REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 135 OF 2012

MILLY GLASS WORKS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION & ANOTHER.....DEFENDANTS

RULING

(Application for amendment of plaint; application filed after both parties had closed their cases; application denied)

1. The application before me is that dated 28 April 2020 filed by the plaintiff. It is an application seeking leave to amend the plaint. The application is opposed.

2. To put matters into perspective, this suit was commenced through a plaint which was filed on 12 July 2012 through the law firm of M/s Anjarwalla & Khanna Advocates. The plaintiff averred that through a lease dated 16 January 1980, the 1st defendant leased the land parcel Mombasa/Block XLVIII/134 to Kenya Glass Works Limited for a term of 81 years with effect from 1 January 1977 at an annual rent of KShs. 22,000/=. On 26 April 1993, Kenya Glass Works transferred the lease to the plaintiff. It is pleaded that it was a term of the lease that the 1st defendant would have the right to raise annual rent at the expiry of each period of 30 years, which rent would comprise of an amount equivalent of 1/20 of the unimproved value of the land at the date of the revision. The plaintiff pleaded that the 1st defendant in breach of this term, increased rent from KShs. 22,000/= to KShs. 146,000/= on 1 January 1994, which is the amount the plaintiff has been paying. The plaintiff averred that on 1 January 2007, the rent payable was due for revision, but the 1st defendant did not exercise its right to raise the rent. It is the argument of the plaintiff that not having done so, the 1st defendant waived its right to raise rent. The plaintiff thus contends that the revision of the rent will now fall again on 1 January 2037, on the 60th anniversary of the lease. The plaintiff has pleaded that through a letter dated 30 September 2011, the 1st defendant purported to increase the rent payable from KShs. 146,000/= to KShs. 10,200,000/= with effect from 1 January 2012. This is submitted to be unlawful and contrary to the terms of the lease. On 4 July 2012, the 1st defendant appointed the 2nd defendant, a firm of auctioneers to collect the rent. This is what prompted the plaintiff to come to court. In the plaint, the plaintiff has asked for the following orders :-

> (a) A declaration that the 1st defendant has no right under the terms of the lease dated 16th January 1980 to raise the annual rent payable for the parcel of land known as Mombasa/Block XLVIII/134 until 1st January 2037;
>
> (b) A declaration that the revision of the annual rent for the parcel of land known as Title No. Mombasa/Block XLVIII/134 from KShs. 146,000.00 to KShs. 10,200,000.00 is unlawful, null and void and of no effect;
>
> (c) An order for a permanent injunction against the defendants, their servants, employees, officers and/or agents restraining them from interfering in any manner whatsoever with the plaintiff's quiet and peaceful possession of the suit property and in particular restraining them until 1st January, 2037 from charging the plaintiff an annual rent higher than KShs. 146,000.00 and for levying distress or taking any other action for the recovery of such higher amount;
>
> (d) Costs of and incidental to this suit;
>
> (e) Any other or further relief that this Honourable Court may deem fit to award.

The 1st defendant filed defence basically joining issue with the plaintiff.

3. The hearing of the suit commenced on 20 April 2015 before my predecessor, Hon. Justice Ann Omollo. The plaintiff called its general manager as its witness. He testified in chief and was cross-examined and he finalised his evidence. With his evidence, the plaintiff closed its

case. The witness for the defence was not available on that day and the matter was adjourned for further hearing on 18 August 2015. The matter did not take off on that day and it was in fact adjourned several times after that, for it was mentioned that there is a related matter that was on-going. On 7 December 2017, it was mentioned that judgment in the other matter said to be related, had been delivered and arising from that judgment, parties had decided to negotiate this matter so as to arrive at an out of court settlement. The matter was thereafter mentioned on 12 March 2018, 27 September 2018, and 29 November 2018 on which date it was said that parties were unable to reach any settlement and they sought a hearing date. The matter was then fixed for hearing on 4 June 2019 but it appears that it never went to court on that date. Justice Ann Omollo was at around the same time transferred to another station. Subsequently, the law firm of M/s Anjarwalla & Khanna applied to cease acting for the plaintiff. I allowed that application on 15 October 2019 and directed the matter to be mentioned on 29 January 2020 to take a date for defence hearing. The plaintiff did not attend the mention on 29 January 2020 despite being served with a mention notice and I gave the hearing date of 10 March 2020.

4. On the day of the hearing, the plaintiff appointed the law firm of M/s Gikandi & Company Advocates to act for her. Counsel for the defendant stated that he had one witness and was ready to proceed. Ms. Murage, who held brief for Mr. Gikandi, sought an adjournment on the grounds that Mr. Gikandi had just been appointed and he thought that the matter was for hearing of the plaintiff's case. It was also mentioned that there is need to amend the plaintiff's pleadings. The adjournment was opposed, and it was pointed out that the previous advocate had ceased acting in October of the previous year. I was not persuaded to adjourn. I took note that the plaintiff had closed her case in the year 2015. It was immaterial to me that Mr. Gikandi had just been appointed and I reasoned that he knew what he was getting himself into before taking up the appointment. I gave time allocation for the hearing of the matter.

5. Later in the day, Mr.Gikandi was present for the plaintiff and Mr. Karina was present for the defendant. Mr. Gikandi yet again revived the application for adjournment on the same grounds raised earlier in the day. I was still not persuaded to adjourn and directed the matter to proceed. The defence presented its witness and closed their case. Counsel for the plaintiff then sought 30 days to file his submissions and Mr. Karina indicated that he could file his submissions 14 days thereafter. I directed counsel to file submissions as they had advised and directed the matter to be mentioned on 7 May 2020. Before that day, this application was filed on 29 April 2020.

6. I have already mentioned that it is an application seeking leave to amend the plaint. Annexed to the application is a draft amended plaint. The supporting affidavit is sworn by Mohamed Rashid, the plaintiff's Managing Director. He has deposed that the plaintiff has been paying the new demanded rent despite having obtained an injunction in its favour. He has deposed that the plaintiff was forced to pay the new rent in order for the 1st defendant to grant it consent to charge the property so that the plaintiff may receive some financial accommodation. He has averred that the plaintiff has been paying the contested reviewed rent since 2013. He has deposed that the plaintiff wishes to have a refund of the rent paid should the court agree that the 1st defendant did not have a right to review the rent as it did. He has pointed out that the plaint does not seek a refund of rent as a consequential relief and it is thus necessary to amend the plaint. He has averred that the only issue that the plaintiff needs to add to its plaint is whether or not it should be refunded the rent, should its suit succeed.

7. The 1st defendant filed a replying affidavit sworn by Jane Mbugua, its Real Estates Manager for Coast region. She has deposed that the amendment is based on a misconceived speculation that the suit will be determined in favour of the plaintiff. She has pointed out that this will be a new cause of action and further that the amendment will delay this suit because it will naturally prompt the 1st defendant to amend its defence to include a counterclaim for rent arrears for the years 2019 and 2020. It is her view that this is a delaying tactic. She has further deposed that the amendments will prejudice the 1st defendant, because the case has been heard and parties have closed their respective cases, and that the amendment will force the parties to reopen their cases. She has further stated that the delay in hearing this case will further prejudice the 1st defendant for key witnesses may have left employment and it will be difficult to trace documents after so long. She believes that the interest of the plaintiff will be safeguarded by filing a fresh suit.

8. I invited counsel to file submissions and I have taken note of the submissions of Mr. Gikandi for the applicant and Mr. Karina for the 1st defendant together with the authorities that they supplied.

9. I am aware of the provisions of Order 8 Rule 3 which provides that the court may at any stage of the proceedings allow a party to amend its pleadings. I am also aware that courts are generally liberal in allowing parties to amend their pleadings. Indeed, courts would ordinarily allow an amendment unless it is shown that there will be prejudice to the other party.

10. The general rule on amendments was well articulated by O'Connor J, in the case of *Eastern Bakery vs Castelino (1958) EA 461*, where the judge stated as follows at p462 :-

> *"It will be sufficient for purposes of the present case, 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: Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side".*

11. I am in agreement with the above dictum. I will only add that the more advanced the matter is, the more difficult it may be for a party to be allowed to amend his pleadings. In as much as an amendment may be sought at any time of the proceedings, and that would include an amendment after the hearing of the suit, my view is that at this level of the proceedings, an amendment that is not superficial in nature, say, to properly describe a name of a party or the subject matter of the suit, but is substantial, may be difficult to procure. This is because there is a high probability of there being prejudice to the other party, for that party will have closed his case and may not have a chance to re-open, in order to challenge any new matter intended to be raised in the new pleadings. Special circumstances indeed need to exist for the court to

allow an amendment after parties have already presented their evidence and closed their respective cases.

12. In our case, it is the position of the plaintiff that in the event that it is successful, then it will need to claim the money that it has paid under the reviewed rent, which is the very subject of this litigation. I can see from the deposition of the plaintiff's general manager, that the plaintiff has been paying the new contested rent since the year 2013. I have to ask myself where the plaintiff has been for the last 7 years. This is not something new that has cropped up this year. There was therefore time to amend if the plaintiff thought that it is important for this issue to be canvassed together with the original pleadings. In fact, in the year 2013, the plaintiff had not yet presented its evidence, which it did in the year 2015. There was two years in between to effect any such amendment. Neither was any move to amend the pleadings taken shortly after the plaintiff had testified. The plaintiff is thus guilty of laches and I am unable to be sympathetic to her.

13. The fact that both parties have closed their respective cases is important, and so too the fact that the amendment sought is substantial, which will require parties to re-open their cases in order for evidence to be led on what has been paid and what has not been paid. I agree with the defendant that this will cause the 1st defendant great prejudice. This case has been pending in court for the last 8 years which is a fairly long time.

14. In any event, I do not see any prejudice that the plaintiff will suffer if leave to amend is denied. If the plaintiff succeeds in this suit, and it is found that it ought not to have paid the revised rent, it can always sue for a refund of what it has paid in excess. If the plaintiff fails in this suit, nothing will arise. The plaintiff is thus not shut out completely from pursuing what it has paid, if it is found that it ought not to have paid the same. To me, that is the better route to take, other than re-opening this suit all over again.

15. For the above reasons, I find no merit in this application. It is hereby dismissed with costs.

16. Orders accordingly.

DATED AND DELIVERED THIS 24 DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA