



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 177 OF 2018**

**RONALD KIMEU KITULI..... PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT**

**RULING**

**Introduction**

1. Vide a Notice of Motion dated 6<sup>th</sup> October, 2020 that was filed pursuant to the provisions of **Sections 1A, 1B & 3A of the Civil Procedure Act, Order 8 Rule 3 (1), (2) & (3) and Order 51 Rule 1 of the Civil Procedure Rules 2010**, the Applicant sought for the following orders:

*a) That the Defendant/Applicant be granted leave to file an Amended Defence and counterclaim out of time.*

*b) That the cost of this application be provided for.*

2. The Application was supported by the Affidavit of the Counsel for the Defendant who deponed that in the Defence on record, they inadvertently omitted to include a counterclaim seeking prayers for declaration and protection of the Defendant's rights.

3. Counsel for the Defendant deponed that they had information that the Defendant on diverse dates between May 2002 and January 2004 entered into mutual agreements with the Plaintiff wherein they separately bought two portions of land forming part of a parcel of land otherwise known as Machakos/Matuu/590 for an agreed consideration.

4. Counsel deponed that upon purchase, the Defendant immediately took possession of the land, developed it and has since established a bus park which serves all public vehicles in Matuu town along Garissa Highway; that the annexed draft Defence and counter claim raise triable issues and that it was in the interest of justice that the Defendant be granted leave to file the amended Defence and Counterclaim.

5. The Application was opposed vide a Replying Affidavit by the Plaintiff sworn on 24.11.2020 who deponed that the Application is fatally defective and should not be heard because it is a waste of judicial time; that the alleged counter-claim has no merit on the ground of ambiguity of the dates mentioned by the Defendant of the signing of the agreement; that the agreement was executed on 2.5.2002 and that the Defendant proceeded and trespassed on the Plaintiff's land measuring approximately 30 x 100 feet.

6. The Plaintiff deponed that he had read the attached Defence and Counterclaim and was persuaded that it did not raise triable issues since the sale agreement in clause 3 was specific that the transfer was to be effected 6 months after payment of the last instalment and that the Defendant breached the said term of the contract.

7. The Plaintiff deponed that the proposed Counter claim referred to a portion of land measuring 150ft by 100ft while the agreement was for the purchase of 100ft x 120ft; that the Defendant trespassed into the extra land measuring 30ft x 100ft which belonged to him and that the Defendant had not presented any documents to substantiate why he sought to amend his Defence at

this stage while he had the opportunity to so at the pre-trial stage.

**Submissions**

8. The Application was canvassed by way of written submissions. Counsel for the Defendant submitted that the law regarding the grant of leave to amend is well settled and that the general rule is 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 party can be compensated by costs.

9. Counsel for the Defendant/Applicant relied on the case of *Abdul Karim Khan vs Mohamed Roshan (1965) EA. 289 (C.A)* where the court stated that courts will not permit an amendment that is inconsistent with the original pleading and entirely alters the nature of the Defence or Plaintiff. Counsel submitted that the principles upon which a court acts in an Application to amend a pleading before/during trial were stated in *Eastern Bakery vs Castelino, (1958) E.A. 461 (U.)* at p.462 as follows:

***“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”***

10. Counsel also relied on the decision of Bramwell, LJ in *Tildesley vs Harper (1878), 10 Ch.D.* at p.296 where he held as follows:

***“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”***

11. Counsel also relied on the case of *Ochieng and Others vs First National Bank of Chicago Civil Appeal Number 147 of 1991* which was quoted in *St. Patrick’s Hill School Limited vs Bank of Africa Kenya Limited [2018] eKLR* where the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings as follows:

***a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;***

***b) the amendments should be timeously applied for;***

***c) power to amend can be exercised by the court at any stage of the proceedings;***

***d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;***

***e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.***

12. Counsel cited the case of *Harrison C. Kariuki vs Blueshield Insurance Company Ltd [2006] eKLR* which was quoted with approval in *City Clock Limited vs County Clock Kenya Limited & another [2020] eKLR* in which the court referred to the Court of Appeal decision in *Central Kenya Ltd vs Trust Bank Ltd [2000] EALR 365* where it was held as follows:

***“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”***

13. Counsel submitted that in the instant case, the matter had not proceeded for hearing; that the Defence and counterclaim has not raised any new matters that are not in the Plaintiff; that the Plaintiff/Respondent in his Replying Affidavit actually confirms that he indeed sold the land to the Applicant and that what is disputed is the size of the portion of land sold.

14. Counsel submitted that the proposed amendments seek to help this court establish the real issue in controversy and make a just and fair determination of the same and that the proposed amendments will not prejudice the Plaintiff’s claim.

15. Counsel for the Plaintiff submitted that the alleged counter-claim had no merit since the Applicant has admitted the Plaintiff’s claim in respect to the disputed parcel of land and that the Defendant trespassed into the Plaintiff’s land and took possession of a portion measuring approximately 30ft x 100ft without the consent of the Plaintiff.

### **Analysis and Findings**

16. Having considered the pleadings, the only issue that arises is whether the Defendant should be allowed to file an amended Defence and Counter-Claim out of time.

17. The provisions of **Order 8 Rule 3** provides as follows;

***“(1) 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.***

***(2) Where an application to the Court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.”***

18. A number of authorities in this jurisdiction have held that the Court has wide discretion in allowing amendment of pleadings to meet the ends of justice. Indeed, the position of the courts has always been that as long as no prejudice is visited on the opposite party, amendments should be liberally allowed and even if the amendment may cause prejudice, the same should be allowed if the prejudice can be compensated with costs.

19. In *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR*, the Court of Appeal set out the principles under which Courts may grant leave to amend the pleadings as follows:

- a) *the power of the court to allow amendments is intended to determine the true substantive merits of the case;*
- b) *the amendments should be timeously applied for;*
- c) *power to amend can be exercised by the court at any stage of the proceedings;*
- d) *that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;*
- e) *the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.*

20. In the case of *Central Kenya Ltd v Trust Bank Ltd [2000] EALR 365*, it was held as follows:

*“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sough be permitted in order that the real question in controversy between the parties be determined.”*

21. In the instant Application, the Defendant’s case is that he entered into a mutual agreement with the Plaintiff wherein he separately bought two portions of land forming part of a parcel of land otherwise known as Machakos/Matuu/590 for an agreed consideration. The proposed amendments to the Defence and the counter claim are consistent with the original Defence and counterclaim.

22. I say so because the proposed amendments bring forth the question of how, if at all, land measuring 150ft by 100ft was reduced to 120ft x 110ft or thereabouts by the Plaintiff for the Plaintiff to allege that the Defendant has trespassed on a portion of his land. This is an issue that need to be proved and controverted at the trial.

23. As was held in *D. T. Dobie & Company Ltd vs Muchina [1992] KLR*, no suit or defence should be terminated summarily unless it is so hopeless that it plainly discloses no reasonable cause of action or it’s so weak to be beyond redemption or cured by an amendment. If it can be injected with life by an amendment, it ought to proceed for the court to consider the facts at the trial.

24. The proposed amendments are not only meant to inject life in the Defendant’s Defence, but to also bring forth all the issues for the just determination of the suit. Considering that the Plaintiff has not shown the prejudice that he will suffer if the proposed amendments are allowed, or that the proposed amendments are inconsistent with the initial claim, I shall allow the Application dated 6<sup>th</sup> October, 2020 as follows:

- a) **The Defendant is hereby granted leave to file and serve an Amended Defence and counterclaim within 14 days of this Ruling.**
- b) **Costs to be in the cause.**

**DATED, DELIVERED AND SIGNED VIRTUALLY IN MACHAKOS THIS 8TH DAY OF OCTOBER, 2021**

**O. A. ANGOTE**

**JUDGE**

**In the presence of:**

.....for Plaintiff

.....for Defendant

Court Assistant – John Okumu