



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

ELC SUIT NO. 187 OF 2007

EVEREST LIMITED.....PLAINTIFF

VERSUS

KATHERINE WAMBUI KURIA.....DEFENDANT

RULING

The Plaintiff seeks leave to amend its plaint in terms of the draft amended plaint annexed to the application. It also seeks orders that the defendant be deemed to have been served with the amended plaint and that leave be granted to the defendant to amend her defence if she so desires within 14 days of the date of the order.

The Notice of Motion dated 1st July, 2016 is taken out under Section 1A, 3A of the Civil Procedure Act, Cap 21, Order 12 Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules. The motion is supported by the affidavit of James Muriuki sworn on 1st July, 2016. The defendant filed grounds of opposition on 14th February, 2017 citing three main grounds: - that the application is an abuse of the court process, the plaintiff has been indolent and, that the plaintiff had the information on ownership of the Suit Property since the inception of the suit.

During the oral canvassing of the application, Mr. Ochieng urged that the plaintiff wishes to amend the plaint because of the change in circumstances. Initially, the plaintiff sought specific performance to conclude a sale in respect of L.R. No. 330/537 (the "Suit Property") which has since been sold necessitating the plaintiff to sue for damages hence the need to amend the plaint. The plaintiff further argued that the defendant will neither suffer prejudice nor be deprived of any right to a defence if the amendment is allowed. The plaintiff urged that the amendment is intended to bring before this Court all the matters in dispute fully and properly to enable the court determine the real questions in controversy between the parties.

Mrs. Githae opposed the application citing delay urging that since this suit was filed on 26th June, 2007, the Plaintiff has not taken any substantive steps in the matter for almost ten years. The Defendant further argued that the plaintiff knew the factual position on the ownership of the suit land at the time it brought this suit and that what it now wants to plead was known to it at that time. The defendant also argues that the proposed amendment to bring a claim for Kshs.100 Million will prejudice her. In reply, Mr. Ochieng urged that when the defendant disposed of the Suit Property after taking a deposit from the plaintiff of Kshs. 2.7 million, it ought to have considered the likelihood that she could be sued for refund and damages. He further argued that it is not the adequacy of damages that determines whether the plaintiff should be allowed to amend the plaint or not.

After considering the application and the submissions of counsel, and looking at Order 8 Rule 5(1) of the

Civil Procedure Rules, it provides that amendments ought to be allowed for purposes of determining the real question in controversy between the parties.

Under Order 8 Rule 3(5) of the Civil Procedure Rules, an amendment may be allowed even if its effect will be to add or substitute a new cause of action if the new cause of actions arises out of the same facts as the cause of action in respect of which relief has been claimed in the suit by the party applying for leave to make the amendment.

In the plaint, the plaintiff sought an order for specific performance of the sale agreement entered between the plaintiff and the defendant. Through the proposed amendment, the plaintiff now wishes to seek damages for loss of profit because the Suit Property has been transferred together with a refund of the deposit of Kshs. 2.7 million it paid to the defendant and legal fees.

The court is of the view that the new claim arises out of the same facts as the cause of action in respect of which relief was claimed in the plaint.

It is now settled that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice is the other side can be compensated by costs.

It will be in the interest of justice to allow the amendment sought so that all the issues in contention can be properly addressed and determined.

The Court grants the application dated 1st July, 2016. The defendant is granted leave to amend her defence. The draft amended plaint annexed to the application shall be deemed as having been duly filed and served on the defendant upon payment of the requisite court fees. The plaintiff will pay the defendant's costs of this application.

Dated at Nairobi this 3rd day of March, 2017.

Read and delivered in open Court on the 3RD day of MARCH 2017.

**K. BOR
JUDGE**

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... Court Assistant