



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 183 OF 2016

LUCY WACUKA MWANGI.....1ST PLAINTIFF

ESTHER WAITHERA CHEGE.....2ND PLAINTIFF

DAVID NDUNG’U CHEGE.....3RD PLAINTIFF

PETER KAHIGA.....4TH PLAINTIFF

VERSUS

DANIEL MASIKA SADAKA.....DEFENDANT

RULING

1. The application dated 7/10/2019 has been brought by the defendant under **Section 1A, 1B, 3 and 3A, 63(e) and 100** of the **Civil Procedure Act, Order 8 Rules 3 and 5 and Order 51 Rule 1** of the **Civil Procedure Rules 2010**, The defendant seeks the following orders:-

- (1) That the defendant be granted leave to amend his defence herein as per the draft annexed hereto.**
- (2) That the plaintiffs be at liberty to file an amended plaint if they so wish upon being served with the amended defence.**
- (4) That costs of this application be in the cause.**

2. The application is supported by an affidavit of the applicant dated 7/10/2019. It is averred that the proposed amendments are not inconsistent with the claim before the court since they arise from the same chain of transactions that forms the basis of the claim and are merely intended to bring before this court the real issues in dispute between the parties herein; that under **Section 100** of the **Civil Procedure Act** and **Order 8 Rule 3(1)** of the **Civil Procedure Rules**, the court has discretion to allow amendments to pleadings at any stage of the proceedings so as to bring out the real issue in controversy and that the amendments sought by the defendant would not prejudice the plaintiffs in any way and that it is in the interest of justice that the orders sought be granted.

3. In reply to the application the respondents filed a replying affidavit sworn on 6/3/2020 by **Lucy Wacuka Mwangi**, the 1st plaintiff. The main grounds of objection raised in that affidavit are that the plaintiff’s case is now closed and the matter had been scheduled for the defence hearing at least once yet the defendant now seeks by the amendments to introduce a counterclaim in response to the evidence that was adduced in court; that the application is meant to reframe and salvage the defence case by attempting to fix any loopholes detected at the hearing of the plaintiff’s case; that succession proceedings allegedly meant to override this suit were filed by the defendant in the Magistrate’s Court being **Succession Cause No 49 of 2017** which was stayed; that the defendant has raised inconsistent claims and that there has been inordinate delay in the lodging of the application.

4. The defendant filed his submissions on 16/6/2020. The plaintiff filed their submissions on 24/6/2020. I have considered the application, response and the filed submissions.

DETERMINATION

The Issues for Determination

5. The issues which arise for determination in this application are as follows whether this court can allow an amendment of the defence after the plaintiff has closed his case and whether the proposed amendments raise any inconsistent claims.

6. The provisions of **Order 8 Rules 3(1)** of the **Civil Procedure Rules** are as follows :-

“3(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.”

7. The provisions of **Order 8 rule 5(1)** are as follows:

“5(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

8. In the case of **Merry Beach Limited v Barclays Bank of Kenya Limited & another [2018] eKLR** the court stated as follows:

“The Court of Appeal in Elijah Kipngeno Arap Bii (supra) restated the law applicable to amendment of pleadings as stated in Bullen and Leake & Jacob's Precedents of Pleadings - 12th Edition and captured in the Court of Appeal decision in Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991 thus:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

9. The Court of Appeal's observation in **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991** that the general rule is that however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side will guide this court in assessing the merits of the application at hand.

10. In **Eastern Bakery v. Castellino, (1958) E.A.461** the court stated as follows regarding amendments before hearings:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.”

11. The court in **Joseph Tireiti v Jacob Kipsugot Arap Lagate & another [2013] eKLR** stated as follows:

“15. It will be seen from the above clauses, that the court has discretion to allow a party to amend his pleadings. This discretion is meant to enable the court determine the real question in controversy between the parties. However, as will all other discretions, such discretion to allow a party to amend, must be made with the aim of ensuring that justice will prevail and that no prejudice will be caused to any party. When amendments are sought before the matter has commenced, such amendments are in most cases liberally granted. However, as the matter progresses, so does it become more difficult to obtain leave to amend. In other words, the chances of being granted leave to amend, diminish with the progress of the matter and also with the effluxion of time.”

12. In **Precision Belting (Pty) Limited v Beltpro (K) Limited [2016] eKLR** the court observed as follows:

“Meanwhile, in the case of MECHANISED SYSTEMS LIMITED Vs GUARDIAN BANK LIMITED HCCC No. 2 of 2005, L. Njagi J. said;

“It seems, however, that even delay, per se, may not deny an applicant the opportunity to amend if the other side can be compensated by costs. Thus, in CLARAPEDE Vs. COMMERCIAL UNION ASSOCIATION [1883] 32 WR 262, Brett M.R said at page 263;

“However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs?”

13. In the case of **Joseph Tireiti (supra)** Justice Munyao declined leave to amend plaint after both parties had concluded their evidence where the proposed amendments included an additional cause of action in adverse possession.

14. In the case of **Philomena Ingosi Lumula V Jackton Mwanzi - Kakamega Civil Case 209A of 1991 [2006] eKLR** the court observed

as follows regarding an attempt to amend defence to deny ownership of a motor vehicle which had been admitted in the earlier defence:

“The plaintiff has closed his case on the basis of the existing pleadings. If the defendant were allowed to change his defence by denying that which he had admitted and which was the basis on which the plaintiff led its evidence, the effect would be to re-open the case all over again with the result that the plaintiff would have to go back on the drawing board, as it were. Where a party who has had ample time to amend his pleadings negligently fails to take steps to amend and wakes up from his slumber after the close of the plaintiff’s case, should such party be granted leave to amend if the effect of such amendment is to do injustice to the other side? I do not think so.”

15. In the case of **Giro Commercial Bank Limited v Michael Philip Theuri & 4 others [2014] eKLR** the court, while declining an application to amend a defence after the plaintiff had closed his case stated as follows:

“I agree with the Respondent that this application, is brought in bad faith, after a long time, in fact, 11 years. The amendment now seeks to introduce a counterclaim for Kshs.37,000,000/=. This information must have always been with the Applicants for the last 11 years. It is not explained how all this time it escaped the Applicants that they had a claim reaching Kshs.37,000,000/=. Besides, this claim is also time barred, and if the amendment is allowed the same may greatly prejudice the Plaintiff. This is more so since most of the witnesses who are competent to testify with regard to the new matters to be introduced may no longer be in the Plaintiff’s employment as submitted by the Respondent.”

16. In both the **Giro Commercial Bank Limited** case and the **Philomena Ingosi Lumula** case the respective courts observed that the defendants had been represented by counsel at all material times and cited negligence or mischief while declining to allow the amendments proposed.

17. In the instant case the plaintiffs are already concerned that the defendant is intent on mischief in that since his case was closed, the defendant’s intended amendment is meant to plug in loopholes in his case, which plugging is informed by the evidence already given at the hearing.

18. According to the provisions of the **Civil Procedure Rules** and the case law set out above, amendments may therefore be freely allowed at any stage of the proceedings if the court thinks that is the just course of action. It is therefore clear that unless there is an overriding ground upon which to decline it, an amendment of a defence may be allowed at any stage in the proceedings, including after the closure of the plaintiff’s case. In the instant case, subject to the court’s finding in the next issue, an order allowing the plaintiffs to reopen their case and an order providing for costs may be sufficient recompense for the inconvenience that may be occasioned to the plaintiffs.

19. The only other principal ground upon which the plaintiffs object to the instant application is that the defendant has raised inconsistent claims. The objection is rooted in the fact that the defendant seeks specific performance in his proposed amendments in contrast to his allegation in the succession court to the effect that the plaintiffs have no *locus* as they are grandchildren and not dependants to the estate of the late Ephantus Mwangi Kimani.

20. However this court has noted the complexity of this matter; the documents the plaintiffs refer to are not part of the pleadings in this case but in the succession cause which has not and can not be consolidated with this case. They remain potential documentary evidence in this case.

21. It appears that the dispute between the plaintiffs and the defendants may have pushed the defendant to desperation to the point of commencing other proceedings - a citation and a succession petition, in an attempt to secure himself what he considered himself entitled to under the contract with the plaintiffs. The ruling dated **21/2/2020** gives an insight into the succession angle; the defendant had deponed in those proceedings that before purchasing the four plots, the objectors (who are also the 3rd and 4th plaintiffs in this suit) led him to believe that they were the sole beneficiaries of the estate and he executed the agreement with them on that basis.

22. Upon the lodging of the citation the 1st plaintiff herein failed to file succession proceedings as ordered within the time given and the defendant herein filed the succession cause and the 3rd and 4th plaintiffs objected to the succession cause. The matter can not get any more complex than it already is: in the same succession cause the defendants filed, while the 3rd and 4th plaintiffs herein are named as objectors, two entirely new parties, Samuel Njoroge Mwangi and Joseph Kamau Mwangi have applied to be made co-administrators in the estate of the late Ephantus Mwangi Kamau whom they state owned all the suit plots. Perchance it ultimately turns out to be the case that the two applicants are the proper administrators, in what capacity were the plaintiffs then purporting to sell the said plots to the defendant if they held no letters of administration to the deceased’s estate?

23. In this court’s view, the plaintiffs should not be permitted to muddy the well with their feet and expect the defendant to meekly and silently drink from the polluted waters. If the plaintiffs held themselves out as the proper persons to dispose of the suit plots under any capacity whether that representation was rightful or otherwise, there is no bar against the defendant’s raising of the equitable claim for orders of specific performance in his proposed defence and counterclaim. This court can not see how pleading the remedy of specific performance by the defendant would, if allowed, prejudice the plaintiffs. In any event that remedy is only relevant to these proceedings if the plaintiffs’ assertion that the agreement should be rescinded fails. It is quite clear that the apparent contradictory stances taken by the defendant in respect of the plaintiff’s *locus* is informed by the lack of certainty regarding the plaintiff’s capacity to enter into the transaction over the suit plots and it should not be permitted to be the sole ground on which his application is defeated. The emergence of the two applicants in the succession cause is a pointer that all is not well for the plaintiff’s claim to be administrators of the Estate.

24. Consequently I find that the objection by the plaintiffs has no merit. The application dated **7/10/2019** is hereby granted in terms of **Prayers Nos. (1), (2) and (3)**. The amended defence, drawn as per the draft annexed to the application shall be filed and served within **seven (7) days** of this ruling and the plaintiffs shall file an amended plaint within **seven (7) days** of service if they deem it fit to do so. There shall be liberty to apply on the part of all parties. This matter shall be mentioned by way of teleconference on **17/9/2020** to confirm compliance

and for issuance of hearing date for the main suit.

It is so ordered.

Dated, signed and Delivered at Kitale via electronic mail on this 30th day of July, 2020.

MWANGI NJORGE

JUDGE, ELC KITALE.