



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 110 OF 2017

ZEPHANIA KHISA SAUL.....PLAINTIFF

VERSUS

THE SCHOOL COMMITTEE

ST. ANNE'S SECONDARY SCHOOL.....DEFENDANT

RULING

1. This is a ruling on the application dated 7/11/2019 and filed in court by the defendant/applicant on the same date seeking that leave be granted to the applicant to amend its defence.
2. The application has brought the application under **Sections 1A, 1B, 3 & 3A of the Civil Procedure Act, Order 8 Rule 3, 5 and 7, Order 51 Rule 1 of the Civil Procedure Rules.**
3. The grounds upon which the application is made are that the defence was filed herein but all facts were not disclosed and that the amendment is necessary for the real question in controversy to be determined by this court.
4. The application is supported by a sworn affidavit of **Pamela Evereso Oguda**, the Principal and Secretary to the applicant, dated 7/11/2019.
5. The replying affidavit of the plaintiff was filed on 11/11/2019. He states that no good reason has been supplied for the proposed amendments; that new issues will be introduced into the proceedings to the prejudice of the plaintiff; that the defendant is guilty of *laches* and the amendments are ambiguous and contradictory and that the counterclaim contravenes **Order 5** of the **Civil Procedure Rules.**
6. The applicant submits that a party can only be denied leave to amend if the proposed amendments will prejudice the other party or introduce a different cause of action, which in applicant's view is not the case herein.
7. The case of **Catholic Diocese of Kericho v James Tapkei & 3 others [2016] eKLR**, in which reliance was placed on **Section 100 of The Civil Procedure Act** and **Order 3** of the **Civil Procedure Rules**, is persuasive regarding the court's power to order amendments at any stage of the proceedings. In that case the amendments were allowed after the hearing had commenced.
8. The case of **Harrison C. Kariuki -vs- Blue Shield Insurance Co. Ltd 2006 eKLR** is persuasive as to the example of a scenario where one party may be occasioned grave prejudice by an amendment. In that case the court stated as follows:-

“I hold that to allow extensive amendments sought by the plaintiff at this late stage will occasion great prejudice to the defendant that cannot be made good by costs. It will occasion injustice to the defendant who will have to extensively amend its defence. The defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expended case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted”.

9. It is clear that the situation in the instant case is different from that in the **Harrison C. Kariuki case** cited immediately hereinabove.
10. The applicant is of the view that the amendment, if allowed, will enable the court to determine the issues before it and reach a just decision.

11. The applicant relies on **St. Patricks' Hills School Ltd -vs- Bank of African Kenya Ltd Kajiado HCCC No. 7 of 2017** for the proposition that all amendments ought to be made as will be necessary for the purposes of determining the real questions in controversy between the parties.

12. The plaintiff's claim as contained his plaint dated **21/6/2017** is for eviction of the defendant from that parcel of land known as **Kakamega/Mambusi/424**, a permanent injunction, costs and interest. It is the plaintiff's statement in the plaint that he is the lawful owner of the suit land; that he entered into an agreement with the defendant over the suit land whereby a $\frac{1}{2}$ acre was to be sold to the defendant for **Kshs.600,000/=** of which **Kshs.350,000/=** was paid as down payment and the balance remains unpaid to date despite demand.

13. The defendant filed its submissions on **28/11/2019** and plaintiff on **2/12/2019**. I have considered the application, the response and the submissions.

14. The defendant's defence filed on **18/3/2019** admitted the registration of the plaintiff as the owner of **LR. No. Kakamega/Mabusi/424** but denied the agreement and the down payment. It also raised certain technical objections stating that the suit is time barred fatally defective and incompetent.

15. The proposed amendments now seek to admit the agreement and the payment of what the plaintiff refers to as the "*deposit*" and the taking of possession of the land by the defendant, but asserts that the "*deposit*" was paid for the entire property after a valuation and therefore the plaintiff is not owed any more money. The counterclaim seeks that the $\frac{1}{2}$ acre legally purchased from the defendant be transferred to the plaintiff.

16. The issue arising in the instant application is whether the defendant should be allowed to amend the defence.

17. In my view the matters raised by the defence are relevant. A party ought to be allowed to amend its pleadings at any time before judgment as long as that amendment does not prejudice the other party. In this case this suit had been heard *ex-parte* to conclusion and a judgment issued which was later set aside at the defendant's instance. The setting aside order took the parties back to the position where they were before the judgment, and they are at liberty to amend their pleadings with leave of court subject to the rules.

18. In the instant application I do not see how the proposed amendments would prejudice the plaintiff.

19. In the circumstances I allow the application dated **7/11/2019**. The amended defence shall be filed and served with **14 days** of this order. This suit shall be mentioned on **5/3/2020**.

20. Costs of the application will be in the cause.

Dated, signed and delivered at Kitale on this 12th day of February, 2020.

MWANGI NJOROGE

JUDGE

12/2/2020

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Munialo for the defendant

Plaintiff in person (present)

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

12/2/2020