



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC NO. 59 OF 2017

JOHN ROBERT MCTOUGHPLAINTIFF

VERSUS

WILLIAM ROMAN MCTOUGH1ST DEFENDANT

AIRPORT HOUSING CO-OPERATIVE SACCO2ND DEFENDANT

COMMISSIONER OF LANDS3RD DEFENDANT

REGISTRAR OF TITLES4TH DEFENDANT

COUNTY LAND REGISTRAR KISUMU.....5TH DEFENDANT

RULING

The Plaintiff filed a Notice of Motion dated 12th October 2018 seeking orders that the Honourable Court be pleased to grant the Plaintiff leave to amend his plaint as per the annexed draft amended plaint marked as “JRM1”. That the draft amended plaint be deemed duly filed and served upon payment of requisite court fees and that the cost of this application be provided for in the cause.

The grounds for the application as stated in the body and the supporting affidavit of Anthony Nderitu, Advocate of the Plaintiff, are as follows. That it is necessary to amend the plaint to include all questions in controversy arising to effectively and completely adjudicate the Plaintiff’s claim and, the pleadings having been closed, it is imperative that leave be sought and granted for the amendment. That it is in the interest of justice to grant the orders sought. That no party shall be prejudiced if the orders sought are granted. That the court has the discretion and jurisdiction to award the orders as sought.

1ST DEFENDANT’S RESPONSE

The 1st Defendant filed Grounds of Opposition, opposing the application on the grounds that the application is fatally defective; that the application is mischievous and instead of seeking an amendment, it is introducing a third party to the proceedings unceremoniously; that the Plaintiff is guilty of delay to prosecute his suit; and that the orders sought have been overtaken by events.

PLAINTIFF’S SUBMISSIONS

Counsel for the Plaintiff filed written submissions, submitting that the Respondents, upon service of the application chose not to file any objection as stipulated under Order 51 Rule 14 of the Civil Procedure Rules. That amendment of pleadings where pleadings are closed was provided for under Order 8 Rule 3 (1) and Section 100 of the Civil Procedure Act. That the application seeks to make amendments necessary for determining the real issues in questions concerning fraud. That the particularization of the issue of fraud in the proposed amendments, as provided under Order 2 Rule 4 (1), do not raise new issues as the same had been pleaded in the plaint.

Counsel relied on the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR for the proposition that the guiding principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment or joinder will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs.

Counsel submitted that the issue of having the County Land Registrar Kisumu as a defendant in the suit was in compliance with Order 1 Rule 9 of the Civil Procedure Rules.

Counsel also filed further submissions in reaction to the filing of Grounds of Opposition by the 1st Defendant. Counsel submitted that the Registration of Titles Act having been repealed by the Land Registration Act 2012, new Registrars were introduced in the form of the Chief

Land Registrars, County Land Registrars and Land Registrars, pursuant to Section 12 of the Land Registration Act. Therefore, the appropriate office to enjoin in this suit is the Kisumu Land Registrar, which is what the proposed amendment seeks to do. That the office of Registrar of Titles is non-existent thereby risking obtaining orders that cannot be executed.

That the presence of the County Registrar was paramount in assisting the court to contextualize the issues, being the custodian of the file and conveyancing documents relating to the suit property. That the proposed amendments do not in any way prejudice the 1st Defendant. That on the issue of delay, Counsel submitted that since Counsel took over the matter in 2016, the matter has not stalled since then. On the 1st Defendant's ground that the application had been overtaken by events, Counsel submitted that the 1st Defendant had not availed any substantiation to that effect.

1ST DEFENDANT'S SUBMISSIONS

Counsel for the 1st Defendant filed written submissions, submitting that Rule 8 of the Advocates (Practice) Rules barred an Advocate from swearing an affidavit on contentious issues. That the affidavit sworn by the Plaintiff's Advocate lay blame on the Plaintiff's previous Advocate on record for failing to include crucial information. That the said allegation cannot be said to be within the Advocate's personal knowledge as he had not indicated that he was present when the Plaintiff gave instructions to his previous Advocate, risking putting the Advocate on the witness box for cross-examination which would make it impossible or unseemly for the Advocate to discharge his duty to the court and the client. Counsel relied on *Nicholas Kipchirchir Kimaiyo v Wilson Kibet Kimutai & another* [2014] eKLR where Ochieng J struck out a supporting affidavit sworn by the Applicant's advocate and substantively relied on reported speech.

Counsel submitted that the Plaintiff had not annexed the draft amended plaint, therefore the supporting affidavit and notice of motion be struck out for being incompetent.

Counsel submitted that the grounds for amendment in the application did not include addition or substitution of parties in accordance with Order 1 Rule 10 of the Civil Procedure Rules. That Order 1 Rule 25 provided that such application ought to be made orally or through chamber summons. Counsel asserted that the County Land Registrar had therefore been introduced unceremoniously and without accordance to the express provisions of the law.

On whether the sought orders for amendment had been overtaken by events, Counsel submitted that it is trite law that amendments of pleadings ought to be allowed if it can be made without injustice to the other side, as per *Eastern Bakery v Castelino* [1958] EA 461. That the case of *Ochieng and others v First National Bank of Chicago Civil Appeal No. 147 of 1991* set out the principles under which courts may grant leave to amend pleadings – to determine the true substantive merits of the case, amendments should be timeously applied for, the court can exercise this power at any stage of the proceedings, late amendments should be allowed if made in good faith provided costs can adequately compensate the other party, and the Plaintiff will not be allowed to reframe his case or claim if the Defendant would be deprived of his right to rely on Limitations Act, subject to the court's power to allow an amendment notwithstanding expiry of current period of limitation.

Counsel submitted that the suit was filed vide a plaint dated 19th March 2012 where the Plaintiff alleged that the Defendants defrauded him but the aspects of the said fraud were not outlined in the plaint, and have only been outlined in the purported draft amended plaint. That since the Plaintiff's Advocate came on record in 2016, the matter never proceeded for hearing and the advocate did not make this application then despite being aware of the fact that the substratum of the suit largely lies on fraud in the part of the 1st Defendant. That the Plaintiff waited 3 years to make the application without good explanation for the delay. That the application was therefore not made timeously and was not made in good faith.

Issues for Determination

1. Whether the draft amended plaint was properly annexed

Nzioka J in *Garley Enterprises Ltd v Agricultural Finance Corporation & another* [2018] eKLR held that the mode of effecting proposed amendments as prescribed under the Order 8 Rule 7 of the Civil Procedure Rules "... pre-supposes the proposed draft will be annexed to the application to enable the court ascertain whether these provisions have been complied with or not. Therefore the failure to comply accordingly renders the application fatally defective..."

The draft amended plaint was indeed properly annexed to the application and marked "JRM1" as indicated in the Notice of Motion. The Defence Counsel's assertion that the draft amended plaint was not annexed was inaccurate. Furthermore, the draft amended pleadings were not annexures to the supporting affidavit in order to be subject to the provisions of the Oaths and Statutory Declarations Rules.

2. Whether the orders for amendment sought are merited

Order 8 Rule 3(1) of the Civil Procedure Rules provides that, subject to other rules including Order 1 Rule 9 and 10, 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.

The Court of Appeal in *Central Kenya Ltd v Trust Bank & 4 others Civil Appeal No. 222 of 1998* further held that:

"...the guiding principle in applications for leave to amend is that 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 properly be compensated for in costs.

The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs”

The Court of Appeal in *Sanyu International Limited v Oriental Commercial Bank Limited* [2017] eKLR also elaborated on the purpose of amendments of pleadings, citing *Halsbury’s Laws of England, 4th Edition (re-issue) Vol.36(1) at Paragraph 76* 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 of any document, either on application by any party to the proceedings or of its own motion.”

The Plaintiff in this application seeks to amend the Plaint by particularising the alleged fraudulent conduct of the Defendant as pleaded in Paragraph 13 of the original plaint. It is trite law that allegations of fraud must be specifically pleaded. Without the addition of the particulars of fraud as pleaded in the proposed amendments, the Plaintiff’s case would be rendered a non-starter. The amendments are therefore necessary to determine the real questions in controversy between the parties herein. Furthermore, the inclusion of the particulars of fraud would not prejudice the Defendants as they will be afforded the opportunity to file a response against the particulars of fraud as alleged.

Order 1 Rule 9 provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in disagreement so far as regards the rights and interests of the parties actually before it.

Order 1 Rule 10 relates to the substitution and addition of parties and provides that:

“1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

Further, Order 8 Rule 3 (2) provides that

The court is also granted discretionary powers to order amendments it deems appropriate as provided under Order 8 Rule 5 (1):

“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.”

It can also be inferred from the draft amended plaint that it proposes to replace the Registrar of Titles with the County Land Registrar Kisumu as the 4th Defendant. The basis of this amendment is sound in that the office of the Registrar of Titles has since become obsolete and replaced by the Chief Land Registrar and County Land Registrars vide Sections 12 and 13 of the Land Registration Act 2012. Retaining Registrar of Titles as a party herein would undoubtedly run the risk of the court issuing unenforceable orders in respect of a non-existent party. Further, it would hinder the court’s duty to of determining the real issues in dispute and doing substantive justice. Therefore, even though this specific amendment was not canvassed, it ought to be allowed and is hereby allowed. Costs in the cause.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE