



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO. 265 OF 2017

KELVIN NJUIRI MWAURA.....PLAINTIFF/RESPONDENT

VERSUS

MWANGI MWAURA.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to the Notice of Motion dated the 13/12/17 and filed on the 14/12/17. It is expressed under Order 7 section 5,9,17 and 18 Order 8 Rule 3 of the Civil Procedure Rules sections 1A, and 1B of the Civil Procedure Act and any other enabling provision of the law.

2. The Applicant sought orders to amend the statement of defence and set of as per the draft filed on the 15/4/2013. Further he sought leave to file a further witness statement.

3. The application is based on the grounds adduced thereto and the supporting affidavit of the Applicant sworn on the 13/12/17 and filed on the 14/12/17. In it he deposed that the defence as filed omitted certain issues the Defendant wishes the Court to determine. Further that the list of documents filed excluded some crucial documents inter alia such as the witness statement of Ngure Mwaura. In addition, he stated that the amended defence will bring to the fore all the issues to be determined by the Court.

4. In his Replying Affidavit sworn on the 9/12/19 the Respondent deposed that the application is fatally defective, incompetent, frivolous and vexatious and an abuse of the due process of the Court. That the suit was filed in 2013 and an amendment being sought 6 years latter comes too late in the day and amounts to an afterthought. That pretrial closed and further that the amendments have been overtaken by the orders of the honourable Court recorded on the 7/11/17 and the ruling delivered on the 10/5/18.

5. In addition, the Respondent contended that the orders being sought will change the character of the suit and the application is thus untenable nor maintainable in law. He argued that the whole intent of the application is to stall the suit and water down the orders of the Court issued and fully executed in the case.

6. In a further affidavit dated the 18/12/19 the Applicant admitted that the consent judgement was settled leaving the contested amount in respect to the penalty payable, the set off in the defence and who will bear the costs of the suit. That amendments of pleadings are allowed at any stage of the proceedings and that the amendments being sought will not create a new cause of action nor prejudice the Respondent at all. He refuted the allegations that his application is geared to delay the hearing of the suit. He says he brought the application for amendment timeously and therefore there was no delay intended or created.

7. That allowing the application will allow the Court to determine the issues on merit at once.

8. On the 14/1/2020 the parties elected to canvass the application by way of written submissions. On the 25/2/2020 parties appeared before the Court through their learned counsels and informed the Court that they had filed written submissions. However, when I retired to write the Ruling, my perusal of the file shows that there are no written submissions on record. None of the parties filed despite the confirmations made in Court. I shall therefore proceed to determine the application without the benefit of written submissions from either party.

9. 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”.

10. 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.”

11. Order 8 Rule 3 gives the Court discretion to allow the amendments of pleadings 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.

12. 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”.

13. 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.”

14. 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.”

15. Further the Court of Appeal in **Central Kenya Ltd. Vs. Trust Bank Ltd (2000) 2 EA 365** said;

“a party would be allowed to make such amendments of pleadings as was necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there has been no undue delay, (2) no new inconsistent cause of action was introduced, (3) no vested interest or accrued legal right was affected and (4) the amendment could be allowed without injustice to the other side”.

16. Back to the application, the Plaintiffs suit filed on the 8/3/13 seeks orders for specific performance that is to say transfer of LOC2/KANGARI/4437 to the Plaintiff and in the alternative a refund of the purchase price in the sum of Kshs 226,800/- plus the agreed penalty as per para 6 of the agreement of sale.

17. The Defendant filed a defence on the 15/4/13 and under para 3 admitted the Plaintiff claim as follows;

“in answer to para 4 of the plaint the Defendant confirms having received and acknowledge receipt of Kshs 202,600/- but denies having received a further sum of Kshs 24,200/- in part payment of the purchase price and shall put the Plaintiff to strict proof otherwise.”

18. In furtherance of the said admission the parties recorded a consent on the 7/11/17 which consent was adopted as orders of this honourable Court. The said decree has been fully executed.

19. I have perused the annexed draft defense of the Applicant and it is to be noted that the amendments are captured on para 7 and 8 as follows;

“Para 7- The Defendant further avers that the Plaintiff had complained and a result thereof the Defendant was charged at 5 pm.Criminal case No 99 of 2013, Kigumo with the offence of obtaining by false pretense which offence the Defendant was acquitted.

Para 8- the Defendant further avers that he received the purchase price with Messrs Mbiyu Kamau & Co Advocates and the Plaintiff was vide letter dated the 13/3/ 2013 informed of the same.”

20. It is the Respondents contention that the amendments have been overtaken by events in view of the consent orders and the ruling delivered by the Court and that the nature of the orders sought will change the character of the suit making the application untenable. The Applicant has admitted that the consent orders were executed and the monies have been fully paid. That the remaining issues are the penalty payable, the set off and the costs of the suit.

21. My review of the pleadings reveals that neither the cause of action nor the orders being sought by the parties are being affected by the contemplated amendments. I agree with the Applicant that there are still issues that require determination by the Court or consent of the parties on their resolution.

22. On the issue of prejudice, the Respondent has not demonstrated any. I see no prejudice save for costs of the application which I shall deal with shortly.

23. In the end the application is for allowing.

24. It is allowed as prayed with costs to the Respondent.

25. **It is so ordered.**

DATED, SIGNED & DELIVERED VIA EMAIL THIS 12TH MAY 2020.

J G KEMEI

JUDGE