



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 660 OF 2002

SAMUEL O TIMA.....1ST PLAINTIFF

LYDIA NYABONYI.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....1ST DEFENDANT

JOSEPH KARUIKI WANYUGI.....2ND DEFENDANT

RULING

1. The 1st Defendant's Chamber Summons application dated 22nd September 2009 and filed on 29th September 2009 was brought pursuant to the provisions of Order VIA Rule 6 (now repealed and replaced with Order 8) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The 1st Defendant sought the following orders:-

1. THAT this honourable court be pleased to extend the time within which the pleadings herein can be amended.

2. THAT pursuant to prayer 1 above, the 1st Defendant be granted leave to amend the statement of defence in terms of the annexed amended draft defence within such period as the court shall direct.

3. THAT the costs of this application be provided for.

2. The application was premised on the grounds that on 17th July 2009 the court granted leave to the 2nd Defendant to file and serve its amended defence within fourteen (14) days with corresponding leave to the 1st Defendant to file and serve its amended pleadings within fourteen (14) days of service of the 2nd Defendant's amended defence.

3. It averred that the delay in filing the amended pleadings was occasioned by its previous advocates on record and that the intended amendments were necessary and would be prejudicial to it if the orders sought were not granted.

4. The application was supported by the affidavit of Joseph K Kania that was sworn and filed on 22nd September 2009 and filed on 25th September 2009. He reiterated the grounds on the face of the application and further deposed that both the Plaintiff and the 2nd Defendant stood to suffer no prejudice if the orders sought were granted for the reason that the intended amendments were in response to the further amendments that had been made by the parties. The 2nd Defendant did not oppose the application.

5. The Plaintiffs' Replying Affidavit was sworn by Samuel O Tima on 9th November 2009. It was filed on the same date. The deponent contended that the 1st Defendant's application sought to extinguish his right that had accrued from the ruling of Azangalala J on 4th December 2007. He was emphatic that the intended amendment would be prejudicial and cause injustice to him and the 2nd Plaintiff. It was his averment that the intended amendments were actuated by bad faith, which smacked of wanton and virulent distortion of clear and pertinent facts and that they did not raise any new points but sought to plead legal arguments.

6. The 1st Defendant filed its written submissions dated 25th April 2013 on 26th April 2013 and further written submissions dated 3rd March 2014 on 11th March 2014. The crux of its submissions was that the delay in executing the application was explainable and that the provisions of the Civil Procedure Rules applicable at the time allowed the court to grant an amendment to pleadings if it was of the considered opinion that no party would be prejudiced by such amendment and if the same could be compensated by an award for costs.

7. It referred the court to the cases of **Civil App No NAI 100 of 1995 Henry Njau Kingoro v John K Mugui, HCCC No 1811 of 1999 Blueshield Insurance Co. Limited v Richard Mbondo & 2 Others** and **Registered Trustees Church of God East Africa (K) v Fredrick Maengwe Matara & 8 Others (2013) eKLR** to buttress its arguments.

8. In their submissions dated 27th May 2013 and filed on 28th May 2013, the Plaintiffs submitted that the delay of over four (4) years that the 1st Defendant took in prosecuting its application was inordinate delay and was aimed at distorting the facts.

9. In support of their allegation relating to inordinate delay, the Plaintiffs relied on the case of **Joseph Ochieng v First National Bank of Chicago CA No 149 of 1991**. They further submitted that the Court ought to dismiss the 1st Defendant's application as it was only meant to waste the court's time.

LEGAL ANALYSIS

10. In a ruling of Lesiit J dated 29th June 2009 and delivered on 17th July 2009, the 2nd Defendant was granted leave to file and serve its amended defence. The Plaintiff and the 1st Defendant were granted corresponding leave to file and serve amended pleadings if they deemed it necessary within fourteen (14) days of service of the amended defence of the 2nd Defendant. The Plaintiffs did not, however, make any reference to this ruling in their Replying affidavit sworn on 9th November 2009.

11. They alleged that the 1st Defendant was conversant with the issues in the matter, having filed its Defence and Counterclaim on 29th March 2007. They submitted that the 1st Defendant was trying to introduce facts that were well within its knowledge through its application for extension of time to amend its pleadings. On the other hand, the 1st Defendant contended that the delay in prosecuting its application was occasioned by the previous advocates on record who did not set out the facts it sought to introduce in its Amended Defence.

12. In her ruling on 17th July 2009 regarding the 2nd Defendant's application dated 27th April 2009 in which he had sought to amend his Statement of Defence, Lesiit J stated thus:-

“Allowing the amendment will not take away any rights from the plaintiffs. The Defendants

will still need to prove its case on the standard required by law.”

13. From the pleadings on record, the Plaintiffs did not clearly elaborate what rights they had accrued. Just as the said learned judge had observed at the time, this court finds that the amendments sought by the 1st Defendant did not appear to take away any rights that may have been accrued to the Plaintiff, if at all, if the intended amendments herein were allowed.

14. In any event, there is nothing in the law that prevented any party from amending its pleadings after an interlocutory injunction had been granted as parties to the suit would be required to take all necessary action that would assist in the preparation of their cases during the full trial. The court therefore finds that the Plaintiffs did not demonstrate what prejudice or harm that they stood to suffer.

15. While the court noted the 1st Defendant's submissions that it was upon discovery of an error in the pleadings that the current advocates saw the need to amend its Defence, it was not clear to the court why the 1st Defendant's application that was filed in 2009 was not prosecuted then.

16. However, amendments should be freely allowed at any stage of the proceedings if it can be established that costs would be adequate to compensate an opposing party for the prejudice that it suffered. In addition, the court may also allow a party to amend its pleadings if the amendment was not effected within the time lines that had been set out by the court. This has been well captured in Order 8 Rule 7 of the Civil Procedure Rules, 2010 which Rules became operative after the application herein was filed.

17. Having considered the pleadings, affidavits and the written submissions by the parties herein, the court found that this was a suitable case for it to exercise its discretion to allow the 1st Defendant's application to enable the court arrive at a just determination of the matter herein. Indeed, the 1st Defendant is entitled under Article 50 of the Constitution of Kenya, 2010, to a fair opportunity to present its case before the court. It is trite law that a party should only be denied an opportunity to ventilate its case only as a very last resort.

18. However, due to the long period it has taken to prosecute the application herein, the 1st Defendant must be condemned to pay costs to the Plaintiffs for the inconvenience that they have suffered by being set back in their case. It cannot be allowed to go scot free.

DISPOSITION

19. Accordingly, the upshot of this court's ruling is that the 1st Defendant's Chamber Summons application dated 22nd September 2009 and filed on 29th September 2009 is hereby allowed in terms of prayers (1) and (2).

20. The 1st Defendant shall file and serve its Amended Defence within fourteen (14) days from the date of the ruling.

21. The Plaintiffs shall file and serve its Reply to Amended Defence within fourteen (14) days from the date of service.

22. The 1st Defendant is hereby directed to pay to the Plaintiffs thrown away costs in the sum of Kshs. 50,000/= within fourteen (14) days from the date of this ruling, failing which the Plaintiffs will be at liberty to seek such further appropriate orders as it would deem fit.

23. Costs shall in be in the cause.

24. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 16th day of October 2014

J. KAMAU

JUDGE