



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 796 OF 2009

NGAGA ENTERPRISES LTD ::: PLAINTIFF

VERSUS

PETER OPANDE ::: DEFENDANT

R U L I N G

1. By a **Notice of Motion** application dated 15th June 2015 and filed herein on 17th June 2015, the defendant seeks the following orders;-

1. That this Honourable court be pleased to grant its leave to the Defendant to further amend his defence & counterclaim in terms as proposed in the draft. Further Amended Defence & counterclaim exhibited herewith.

2. That the costs of and relating to this application be provided for.

2. The application is premised on the ground set out therein, and is supported by an affidavit sworn by the defendant on 15th June 2015.

3. The applicant's case is that the plaint herein was amended on 29th November 2010 pursuant to which the defendant on 26th January 2011 filed an amended Defence and counterclaim. The defendant then changed his advocates, who upon perusing the pleadings have now provided a legal opinion recommending further amendment to the Defence and counterclaim. The defendant case is that the amendments are necessary to clarify the defendant case and should be allowed in the interest of justice. The defendant states that the proposed amendments incorporate material facts and defence that were hitherto mistakenly overlooked or omitted, but are necessary for the defendant's case.

4. The plaintiff opposed the application via grounds of opposition dated 13th July 2015 and the replying affidavit sworn by Anthony Gathiuri on 21 September 2015. The plaintiff/Respondent case is that the application has come too late in the day, being brought six years after the suit was filed in 2009. The Respondent further submitted that the amendments sought are so extensive and substantial that they form an entirely new cause of action. Further the respondent states that the draft. Further Amended Defence and Counterclaim raises several new defences, several amendments and allegation in the guise of an attempt to supply the court with better and further particulars of the events.

5. With the leave of the court the applicant filed written submissions while the Respondent relied solely on the ground of opposition and the Replying affidavit.

6. I have carefully considered the application. In my view, the only issue for consideration is whether in the nature of the current application, the court can exercise its discretion to grant the application.

7. It is trite law that amendments to pleadings can be allowed at any time of the proceedings, even if such amendments have the likelihood of introducing a new cause of action. The duty of the court is to look at each case to determine whether or not to allow the application. In doing this the court will consider, among other factors, the following;

- a) Time taken before the application for amendment is brought before the court.
- b) The merit of the proposed amendment.
- c) Whether the application is brought in good faith.
- d) Whether the proposed amendments materially change the text and tenor of the relevant pleading unjustifiably.
- e) Whether the application brings in relevant information to the court which is necessary for the disposal of the matter.
- f) Whether the application is an afterthought, and is designed to delay the finalization of the matter.
- g) Whether the proposed amendments are measurable.

8. While the law allows an application for amendment of pleadings at any time before the judgment, the parties must still show legal justification for amendment. Proposed amendments to pleadings must on the face show clarity and purpose. Any proposed amendments which appear to blur or muddle the issues cannot be allowed. An amendment which on the face thereof appears to be so extensive and risks blurring the original issues cannot be allowed. Such an amendment will cause prejudice to the respondent and the court must be careful to distinguish an acceptable proposal for amendments from those that blur the original issues and causes the matter to delay.

9. I have carefully considered the application against the law and against the parameters I have set up at paragraph 7 above. In my view this application is brought rather too in the day. The defendant filed an amended defence and counterclaim on 26th January 2011. It took the defendant a further four years to realize that he needed to amend his defence and counter-claim. While the delay herein alone is not a bar to the grant of the orders, it is also my view that the application is an afterthought, and is brought primarily to blur the issues and to possibly delay the hearing and finalization of this matter. I say this because the proposed amendments are so extensive including the prayers sought as to amount to a fresh suit. Fresh averments have been added throughout the draft Further Amended Defence and Counterclaim thereby changing the original defence from mere denials. Further the proposed counterclaim is intertwined with the proposed further amended defence so as to form an entirely new claim. The court gets the impression that the true intension of the Defendant / Applicant is to rewrite the original defence and improve his case as the matter progresses. The draft Further Amended Defence and Counterclaim has brought in new prayers that are so substantial as to form an entirely new suit. In my view, the proposed amendments, being filed six years after the defence was filed, if allowed, will be highly prejudicial and unjust to the plaintiff as the original tenor of the suit and the defence would be entirely lost to the detriment of the plaintiff.

10. Pursuant to the foregoing, the court declines to exercise its discretion in favour of the applicant. Accordingly the application under reference is herewith dismissed with costs to the Plaintiff / Respondent.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 11TH DAY OF FEBRUARY 2016.

E. K. O. OGOLA

JUDGE

Ruling Read in open court in the presence of:

No Appearance for Plaintiff

Mr. Maweu for Defendant