



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO.39 OF 2007

ANNA MARIE CASSIEDE

BRUNO CASSIEDE.....PLAINTIFF/RESPONDENTS

-VERSUS-

PETER KIMANI KAIRU T/A KIMANI KAIRU & CO.

ADVOCATES.....DEFENDANT/APPLICANT

R U L I N G

1. Before me is a Notice of Motion dated 18/03/2020 brought under *Article 50 of the Constitution and Order 8 Rule 3 of the Civil Procedure Rules*. In the Motion, the defendant has sought leave to further amend his Statement of Defence and to include a Counterclaim to the suit against him.

2. The application was supported by the affidavit of the defendant, **Peter Kimani Kairu**, sworn on 18/3/2020 and his further affidavit sworn on 23/7/2020, respectively. He contended that he wished to include and add material facts which had not been included in his defence originally. That a summary judgment had been entered against him on 04/06/2008. which led him to pay the plaintiffs a sum of Ksh.29,500,000/= further, the Court of Appeal had delivered a judgment on 19/07/2019 setting aside the summary judgment and directed that the suit be heard and determined on its merit.

3. In response to the application, the plaintiffs filed a replying affidavit sworn 23/11/2020 by **Bruno Cassiede**. He contended that the applicant had no right to claim in his counterclaim the 10% deposit of the purchase price of the suit property and a refund of the alleged overpayment of Kshs.3,693,500/- as he was not the seller. That he could not claim Ksh.2,000,000/- paid as costs in the Court of Appeal as the issue of costs of the appeal and of these proceedings, are to abide by the result of the trial by this court.

4. Both parties filed their respective submissions which the Court has considered. *Section 100 of the Civil Procedure Act* provides: -

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in any suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

5. While *Order 8 Rule 5(1) of the Civil Procedure Rules* provide that: -

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.”

6. It is clear from the foregoing that, the Court has the discretion to allow the amendment of pleadings in the pursuit of justice. That the said discretion is to be exercised in order to determine the real question in controversy. The amendments may be allowed at any stage of the proceedings but subject to such terms as to the costs.

7. In ***Bosire Ogero vs. Royal media Services (2015) eKLR***, the court held: -

“In Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127 titled “amendment with leave-time to amend” it is stated that the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”

8. While in Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR, the Court of Appeal observed that: -

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

9. From the foregoing, it is clear that the power of the court to allow amendments is for the determination of the true substantive merit of the case. The application for amendment should be made timeously and the power to amend can be exercised at any stage of the proceedings. However, if the same is made so late in the day, it should be allowed if made in good faith provided costs can compensate the opposite party.

10. The background to the application is that a summary judgment had been entered against the defendant by which he was ordered to refund the plaintiffs a sum of Kshs. 2,500,000/- and Euros 286,000/-. He had received the said amount from the plaintiffs for the purchase of **L.R 3734/384 along Othaya Road in Kileleshwa, Nairobi**. Aggrieved by the decision, the defendant appealed to the Court of Appeal which overturned the said judgment on 19/07/2019. The said Court ordered that the suit be heard on its merit. By that time, the defendant had paid to the plaintiffs a total of Kshs. 29,500,000/- in settlement of the judgment against him.

11. In its judgment, the Court of Appeal observed that the issue of whether a contract for sale was entered into was a serious contestation that required to be investigated. There are monies which the defendant paid to the plaintiffs subsequent to the impugned summary judgment and part of which he intends to claim by way of a Counterclaim.

12. According to the plaintiffs, the defendant is not entitled to claim the said monies. To my mind, the issue of whether or not the claims are valid is an issue for trial. The defendant cannot be barred from amending his defence on the ground that the claims he seeks to raise are unwarranted or are baseless. The same had not arisen when he originally filed or even amended his defence. The application cannot therefore be said to have been made too late in the day either.

13. The plaintiffs will have an opportunity of answering the claim by way of a defence and calling of evidence in rebuttal. They stand to suffer no prejudice if the application is allowed. To the contrary, if the defendant is not allowed to amend his defence as he sought, he will forever be barred from raising the same and thereby be irreparably prejudiced.

14. In the circumstances, I find that the application is meritorious and I allow the same as prayed. The Further amended defence be filed and served within 14 days of this ruling. The plaintiffs to file and serve their defence thereto, if any, within 14 days of service.

15. The costs of the application will be in the Cause.

It is so ordered.

DATED and DELIVERED at Nairobi this 4th day of February, 2021.

A. MABEYA, FCIArb

JUDGE