



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 71 OF 2018

(FORMERLY ELC NO. 79 OF 2013)

MIRIAM WAMBUI GITAU.....PLAINTIFF

-VERSUS-

HOUSING FINANCE COMPANY

OF KENYA LIMITED.....1ST DEFENDANT

P.K. KIBERA.....2ND DEFENDANT

CHARLES KARIUKI KAMAU.....3RD DEFENDANT

R.K. SILA T/A

LEGACY AUCTIONEERING SERVICES.....4TH DEFENDANT

DISTRICT LAND REGISTRAR.....5TH DEFENDANT

HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

[1] The Notice of Motion dated **28 September 2020** was filed herein by the Plaintiff, **Miriam Wambui Gitau**, pursuant to **Section 100** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, and **Order 8 Rule 3** of the **Civil Procedure Rules, 2010**. She thereby seeks the leave of the Court to amend the Plaint further so as to refine the real matters in controversy between the parties. She relied on the averments set out in her Supporting Affidavit sworn on **28 September 2020** in which she averred that she intends to specifically plead the rent that she had to pay from the date of her eviction at **Kshs. 30,000/=** per month. She annexed a receipt in proof as **Annexure 'A'** to the Supporting Affidavit and added that the defendants can be mollified by costs for any prejudice that they may suffer.

[2] On behalf of **Mr. Ngigi Mbugua** for the 3rd defendant, **Mrs. Mitei** intimated that he was not opposed to the application. Likewise, **Mr. Kuria**, learned Counsel for the 5th and 6th defendants, was agreeable to the plaintiff's application being allowed. In essence therefore, the application was opposed only by **Mr. Momanyi**, counsel for the 1st, 2nd and 4th defendants; and whereas he did not file any response to the application in the manner envisaged by **Order 51 Rule 14** of the **Civil Procedure Rules**, he filed written submissions herein, dated **9 March 2021**, in opposition to the application. It is noteworthy too that **Mr. Kigamwa** for the plaintiff did not file any written submissions herein.

[3] In his written submissions, **Mr. Momanyi** took the view that, since the cause of action on the eviction arose more than 20 years ago, the application has been made too late in the day, and is therefore barred by limitation. He further submitted that the central issue in contest herein is the exercise of the chargee's power of sale; and therefore that if the Court finds that the exercise was proper, the issue of valuation of the suit property and the claim for rent will be irrelevant. Lastly, it was the contention of **Mr. Momanyi** that the effect of the proposed amendment is to deprive the 1st, 2nd and 4th defendants of their defence. In his view, the application has not been brought in good faith and therefore ought to be dismissed with costs. He relied on **City Clock Ltd vs. County Clock Kenya Ltd & Another** [2020] eKLR and **St. Patrick's Hill School Ltd vs. Bank of Africa Kenya Ltd** [2018] eKLR to augment his submissions.

[4] I have given careful consideration to the application in the light of the averments in the Supporting Affidavit and the written submissions

filed herein by **Mr. Momanyi**. I have likewise perused the pleadings and the proceedings to date. Needless to mention that the Court has unfettered discretion to allow an amendment of pleadings at any stage of the proceedings. Indeed, **Section 100** of the **Civil Procedure Code** provides that:

“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 proceeding in a 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] Likewise, **Order 8 Rules 3(1)** of the **Civil Procedure Rules**, is explicit that:

“...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.”

[6] The rationale for amendment of pleadings need not be belaboured; it is so that the Court can then effectively and effectually determine the issues in controversy between the parties to the suit. Hence, an application for amendment should be freely allowed, especially if made before the commencement of the hearing. This point was made in **Nyamodi Ochieng Nyamogo vs Kenya Posts and Telecommunication Corporation** [2007] eKLR, thus:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim.”

[7] Accordingly, if the Court is satisfied that good cause has been shown for it, it ought to allow an amendment, notwithstanding previous amendments. In this matter, the record shows that a previous amendment was effected on **22 August 2016**, and that all the plaintiff seeks to introduce is the alleged fact of her eviction on **27 April 2002**; and that she has had to pay rent of **Kshs. 30,000/=** per month since then, which she proposes to claim together with interest from the defendants from **27 April 2002** to the date of Judgment. At paragraph 12B of the draft Amended Plaintiff, she has averred that the subject property was valued at **Kshs. 7,130,000/=** as at **1999**; and that its value had appreciated to **Kshs. 31,900,000/=** as at **May 2015**.

[8] There is no doubt that the application has come rather late, granted that the facts in question were all along within the knowledge of the plaintiff and her counsel. However, that of itself is no reason to deny the plaintiff an opportunity to refine her Plaintiff. I say so because, in **Rule 3(2)** of **Order 8, Civil Procedure Rules**, it is provided that:

“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.”

[9] And **Subrule (5)** of **Rule 3** recognizes that:

An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute 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.

[10] These considerations are also explicit in the two authorities, namely **City Clock Ltd vs. County Clock Kenya Ltd & Another** (supra) and **St. Patrick's Hill School Ltd vs. Bank of Africa Kenya Ltd** (supra) that **Mr. Momanyi** relied on. Accordingly, the mere fact that the proposed amendment has come too late in the day, or that, if allowed, it will serve to deny the 1st, 2nd and 4th defendants of their defence, are not valid reasons for denying the plaintiff and opportunity to amend her pleading; particularly in the absence of proof of bad faith or an attempt to overreach. As pointed out hereinabove, no Replying Affidavit was filed in rebuttal of the facts adverted to by the plaintiff in her Supporting Affidavit. Hence, the fact only that the application has been brought belatedly is no reason to penalize the plaintiff by rejecting her application, as indeed I am satisfied that no prejudice will befall the defendants for which an award of costs would be inadequate as recompense. As aptly stated by **Apaloo, JA** in **Philip Chemwolo vs. Augustine Kubende**[1985] **KLR 492**, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

[11] Accordingly, it is my finding that the Plaintiff's application dated **28 September 2020** does have merit. The same is hereby allowed and orders granted as prayed in the following terms:

[a] That leave be and is hereby granted to the Plaintiff to further amend her Plaintiff in terms of the draft Further Amended Plaintiff annexed to the Supporting Affidavit herein.

[b] That the Further Amended Plaintiff be filed and served within 14 days from the date hereof; with corresponding leave to the defendants to amend their respective Defences if need be.

[c] That the costs of the application be borne by the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 13TH DAY OF APRIL, 2021

OLGA SEWE

JUDGE