the capacity of administrator. There is nothing wrong with this rule against inconsistency which tries to avoid a situation where the defendant is confused as to what he is supposed to defend since the two pleadings cannot be reconciled.

17. But I do not see the applicability of Rule 6 above to our situation. There is in fact no inconsistency in the pleadings in the plaint and in the Reply to Defence. The plaint seeks to recover land that is alleged to be public land that was wrongfully converted into private hands. It is contended that this conversion of the land from public to private was fraudulent in the plaint. That still remains the position, even in the Reply to Defence. Nothing has changed, only that now the Reply to Defence raises some particulars of fraud in direct response to the defence filed by the applicants and I have already demonstrated that this is permissible by the rules.

18. Mr. Oluga in his submissions referred me to the 1988 decision of the Court of Appeal in the case of *Kinyatti vs Attorney General (1988) eKLR*. The facts of that case were that the appellant was charged and convicted on 18 October 1982 for a term of 6 years. It appears that he was denied his right of remission of sentence. On 3 April 1987, he filed suit so as to have his remission given effect. The defendant filed a defence that was a bare denial. Later, it applied to amend the defence with a further prayer that the plaintiff may have liberty to amend his plaint. Leave was granted to amend defence and the plaintiff granted leave to file an amended reply. The amended defence raised a new issue, that of limitation of time of the suit. It was contended that the suit of the plaintiff was filed out of time given the provisions of Section

3 (1) of the Public Authorities Limitation Act, CAP 39. The plaintiff filed a reply to this amended defence and denied that he was out of time. He contended inter alia that his cause of action accrued on or after 18 October 1986 which is when 2/3rd of his sentence would have been completed. The defendant raised a preliminary objection that there is a departure to the pleadings contrary to Order VI Rule 6 (1) (similar to the now Order 2 Rule 6 (1) in the Civil Procedure Rules, 2010). It was contended that this reply to defence was in conflict with the pleadings and that it introduces a new cause of action not pleaded in the pleadings. The court upheld this objection holding that there was a departure in the pleadings, and in addition proceeded to dismiss the suit as being out of time. This decision was upheld on appeal. I must confess, with utmost respect, that this decision makes torturous reading. Putting aside the issue of limitation, the court appeared to suggest that what the appellant needed to file was an amended reply to defence and not a reply to amended defence. I am unable to put together that reasoning and I am unable to fathom what difference this brings. To me, it is nothing but a splitting of hairs. I also, with respect, see no departure with the pleadings that the appellant had in the pleadings. The appellant was simply filing a reply to the now new defence of limitation that was first raised in the amended defence. He could not have pleaded in his pleadings that his suit is within time as this was not a defence that he may have anticipated from the defendant. His traverse would have come in the reply to the amended defence. I think we need to look into this *Kinyatti* decision in the light of the prevailing circumstances at the time (for if memory serves me right, and I pray to be pardoned in the event that I am wrong, the appellant had been charged and convicted for being in possession of seditious material). In any event, the 2010 Constitution, at Article 159, abhors the insistence of being overly technical to the prejudice of substantive justice. We must have this in consideration when reviewing some of these pre-2010 decisions. In short, I am not persuaded that the said authority applies to the circumstances of this case and even if it did, I think the issue would be curable by Article 159 of the Constitution, 2010.

19. I think I have said enough to demonstrate that this application must fail. It fails and it is hereby dismissed with costs.

20. Orders accordingly.

DATED AND DELIVERED THIS 21ST DAY OF OCTOBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA.