



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 100 OF 2003

FLORENCE KATHAMBI MUTISO.....PLAINTIFF

VERSUS

MERCY NJAMWEA.....DEFENDANT

RULING

What is before Court for determination is the Defendant's Notice of Motion Application dated the 23rd March, 2021 where she seeks leave to amend her Defence. The Application is premised on the grounds on the face of it and the Supporting Affidavit of MERCY NJAMWEA where she explains how she acquired her plot and confirms it shares a boundary with Plot No. 377/1682 which belongs to the Plaintiff. She confirms that she started construction in 2003 and the Plaintiff filed this suit together with an Application for injunction which was granted stopping the said construction. She claims from the documentation forming part of the records, the acreage of the Plaintiff's land as indicated in the title is twice that on the survey plan. She insists she is not to blame for errors as she is a purchaser for value. She explains that this suit has dragged for 19 years, her house which only had the roofing remaining at the time the injunction was granted is since dilapidated and its condition as such cannot be completed, is now a security risk and has to be demolished. She avers that she has suffered loss of user for the 19 years and has been unfairly forced to incur expenses for renting accommodation in Nairobi when she would be using her house. She reiterates that it is in the interest of justice that she should be allowed to amend her Defence to include a Counter-claim, for purposes of determining the loss she has incurred. She avers that she is not aimed at delaying this matter and no prejudice will be occasioned by the Plaintiff which cannot be sufficiently compensated by costs. Further, the present application does not introduce new facts other than laying basis for the prayers she seeks in addition to minor technical amendments on the frame of the Defence and Counter-claim.

The Plaintiff opposed the application by filing a replying affidavit sworn by PHILLIP M. MULWA her advocate where he deposes that the application has been brought in bad faith and a scheme to delay this matter. He avers that the prayers sought in the application translate to reopening of the whole case and sending it back to pre trials. Further, on 1st October, 2020, the Defence was granted a last adjournment in respect to hearing of the defence case which was set on 23rd October, 2021. He insists the amendments sought are time barred and cannot be sustained. He explains that it is now 18 years since the issuance of injunctive orders and the idea of amending the Defence and Counter-claim to include sufficient security as an undertaking for damages occasioned and/or to be occasioned to the Applicant is an afterthought. Further, the claim for security is misguided and lacks basis in law. He contends that the Plaintiff will be greatly prejudiced as she is not to be blamed for any errors that may have occurred in the allocation of the parcels of land in question.

The Defendant filed a supplementary affidavit where she opposed the Plaintiff's Advocates' allegations and reiterated her claim.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 23rd March, 2021 including the respective affidavits and rivalling submissions, the only issue for determination is whether the Defendant should be granted leave to amend her Defence to include a Counter-claim.

The Defendant in her submissions states that the instant application is good in law as the court at any stage can allow amendment of pleadings. Further, amendments must be allowed to determine the real question in controversy and no prejudice will be occasioned by the Plaintiff. To support her averments, she has relied on the following decisions: **Eunice Chepkorir Soi V Bomet Water Company Ltd (2017) eKLR; Bosire Ongero V Royal Media Services; Institute for Social Accountability & Another V Parliament of Kenya & 3 Others (2014) eKLR; Daniel Ngetich & Anor V KRep Bank Limited (2013) eKLR; Avanti Company Limited V Barclay Bank of Kenya Limited (2012) eKLR; Okiya Omtatah & Anor V Bidco Africa & 4 Others (2018) eKLR and Central Bank of Kenya Limited V Trust Bank Ltd & 5 Others (2000) eKLR.**

The Plaintiff in her submission insists the Defendant is not entitled to the orders sought as allowing the subject prayers would prejudice her. Further, it is now 18 years since issuance of orders of injunction and the idea of amending the Defence and Counter-claim to include sufficient security as an undertaking for damages occasioned and/or to be occasioned to the Defendant is an afterthought and a tactic for delay. To support her arguments, she has relied on the following decisions: **Mwangi S Kimenyi Vs Attorney General & Another (2014) eKLR and Dickson Miriti Kamonde V Kenya Commercial Bank (2006) eKLR.**

Order 8 Rule 3(1) and (2) of the Civil Procedure Rules provide that: **‘(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 subrule (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 subrule if it thinks just so to do.’**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **‘(1) For purposes 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.’**

In the case of ***Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR***, the Court of Appeal in dealing with issues of amendment held as follows: **‘The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-**

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

In the current scenario, I note the Defendant seeks to bring to fore certain issues in respect to acquisition of the suit land as well as the current state for her land. I note the fulcrum of the dispute herein relates to the suit land which borders the Plaintiff’s land. Further, the Plaintiff obtained injunctive orders 18 years ago restraining the Defendant from constructing a house on her land, claiming she had encroached on it. Certain issues have been raised in respect to error in title as well as size of land on the ground, which both parties insist they are not to blame for. The Plaintiff has vehemently opposed the amendment sought. However, as a Court, I opine that it is pertinent for all parties to present all facts in respect of a dispute to enable it make a proper determination of the same based on merit. From a reading of the legal provisions cited above, it is clear that the purpose of amendment is to *“determine the real question or issue raised by or depending on the proceeding”* and it can be done *“at any time”* which means from the time the suit is filed to its final disposition. It is my considered view that since the Plaintiff has enjoyed injunctive orders for the past 18 years, she cannot suffer any prejudice if the orders sought are granted. I opine that she is entitled to leave to file a response to the Amended Defence and Counter-claim. Based on the facts as presented while relying on the legal provisions certain above as well as associating myself with the quoted authority, I find the instant application merited and will allow it.

I grant the Defendant leave of 14 days to file and serve the Amended Defence and Counter-claim. Upon service, I grant the Plaintiff leave of 14 days to file and Serve an Amended Plaintiff and Defence to Counter-claim if need be.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 15TH DAY OF NOVEMBER, 2021

CHRISTINE OCHIENG

JUDGE