



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

E.L.C CASE NO. 240 OF 2016

RAEL MORAA ONDIKAPLAINTIFF

VERSUS

SWANYA LIMITED.....1ST DEFENDANT

ZADOK EAST AFRICA LIMITED.....2ND DEFENDANT

RULING

Introduction

1. What is before me is the Defendants' Chamber Summons dated 20th July 2020 brought pursuant to Order 8 Rule 3 of the Civil Procedure Rules seeking leave to amend the Defence and Counterclaim in terms of the annexed Draft Amended Defence and Counterclaim. The applicant also prays that the trial commences de novo and that parties be granted leave to amend their pleadings and recall their witnesses.
2. The application is based on the grounds disclosed on the face of the application and the supporting affidavit of Caren Moracha, a Director of the 2nd defendant sworn on the 20th July 2020. In the said affidavit she depones that the 2nd defendant wishes to include prayers that the 2nd Defendant deposits the balance of the purchase price in court and a prayer for an order directing the Plaintiff to give vacant possession of the suit property as well as an eviction order should the Plaintiff default in giving vacant possession. She further depones that the proposed amendments will assist the court to determine the real issues before it and arrive at a just conclusion.
3. The Plaintiff has resisted the application through her Replying Affidavit sworn on the 20th August 2020. She is of the view that the application has been made in bad faith and is merely intended to delay the suit with a view to denying her justice. She reads mischief into the application for amendment which is being made after the plaintiff has testified. She depones that the applicant has not provided any basis upon which the court should exercise its discretion nor has she explained why the amendments could not have been made earlier, yet the 2nd defendant has all along been represented. Further, that the amendments sought depart from the original defence and are a gamble at the plaintiff's expense. She depones that the proposed amendments are time barred as the contract the defendants are attempting to complete has been overtaken by events.
4. She states that the application is contrary to the overriding objective as the suit has been in court since 2016 and she is likely to suffer prejudice which cannot be compensated by costs as she is a widow and is in a poor state of health.
5. The application was disposed of by way of written submissions but plaintiff opted not to file any submissions.

Analysis and Determination

6. The main issue for determination is whether the defendants should be granted leave to amend their defence and Counterclaim.
7. Order 8, rule 3 of the Civil Procedure Rules provides as follows:

Amendment of pleadings with leave

(1) 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.

8. The principles that should guide the court in dealing with applications for amendments are elaborated in **Mulla, the Code of Civil Procedure, 18th Ed, Vol 2 pages 1751-1752** which has been cited in various authorities including the case of **Coffee Board of Kenya V**

Thika Coffee Mills Limited & 2 Others (2014) eKLR where it is stated as follows:

- i. *Amendments should be allowed which are necessary for determination of the real controversies in the suit;*
- ii. *The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;*
- iii. *Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;*
- iv. *Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;*
- v. *Amendments of a claim or relief barred by time should not be allowed;*
- vi. *No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time*
- vii. *No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties*
- viii. *The delay in filing the petitions for amendment should be properly compensated by costs*
- ix. *Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”*

9. In the case of **Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, where the court observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

10. The issue of amendment of pleadings was also considered in **Suleiman v Karasha [1989]eKLR** the Court of Appeal held that:

“Under the Civil Procedure Rules, the parties can amend their pleading with the leave of the court at any time before judgment. Such amendment would clearly set the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as it may deem just. “

11. What can be gleaned from the above decisions is that the court has a wide discretion to amend pleadings at any stage of the proceedings so to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.

12. In the instant case the application has been made after the plaintiff has closed her case. Although the proposed amendments are not extensive, the applicant has not explained why the plaint was not amended earlier as this case has been in court for the last 4 years and the plaintiff has always had legal representation. On the other hand, the respondent has argued that if the application is allowed, she will suffer prejudice that cannot be compensated by costs. Her concern which I find valid is that she is not in good health and it would be in her best interest if this case could be heard and determined expeditiously.

I have considered the authorities cited by counsel for the respondent and in the case of **Lawrence Owino Omondi v Kenneth Muyera (2017) eKLR**, the proposed amendments were found to be extensive as they entailed enjoining new defendants in addition to the application being filed late. Similarly, in **Harrison Kariuki v Blueshod Insurance Co Limited (2006) eKLR** the plaintiff intended to make extensive amendments and the case had been fully heard and was pending for submissions. The two authorities are therefore distinguishable from the instant suit.

Whereas I appreciate the Plaintiff’s concern regarding her health, I am of the view that it would be in the interest of justice if the applicants were allowed to amend the defence so that the court can determine the real issues in controversy. Consequently, I allow the application in terms of prayers 1, 2 and 3 of the Chamber Summons. The costs of the application shall be borne by the applicants.

Dated, signed and delivered at Kisii this 3rd day of November 2020.

J.M ONYANGO

JUDGE