



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 134 OF 2016

JOSHUA KIMANI.....PLAINTIFF

VERSUS

1. KISO ENTERPRISES LTD

2. KETAN DOSHI

3. THE CHIEF LANDS REGISTRAR

4. THE HONOURABLE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By this Notice of Motion application dated 20th February 2019, Joshua Kimani (the Plaintiff) prays for leave to amend his Complaint to include additional prayers. In a short affidavit in support of the application, he avers that he has realized there is need to broaden the prayers sought from the Court in order to cover all eventualities and that the Defendants would not be prejudiced in any way if the amendments are made.

2. The application is opposed by both the 1st Defendant on the one side as well as the 3rd and 4th Defendants on the other. In Grounds of Opposition dated 12th September 2019 as filed herein on 12th October 2019, the 1st Defendant opposes the Motion on the grounds that: -

1. The Plaintiff's application has no merit to warrant this Court to exercise its discretion;

2. The Application is misconceived and incompetent and ought to be dismissed with costs;

3. The proposed amendments raise new facts aimed at altering the cause of action in this matter contrary to Order 2 Rule 6(1) of the Civil Procedure Rules;

4. It is the 1st Defendant's legitimate expectation that litigation should come to an end and to allow this application amounts to prolonging the matter which is contrary to the overriding objectives in the Civil Procedure Act and the Judicial Process as a whole which advocates for expeditious disposal of suits;

5. The Proposed Amendments made by the Plaintiff will not enable the Court determine the real question in controversy but are rather aimed at defeating the efficient determination of the suit herein; and

6. The proposed amendment will cause the 1st Defendant great prejudice which cannot be compensated in costs.

3. Similarly, on their part, the Honourable the Attorney General for the 3rd and 4th Defendants opposes the application on the grounds contained in their Grounds of Opposition dated and filed herein on 1st November 2019 to the effect: -

1. That the proposed amendments are contrary to the provisions of Section 100 of the Civil Procedure Act as they have not been made with the purpose of determining the real question or issue raised;

2. That the application is an abuse of the Court process and is contrary to Order 3 Rule 4(2) of the Civil Procedure Rules as the Plaintiff/Applicant omitted to sue in respect of the claim in the Complaint and (the) amended Complaint and cannot thus now seek to sue in respect of the portion omitted;

3. The application is misconceived and lacking in merit as the allegations of fraud constitute a new suit against the 3rd Defendant and will thereby occasion prejudice to the 3rd Defendant;

4. The application is incompetent since there has been an inordinate delay in making the application thus they are undeserving of the orders sought; and

5. That the application is premised upon mere speculation as there is no indication that the substratum of the suit will be lost by the Plaintiff for failure to amend the Plaint.

4. I have perused and considered the application and the respective responses thereto. I have similarly considered the Written submissions as placed before me by the Learned Counsels for the parties.

5. The discretion to allow amendment of pleadings is donated to the Courts under Order 8 Rule 5(1) of the Civil Procedure Rules as follows:
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“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on 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.”

6. The Learned Authors of *Halsbury’s Laws of England, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76*, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.

...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...” (Emphasis added).

7. In the matter before me, the Plaintiff avers that he has realized there is need to broaden the prayers sought from the Court in order to cover all eventualities and that the Defendants would not be prejudiced in any way by the amendments. I have looked at the draft amended Plaint. While the Plaintiff avers that he merely intends to broaden the prayers, a perusal thereof reveals that the Plaintiff intends to literally amend the entire Plaint and to introduce a completely new version of Paragraphs 8 to 13 as well as an additional paragraphs 16 to 19.

8. While it is true that the said amendments are based on facts arising from the same circumstances leading to the filing of this suit, the Plaintiff does not state why the said amendments were not brought earlier in the day. This suit was filed on 3rd June 2016, some three years before this application was filed. As it were, the parties went for pre-trial directions and thereafter the Plaintiff testified at the trial and closed his case a month before this application was filed.

9. Considering the record and the material placed before me, it is evident that by this application, the Plaintiff seeks to fill the gaps that were raised by the defence during the cross-examination of the Plaintiff. That fact is indeed confirmed by the Plaintiff himself who in his submissions before this Court filed on 29th November 2019 states at page 2 thereof as follows: -

“The amendment sought has been brought after the hearing of the Plaintiff’s claim due to the fact that certain factors were revealed during the hearing. However, it is brought in good faith and the defendants will not in any way be prejudiced since the amendment is only seeking to make the prayers sought clearer.”

10. As I have stated hereinabove, the amendments sought are not merely about clarifying the prayers. From the Plaintiff’s submissions, they are not made in good faith but are meant to fill-in the gaps left after the cross-examination of the Plaintiff. They include new statements accusing the Defendants of misrepresentation and fraud whose particulars are newly listed under paragraph 18.

11. In the premises, I am in agreement with the Defendants that the intended amendments are intended to advance new grounds of defence and have been brought too late in the day. Accordingly, I find no merit in the Motion dated 20th February 2019. It is dismissed with costs to the Defendants.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE