



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANGA

ELC NO. 278 OF 2017

SAFARICOM LIMITED.....PLAINTIFF

-VS -

JOSENGA COMPANY LIMITED.....1STDEFENDANT

SABINA GITHINA.....2NDDEFENDANT/APPLICANT

PUNDA MILIA CO-OPERATIVE

SOCIETY LIMITED.....3RDDEFENDANT

THE LAND REGISTRAR, MURANGÁ.....4THDEFENDANT

ROBERT KIMANI NDUNGU.....5THDEFENDANT

RULING

1. This is a ruling relating to the amendment of a defence brought under Order 8 Rule 3 of the Civil Procedure Rules and adverted by the 2ndDefendant/Applicant on the 20/1/2020.
2. In it, the Applicant sought leave to amend her defence, counterclaim and cross claim against the Plaintiff and the co – Defendants.
3. The application is anchored on the grounds adduced thereto and the affidavit of the Sabina Githina sworn on the 17/1/2020 where she deposed that on the 23/9/2019 the parties entered into a consent to allow the 4thDefendant to file it's bundle of documents and serve all the parties in the case despite having failed to file and serve a statement of defence. That on receipt of the documents she realized that parcel 5993 was created in 2004 simultaneously with her parcel of land 5992. She deposed that at the time her parcel was created there was no mention of parcel 5993 being in the middle of her land. That alongside the two parcels another one namely 5991 was also created in 2004. With this realization she states that it has become necessary for her to amend her statement of Defendant and counterclaim to bring on board these new facts which hitherto were not in her possession. She has attached her draft defence to the application as well as documents such as the transfer in respect to parcel 5993, the letter of consent in respect to parcel 5993, application for consent , green card for parcel 5308 (original land) , mutation form for the subdivision of parcel 5308 and green cards for parcels 5992 and 5993.
4. The Plaintiff did not oppose the application subject to being given leave to recall its witness, if need be. It is to be noted that the Plaintiff led evidence and closed its case with a rider that should the 4thDefendant tender evidence it would, subject, to the leave of the Court seek to reopen its case, if need be.
5. Despite the leave of the Court having been granted the 4thDefendant failed to file its defense at all. However pursuant to the witness summons issued by the Court, the Land Registrar filed and served its bundle of documents on all the parties to the suit triggering this motion by the 2ndDefendant.
6. The motion is opposed by the 1st 3rd and 5thDefendants on the grounds that the search documents said to have emanated from the 4thDefendant had actually been filed by the 1st 3rd and 5thDefendants in its bundle and therefore the position taken by the Applicant that it saw if for the first time is untrue. Further that the prayer to amend the defense by the 2ndDefendant allows her to reconstruct her case which is tantamount to an abuse of the process of the Court. That the proposed amendment will not guide the Court in determining the real issues in controversy but will serve to confuse and cloud the issues.

7. The application was heard in open Court and parties made their arguments. The Applicant reiterated the grounds in the motion and added that Order 8 Rule 3 allows amendments to pleadings unless prejudice is demonstrated to be suffered by the other side. That the 2nd Defendant wishes to clarify that parcel 5992 and 3993 were created at the same time through subdivision and not that parcel 5993 was exercised out of parcel 5992 as she had stated before. That it was imperative that the said position is clarified in her pleadings so that the issues in controversy are made clear. That no prejudice will be suffered by the 1st 3rd and 5th Defendants because they have not commenced their case and neither have their witnesses testified and they will have the opportunity to be heard on their defence and test the veracity of the testimonies arising from the hearing

8. In opposing the application Mrs. Kuria the learned Counsel for the 1st 3rd and 5th Defendants tore into the arguments of the Applicant and stated that the application is being brought midstream a trial where the Plaintiff has closed its case. That allowing the application will mean that the Plaintiff will reopen the case for the Defendants to cross examine the witnesses an exercise that is costly in terms of money and time for all the parties. That it is not putting the Courts scanty resources such as time into good use.

9. Further that the application is an abuse of the process of the Court because some of the cited documents were supplied to the Applicant by the Respondents way back in 2016 and the Applicant cannot feign ignorance of the same in 2019. That her clients are entitled to an expeditious hearing and will continue to be prejudiced in terms of the attendant delays brought about by the application. That the Applicant cannot be allowed to visit her failure to prepare her case in advance to the rest of the parties by failing to peruse the documents served upon them by the Respondents.

10. She urged the Court to dismiss the application with costs.

11. Mr. Mukele learned Counsel for the Applicant urged the Court to uphold her clients position based on the arguments made at the hearing, the procedural law and the pleadings on record. He however admitted that the Applicant had in her possession the searches referred to by the Respondents but not the other documents to wit the green cards and the mutation forms which has made the position of the parcels clearer. On the issue of prejudice, he urged the Court to balance the inconvenience of possibly having to rehear the Plaintiff and the interest of justice and hold for the latter.

12. Having heard the parties, read and considered the application, the grounds and the rival affidavit evidence the key issue for determination is whether the Application should be granted.

13. Pleadings of material facts and necessary particulars in a suit are key so that the opposite party is notified of the nature of the case or the defence that faces him. Pleadings and particulars are also essential for the Court to decide the true rights of the parties in trial. Sometimes parties may find it necessary to amend pleadings before or during the hearing of the suit.

14. The provisions of Order 8 Rule 3 provides as follows;

“ (1) Subject to Order 1, Rules 9 and 10, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, 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.

(2) Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do. (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued”.

15. Amendment of pleadings is a matter of the discretion of the Court. It has been held in a number of decisions by Courts in this country that amendments should be allowed freely so that the real issues in controversy may be determined on the merit of the case provided that no prejudice shall be visited on the parties on the opposing side.

16. In the case of **Ganesh Trading co Vs Moji Ram (1978) 2 SCR 614** the Supreme Court of India stated that procedural law is intended to facilitate and not obstruct the course of substantive justice. Pleadings in civil cases are meant to give each side the intimation of the case of the other side so that it may be met to allow Courts to determine what is really at issue between the parties and to prevent the deviations from the course which litigation on particular causes may take.

17. The Court's objective therefore is to decide the rights of the parties and never to punish them for mistakes they may make in the conduct of their cases. Having said that, it is the duty of the Court to remain vigilant against a party who moves the Court with a view to facilitate the patching up of a case. This must not be allowed at all.

18. In exercising its discretion the Court must consider factors such as; whether the amendment expresses a valid claim or defence; reasons for not including the proposed amendment in the original pleading; the delay that the amendment shall cause to the administration of justice and the extent to which the amendment departs from the original claim or confuse the issues. Amendments that tend to confiscate, confuse or complicate issues for trial should be rejected. On whether the amendment sets up a new cause of action or a party enriches their case should be discouraged.

19. A number of authorities in this jurisdiction have held that the Court has wide discretion to allow amendment of pleadings to meet the end of justice. I hold the view that circumstances that can justify amendment are numerous and the Court is entitled to look at the circumstances of each case and make a consideration. There can never be a blanket application of one set of circumstances to another. As long as no

prejudice is visited on the parties, amendments should be liberally allowed and if there be prejudice then it should be one that can be compensated with costs.

20. In the case at hand, the Applicant's case and defence is based on fraud. In her original defence and counterclaim she averred that the parcel 5993 was carved out of parcel 5992 in a fraudulent manner. With the filing of the 4th Defendant's bundle of documents, it occurred to her, she avers, that both parcels were created in 2004 as a result of subdivision of parcel 5308, the original land. Her case and defense still remain anchored on fraud which she carries the cross of proving it. The amendments carry a consistency to the original defense and counterclaim. She raises the question as to how land purchased by her husband measuring 3 acres was reduced to 2.4 acres or thereabouts. This is an issue that need to be proved and controverted in the trial.

21. It is true that the Plaintiff has closed its case. That said, it is also correct that the Plaintiff did not oppose the application subject to being granted leave to recall its witness, if need be. The parties had earlier in the trial consented and the Court allowed the 4th Defendant to file defense out of time as the parties informed the Court that the evidence of the 4th Defendant was crucial to the controversy at hand. The source and reason for amending the defense arose from the documents filed of the 4th Defendant. The Court finds the explanation tenable in the circumstances.

22. I am satisfied that no prejudice shall be visited to the Respondents that cannot be compensated with costs.

23. To accord the 2nd Defendant to ventilate its case, I shall allow the amendments as prayed with costs of the application payable to the 1st 3rd and 5th Respondents.

24. To ameliorate the prejudice if any I shall grant leave to the Plaintiff to recall its witness if need be.

25. Equally the 1st 3rd and 5th Defendants shall have the liberty to amend their defenses/file replies if need be within the next 30 days for this ruling. The Plaintiff shall have leave to file any replies if need be to the amended defence and counterclaim within a similar period.

26. The application is meritorious and it is hereby allowed.

27. **It is so ordered.**

DATED, SIGNED & DELIVERED VIA EMAIL ON THE 12TH DAY OF MAY 2020.

J.G. KEMEI

JUDGE