



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 68 OF 2012

PRISCILLA WARUI NYAGAPLAINTIFF/RESPONDENT

VERSUS

JOSEPH NJOKA KAARA1ST DEFENDANT/APPLICANT

OCTAVIAN KIURA KAARA2ND DEFENDANT/APPLICANT

RULING

The defendants/applicants have moved this Court under the provisions of **Order 8 Rules 3 (1) and 5 (1) of the Civil Procedure Rules** and all other enabling provisions of the law for orders that:-

1. *This Honourable Court be pleased to grant the defendants/applicants leave to amend their statement of defence.*
2. *That costs of this application be in the cause.*

The application is based on the grounds set out therein and supported by the 2nd defendant/applicant's supporting affidavit in which he has deponed that it is important not only to amend their defence to bring out clearly the issues for determination but also to introduce their counter-claim. A draft defence and counter claim are annexed thereto.

In opposition to that application, the plaintiff/respondent has deponed in her replying affidavit that this application is incompetent and an abuse of the Court process and if it is allowed, she will suffer prejudice.

Submissions have been filed by both Ms Wanjiru advocate for the plaintiff/respondent and Mr. Magee wa Magee advocate for the defendants/applicants.

I have considered the application together with the parties respective affidavits and the submissions by counsels.

This application is brought under the provisions of **Order 8 Rule 3 (1) of the Civil Procedure Rules** which states as follows:-

“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”

It is clear therefore that a party may be allowed to amend his pleadings **“at any stage of the proceedings”**. The guiding principal in such applications is that, so long as there is no prejudice or an

injustice caused to the other side and unless the applicant is acting male fides, leave to amend should be freely allowed. This is to enable the parties to bring out all the issues that need to be determined and therefore avoid a multiplicity of suits. In the case of **EASTERN BAKERY VS CASTELINO 1958 E.A 461** Sir **Kenneth O. Conner** the President of the then Court of Appeal for Eastern Africa said the following:-

“It will be sufficient 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”

In her replying affidavit, the plaintiff/respondent has pleaded in paragraph 5 that she will suffer prejudice although she has not stated what exactly is the prejudice she will suffer. However, in the submissions by her counsel, it is indicated that the plaintiff/respondent is at a loss because she cannot tell what is to be added or deleted from the defence. Counsel for the plaintiff/respondent has also taken issue with the fact that draft amended defence and counter claim is not highlighted in red ink as required by **Order 8 Rule 7 of the Civil Procedure Rules**. What is clear is that this application seeks to amend the defence and include

a counter-claim. And although a draft defence and counter-claim was annexed to the 2nd defendant/applicant’s supporting affidavit, it has not been pleaded that the said amended defence and counter claim be deemed as duly filed. My understanding is that once leave is granted, then the amended defence and counter-claim will be filed and at that time, in compliance with the provisions of **Order 8 Rule 7 (2) of the Civil Procedure Rules**, the amendments shall be shown by striking out in red ink all deleted words. The plaintiff/respondent will then know the case that she has to meet and also amend her pleadings if need be. In any event, even where a party were to file amended pleadings without highlighting them as required under the provisions of **Order 8 Rule 7 (2) of the Civil Procedure Rules**, I would consider that to be a mere technicality curable under the provisions of **Article 159 (1) of the Constitution**.

This suit has also not commenced hearing so there is really no prejudice to either party.

Consequently, this application is merited and should be allowed.

In the circumstances, I grant the orders sought in the defendants/applicants Notice of Motion dated 24th March 2015 in the following terms:-

- a. ***The defendants will have leave to file and serve their amended defence and counter-claim within 15 days from today.***
- b. ***The plaintiff will have leave within 15 days of service upon her counsel of the amended defence and counter-claim to file and serve any amended pleadings, if need be.***
- c. ***The plaintiff shall have costs of the application.***

B.N. OLAO

JUDGE

4TH DECEMBER, 2015

COURT: Ruling delivered, dated and signed this 4th day of December, 2015 in open Court.

Ms Kiragu for Defendant/Applicant – present

Mr. Ngangah for Ms Wambugu for Plaintiff/Respondent present.

B.N. OLAO

JUDGE

4TH DECEMBER, 2015