



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 20 OF 2015**

**ESTHER WANJIKU MUCHIRA.....PLAINTIFF**

**VERSUS**

**JAMES MUNENE MUCHIRI.....1<sup>ST</sup> DEFENDANT**

**PHYLIS WANJIKU MWAL.....2<sup>ND</sup> DEFENDANT**

**LILIAN KAGENDO MURIITHI.....3<sup>RD</sup> DEFENDANT**

**RULING**

The application before me is the Notice of Motion dated 10<sup>th</sup> May 2019 brought under **Order 8 Rule 3 CPR** where the Applicant/Plaintiff is seeking leave to amend the plaint. According to the Plaintiff/Applicant, they inadvertently forgot to include an order for mesne profits in their prayers while instituting this suit. The Plaintiff in her supporting affidavit contends that the 3<sup>rd</sup> Defendant/Respondent has been occupying land illegally from 2012 to date and that her occupation has occasioned her loss of profits. She argued that it is imperative that the orders sought are granted to effectually determine the real issues in controversy. The Applicant further contends that the Respondent will not suffer any prejudice if the orders sought are granted.

In a replying affidavit sworn on 6<sup>th</sup> June 2019, the 3<sup>rd</sup> Defendant opposed the Applicant's application stating that the proposed application for amendment of the plaint is an afterthought since this suit was filed in 2015. She also stated that should the said application be allowed, she will be prejudiced as the case had been fixed for hearing and one witness testified before being stood down to avail some documents which were in the Plaintiff's list of documents. The 1<sup>st</sup> Defendant is not opposed to the application.

**PLAINTIFF'S SUBMISSIONS**

The Plaintiff/Applicant through her advocates on record cited the provisions of **Order 8 Rule 3 and 5** which set out, the cardinal principles regarding amendment of pleadings. He stated that this Honourable Court is vested with wide discretion to allow a party to amend pleadings before judgment. He contends that **Section 1A, 1B and 3A CPA** provides for the overriding objective of the Act which is the just, expeditious proportionate and affordable resolution of civil disputes. He stated that this Honourable Court is enjoined to apply the said principles in favour of the Applicant. The learned counsel cited the following cases in support of the application:

1. **Hon. Attorney General Vs Halal Meat Products Limited (2016) e K.L.R.**
2. **Rajashal T/A Rajan S. Shal & Partners Vs Bipin P. Shal (2016) e K.L.R.**

**3<sup>RD</sup> DEFENDANT/RESPONDENT'S SUBMISSIONS**

The 3<sup>rd</sup> Defendant through the firm of Maina Kagio & Co. Advocates submitted that **Section 1A and 1B of the CPA** is guided by the overriding objectives otherwise known as Oxygen Principles which provides for just, expeditious, proportionate and affordable resolution of the civil disputes and that the Courts are enjoined to ensure the just determination of proceedings, the efficient disposal of the business of the Court, the efficient use of the available Judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties and the use of suitable technology. The learned counsel submitted that the order being sought is discretionary in nature and that the Applicant is not deserving of the exercise of the Court's discretion.

**ANALYSIS AND DETERMINATION**

I have considered the Notice of Motion application dated 10<sup>th</sup> May 2019 and the supporting affidavit. I have also considered the draft amended plaint annexed to the supporting affidavit. The *Halsbury's Laws of England, 4<sup>th</sup> Edition (re-issue) Vol. 36 (1) at paragraph 76* sets out the requirements for an amendment as follows:

***“..... 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”.***

In the case of *Central Kenya Ltd Vs Trust Bank & 4 others Civil Appeal No. 222 of 1998*, the Court of Appeal stated as follows:

***“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs”.***

Again in the case of *Elijah Kipngeno Arap Bu Vs Kenya Commercial Bank Limited (2013) e K.L.R*, the Court of Appeal restated the law applicable to amendment of pleadings and stated as follows:

***“The ratio that emerges out of what was quoted from the said book is that power of the Court to allow amendment is to determine the true, substantive merits of the case; amendment 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 amendment 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 Act”.***

I agree with the principles of amendment as espoused in the above decision. The Defendant has not alluded to any of the principles that would disallow the Court exercising its discretion in favour of the Applicant. The Respondent has not stated that the proposed amendment would deprive him of his right to rely on Limitation Acts. He has not alluded to a new cause of action being introduced in the proposed amendment. The Defendant/Respondent has not also stated what prejudice he is likely to suffer which cannot be compensated by an award of costs. I find that the proposed amendment is not useless or merely technical. The proposed amendment is not idle but is one that is made in good faith. As such I find the application merited and allow the same in the following terms:

- 1. The Plaintiff/Applicant is granted leave to amend, file and serve his plaint in terms of the draft amended plaint annexed to the supporting affidavit sworn on 10<sup>th</sup> May 2019 within 7 days from today.***
- 2. The Defendants/Respondents are granted corresponding leave to amend, file and serve their defence within 14 days from the date of service thereof.***
- 3. The costs of the application to be borne by the Plaintiff in any event.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 21<sup>st</sup> day of February, 2020.

.....

**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

**21<sup>ST</sup> FEBRUARY, 2020**

*In the presence of:*

- 1. Mr. Asimwe holding brief for Mr. Maina Kagio*
- 2. Mr. Kahiga holding brief for A.N. Chomba for Plaintiff*
- 3. 1<sup>st</sup> and 2<sup>nd</sup> Defendants – absent*