REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERICHO

ELC CASE NO. 85 OF 2016

PAUL KOECH.....PLAINTIFF

VERSUS

ROBERT KIPKOECH MUTAI.....DEFENDANT

RULING

1. The application for determination before me is a motion on notice dated 8/6/2019 and filed on 11/6/2019. It is brought under Section 3A of Civil Procedure Act(cap 21), Laws of Kenya, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling law. The Defendant – ROBERT KIPKOECH MUTAI – is seeking to amend his defence in order to effectively defend the suit against him. The following orders are asked for

a) That this honourable court be pleased to grant leave to the Defendant to amend his defence.

b) That the defence herewith be deemed as duly filed and properly on record.

c) That costs of the application be provided.

2. The application is anchored on grounds *interalia*, that the defence already on record has some inadvertent omissions; that the amendment will enable the real issues in controversy to be determined; that the proposed amendment will not occasion prejudice to the Plaintiff or the third party being brought on board; that the amendment will serve the interests of justice; and that the Defendant stands to be prejudiced if the amendment is not allowed.

3. The application came with a supporting affidavit which amplifies the grounds advanced. The application also came with a draft defence with a counter-claim added. The counter-claim introduces a new party – SIMON TOO KOECH – who is termed as "THIRD PARTY".

4. The Plaintiff – PAUL KOECH – opposed the application vide a replying affidavit filed here on 17/9/2019. He deposed, *interalia*, that the Defendant has no provable claim against him; that the claim that he had connived with the third party is unsustainable as he had bought the property from the original allotee and the third party was only a witness to the agreement of sale for purchase of the property; that there glaring inconsistencies in both the draft amended defence and the counter-claim. That the Defendant's claim against the third party is, or should be, distinct, separate, and severable from the suit herein and should therefore be a different suit altogether; that such different suit should not even be for this court but a different court altogether; that the end result if the prayers sought are granted would be confusion, legal hardship, and possible embarrassment to the course of justice; and that the application herein only serves to delay the suit.

5. The named third party also opposed the application. He did so vide a replying affidavit filed on 23/9/2019. He deposed that it was not necessary to enjoin him in the suit as there are no transactions between him and the Plaintiff to warrant his joinder as a party. His position is that if the Defendant has a claim against him, he should file a separate suit. He denied having connived with the Plaintiff as alleged.

6. The application was canvassed by way of written submissions. The Defendant's submissions were filed on 14/10/2019. It was submitted *interalia*, that amendment is necessary *"to ensure that all matters in dispute herein are brought to the attention of the honourable court to enable it reach a just and conclusive determination…"* and that *"inadequate pleadings were made against the Plaintiff and by extension the third party…."*. Denial of a chance to amend was said to be likely to prejudice the Defendant as he will have been denied the opportunity to plead his case fully.

7. Although the Plaintiff and the third party are said to have opposed the application, the Defendant submitted that

"*they have not demonstrated what prejudice would be visited upon them if the same is allowed."*

Cases of **ST. PATRICKS HILL SCHOOL LIMITED -VS BANK OF AFRICA LIMITED**[2018] eKLR and

EASTERN BAKERY -VS- CASTELINO[1958]E.A 461(v) were cited in a further attempt to persuade the court to allow the application..

8. The Plaintiff's submissions were filed on 24/10/2019. The application was said to be unmerited as it is likely to cause confusion and embarrass the fair hearing and determination of the case. The application as brought was said to be likely to *"clog, cloud and muddle issues"* as the matter between the Plaintiff and the Defendant is totally different from issue between the Defendant and the third party.

9. It was further submitted that the issues between the Defendant and the third party revolve around breach of contract and they are for a different court. This court was said to lack jurisdiction to handle them. This court was ultimately asked to dismiss the application.

10. The third party also filed submissions. It is clear from the thrust of his submissions that he is in general agreement with the Plaintiff. His submissions however seem to delve more into the possible merits of the claim that the Defendant wants to institute against him. I say so because he is trying to question the existence, validity and even substance of the alleged sale agreement between him and the Defendant. He ultimately submits that the "*amended defence contains false claims based on a land sale agreement that is erroneous and allowing such an application will only be a waste of judicial time."* Like the Plaintiff, the third party asked the court to dismiss the application with costs.

11. I have looked at the pleadings on record. I have also considered the application, the responses made and the rival submissions. A look at the defence sought to be amended clearly shows the need to do some amendment. It is of shallow substance and it largely consists of bare denials of the Plaintiff's claim. If one were to look at the draft amended defence without the added counter-claim, one would appreciate that it is a much more serious response to the Plaintiff's claim.

12. There may apparently be issues with the counter-claim as brought but that, in my view, is no reason to refuse to allow the application as any shortcomings will ultimately benefit, not prejudice, the Plaintiff and the third party if not rectified. The Plaintiff and the third party need to appreciate that issues not otherwise clear in the pleadings sometimes become clear through evidence or through further amendment. Refusal to allow amendment particularly when the case is in its early states like this one may justifiably be construed as denial of a party's right to deploy all the legitimate arsenal at his disposal to his rival in court.

13. The Plaintiff and the third party have tendered their submissions as if the case is already tried. Both have tried to submit on the merits of the amended defence and the counter-claim. Both should hold their horses. Time for that has not yet come. Both stand to reap handsomely if the vagueness, inconsistencies or even the lack of jurisdiction alleged by them happen to be true in the end. In fact, if I were them, I would pray that the problems, if such they are, persist to the end.

14. The court has a wide discretion to allow amendment in order to determine the real questions in dispute and/or to do substantial justice. The amendment can be sought at any stage but within reasonable time provided costs can compensate the other side.

15. The circumstances under which amendment can be sought are wide and varied and each case should depend on its own facts. But a caution needs to be sounded: Amendment can't be allowed to change the character of the suit. The proposed amendment should always flow from the existing and/or original suit.

16. In all cases, amendment should be sought in good faith and the court will not allow amendment if it appears aimed at abusing the court process. And it may amount to abuse of the court process if the proposed amendment is immaterial, useless or merely technical.

17. Amendment should not also be allowed to work injustice to the other side. But an injury that can be compensated by way of cost is not treated as an injustice. The court should aim to avoid multiplicity of proceedings and all amendment that avoid such multiplicity should be allowed.

18. In the matter at hand, I consider that both the Plaintiff and the third party can be compensated by way of costs for any injury likely to be suffered.

Both have raised concerns that cannot easily be wished away. But the concerns should not serve as a reason to deny a party the right to formulate pleadings to his satisfaction. It is clear to me that the Defendant feels wronged both by the Plaintiff and the third party. It is only fair that he be allowed to demonstrate how he was wronged even as the Plaintiff is allowed to exercise his incontrovertible right of proving his case against him.

19. I am therefore persuaded that I should allow the application herein. Even as I do so however, there is a small procedural issue that the Defendant needs to ponder over. The issue is this: I am not sure SIMON TOO KOECH should be in the suit as a third party. If one looks at order 1 of the Civil Procedure Rules, 2010, a third party is enjoined where a sued Defendant feels that if he is found liable in a claim against him, there is another person – called third party in the rules – who should bear that liability or part of it. It is not clear whether the third party in the proposed counter-claim here is supposed to bear such liability. Besides, a reading of the same order shows clearly that there is a procedure for enjoining such party. If the Defendant wants SIMON TOO to remain as a third party, then it must be pointed out that he has disregarded that procedure completely. Here the third party seems to have been plucked from the air. If you like, he happens in the case like pesa-pap. All procedure is given short-shrift

20. I would like to suggest that the third party becomes a defendant in the counter-claim. **Order 7 Rule 8 of Civil Procedure Rules, 2010**, allows it. **Order 8 rule 1(5)** envisages it.

In simple terms, where a Defendant wants to file a counter-claim against a Plaintiff who has sued him, and he feels that another person other than the Plaintiff should also be part of the counter-claim, such Defendant, who essentially becomes Plaintiff in the counter-claim, is allowed

to include or enjoin such person as Defendant in the counter-claim even when the Plaintiff had not included or mentioned such person in the plaint. In the matter at hand, my understanding is that both the Plaintiff and the named third party are part of the Defendant's problem. Mine, however, is a suggestion, not a directive. The Defendant should make a choice. He has an able counsel on record.

21. I had pointed out earlier that I am persuaded that I should allow the application. I now hereby allow it. But the costs of the application should be paid to both the Plaintiff and the named third party by the Defendant. I make this order on costs because had the Defendant exercised due diligence and formulated his pleadings well in the first instance, we would not still be talking about pleadings at this time. We would be preparing the matter for trial.

Dated and signed at Kericho this 23rd day of January, 2020.

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A.K.KANIARU

JUDGE