



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO 103 OF 2017**

**KIHUMWIRI FARMERS COMPANY LIMITED.....APPLICANT**

**VS**

**BREEZE INVESTMENTS COMPANY LTD.....1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF SURVEY.....2<sup>ND</sup> RESPONDENT**

**REGISTRAR OF TITLES..... 3<sup>RD</sup> RESPONDENT**

**COMMISSIONER OF LANDS.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. This ruling arises from an application made by the Applicant seeking leave to amend their plaint dated the 1/11/16. The grounds for the application are set out as; the pleadings have closed; the amendments sought will not prejudice any party and further that the amendments will enable the Court to determine the suit on merit and are not intended to mislead the Court; amendment is for determining the real issues in controversy.

2. The application has been supported by the brief affidavit sworn by Phares Mwangi Njoroge, the Chairman/Director of the Applicant which reiterate the grounds set out above.

3. The application is opposed by the 1<sup>st</sup> Respondent on the grounds that the application is fatally defective as no authority was filed by the said Phares Mwangi Njoroge to sign the supporting affidavit or any other pleading; the proposed amendments introduce issues of forgery and fraud without supplying an iota of evidence in support of the allegations; they are an afterthought designed to delay the finalization of the suit; the proposed amendments offend the law on amendments.

4. The 2<sup>nd</sup> – 4<sup>th</sup> Respondents did not oppose the application.

5. The parties have filed written submissions which I have read and considered in the ruling.

6. The application turns on whether the amendments are in accordance with the provisions of the Civil Procedure Rules and secondly whether the Court should exercise discretion in favour of the application. The concept of amendments in general is governed by Section 100 of the Civil Procedure Act which provides as follows;

“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”.

7. Order 8 Rule 1 (1) of the Civil Procedure Rules stipulates 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.”

8. Under order 8 Rule 5 it is stipulated that;

“An amendment shall 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”.

9. Further, **Halsbury’s Laws of England, 4th Edition (re-issue) Vol.36(1) at Paragraph 76** sets out the requirements for an amendment thus;

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.”

10. In the case of **Eastern Bakery vs Castelino (1958) EA 461**, Sir Kenneth O’Conner, President of the predecessor of this Court stated that;

“It will be sufficient ... to say that amendments to pleadings sought before the hearing 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.”

11. I have perused the draft amended plaint and it is clear that the plaint seeks to introduce particulars of fraud inter alia against the Defendants. The deponent explained that he filed the suit in person and being not schooled in the art of drafting he omitted some claims and now that he has counsel on record, it was found prudent to amend the plaint so that all the issues in controversy are laid bare before the Court for determination. In its submissions the Applicant has placed reliance on the provisions of order 8 of the Civil Procedure Rules, Section 100 of the Civil Procedure Act, section 1A and 1B of the Civil Procedure Rules in respect to the overriding objectives of the Court which is to facilitate the just expeditious proportionate and affordable resolutions of disputes and finally the provisions of Art 159 of the Constitution of Kenya. It has also relied on a number of case law which I have read and considered.

12. The 1<sup>st</sup> Respondent stated that the amendments are coming late in the day when the parties have already filed their witness statements ready for the hearing of the suit and views this application as a delaying tactic. Further it faulted the Applicant for alleging fraud without any iota of evidence in the supporting affidavit which is against the legal principles that fraud must not only be pleaded but must be strictly proved.

13. Guided by the general principles in respect to amendment of pleadings, I note that the hearing of the suit is yet to commence and there is no prejudice because the Respondents shall have the liberty to respond to the allegations in the plaint in their pleadings. The issue of evidence of fraud or the lack of it is a matter best left for the hearing and I need not dwell on it at this stage.

14. In the end I allow the application and make the following specific orders;

- a. The Applicant is hereby granted leave to file and serve the amended plaint within the next 7 days from the date hereof.
- b. The Respondents shall thereafter be at liberty to file their responses or additional responses or amend any filed responses and serve the same within a period of 14 days upon service.
- c. The costs of the application shall be paid by the Applicant to the Respondents.

**15. It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANGA THIS 30<sup>TH</sup> DAY OF JANUARY 2020.**

**J. G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Bwonwonga for the Plaintiff

1<sup>st</sup> Defendant – Absent

2<sup>nd</sup> – 4<sup>th</sup> Defendants – Absent

Irene and Njeri, Court Assistants