



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 97'A' OF 2014

RUTH WAMBUGI NGURETI.....PLAINTIFF

VERSUS

LUCAS KAMAU NGURETI.....1ST DEFENDANT

MISHEK GATANA NGURETI.....2ND DEFENDANT

EDWARD GITHIMU NGURETI.....3RD DEFENDANT

JOHN MWANGI MIHUNI.....4TH DEFENDANT

STEPHEN MAINA GIKONYO.....5TH DEFENDANT

RULING

Introduction

The applicant/plaintiff vide a Notice of Motion dated 5th August 2019 sought the following orders:-

(1) That this Honourable Court be pleased to grant leave to the plaintiff/applicant to further amend the amended plaint as per the draft amended plaint and that draft amended plaint be deemed as duly filed upon payment of requisite filing fees.

(2) That the costs of the application be provided for.

The application is premised on the following grounds:-

(a) That the plaintiff/applicant intends to amend her amended plaint in order to properly articulate his claim before this Court, the 1st defendant having passed on.

(b) In the circumstances, it is fair and just that leave to amend the same be granted.

Applicant's Statement of Facts

The applicant in her supporting affidavit stated as follows:-

(1) That she wishes to amend her pleadings so as to properly articulate her claim before Court.

(2) That her advocate on record has advised her which advice she verily believes to be true that leave of this Honourable Court is required before the same is done.

1st and 2nd Interested parties Statement of Facts

The 2nd respondent filed a replying affidavit in response to the said application and stated thus:-

- (i) That there exists a similar application dated 14th February 2019 which is yet to be heard and determined.
- (ii) That the application is mischievous calculated to introduce a new cause of action through the back door.
- (iii) That the said application is mere abuse of Court process and that he shall raise a Preliminary Objection.
- (iv) That the plaintiff's claim was initially squarely against the 1st defendant largely based on the grounds of miscarriage which cause of action with his death.

Applicant's Submissions

The applicant through the firm of Wangechi Munene submitted that a party cannot be locked out from amending his/her pleadings in order to properly articulate their case before. She submitted that it is trite knowledge also that amendment can be allowed any time before judgment. She referred to an earlier application which she had made dated 14th February 2019 which she stated has since been withdrawn. The applicant also submitted that the application for amendment is allowed under *Order 8 Rule 3 (5)* even though the effect of such amendment is to substitute a new cause of action provided the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit. She cited the case of *St. Patrick Hills School Ltd Versus Bank of Africa Kenya Ltd HCCC No. 7 of 2017* (unreported).

1st and 2nd Interested parties Submissions

The 1st and 2nd respondent through the firm of C.S. Macharia filed their submissions in opposition to the application and stated that there exists on record another application seeking similar orders for leave to amend the plaint dated 14th February 2019. The learned counsel also submitted that the proposed amendment seeks to introduce a new cause of action. He stated that Courts have judiciously interpreted *Section 8 Rule 3 (5)* time and time again and it has been held that parties are not at liberty to fish causes of action left right and centre simply to vex opponents or waste precious judicious time with causes of action that brought mala fides. He cited the case of *Eastern Bakery Vs Castelino (1958) E.A. 462 (C.A U)* which was cited with approval in the case of *Kampala Coach Limited Vs First Community Bank Ltd & Another (2016) e K.L.R.*

In conclusion, the 1st and 2nd interested party submitted that the instant application has been brought with undue delay without any explanation.

Legal Analysis

I have considered the affidavit evidence and the submissions by the parties. I have also considered the application. The applicant in the Notice of Motion dated 5th August 2019 is seeking leave to amend the plaint. **Order 8 Rule 3 (5)** which has been invoked by the applicant read thus:-

“An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment”.

This Court and the superior Courts have rendered themselves on the guiding principles for amendment of pleadings. The learned author of *Halsbury's laws of England, 4th Edition (re-issue) Vol. 36 (1)* at paragraph 76 sets out the requirements for amendment thus:-

“.... 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, either on application by any party to the proceedings or of its own motion”.

In the case of **Central Kenya Ltd Vs Trust Bank & 4 others Civil Appeal No. 222 of 1998 (Nairobi)** unreported, the Court of Appeal addressed the underlying principle in amendment of pleadings and joinder of parties as follows:-

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder, as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs”.

Again in the case of **Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Ltd (2013) e K.L.R.**, the Court of Appeal expressed itself as follows:-

“The law on amendment of pleadings in terms of Section 100 of the Civil Procedure Act and Order VI A rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's precedent of pleadings – 12th Edition, in the case of Joseph Ochieng & 2 others Vs National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“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 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 of to rely on Limitation Acts”.

I entirely agree with the summary of the principles guiding the amendment of pleadings which are applicable to the instant case. The 1st and 2nd interested parties have merely stated that the proposed amendment will change the cause of action without elaborating.

Decision

For all the reasons I have given hereinabove, I find the Notice of Motion dated 5th August 2019 merited and the same is allowed as follows:-

- (1) The plaintiff/applicant is granted leave to amend the plaint in terms of the draft amended plaint annexed to the supporting affidavit within 7 days from today.***
- (2) The pleading will thereafter open and the defendants and the interested parties shall be at liberty to amend and file their defence in accordance with the Civil Procedure Rules.***
- (3) The costs of the application shall be borne by the applicant.***

Ruling READ, DELIVERED and SIGNED physically in open Court at Kerugoya this 13th day of November, 2020.

E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Ms Wanjiru holding brief for C.S. Macharia for the 1st and 2nd Interested parties***
- 2. M/S Githaiga holding brief for Wangechi Munene for Plaintiff***
- 3. Mbogo – Court clerk.***