



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 812 OF 2013

EVANSON MBUTHIA GITAHU.....PLAINTIFF/RESPONDENT

VERSUS

PRISCILLA WANJIKU MURUTHI.....DEFENDANT/APPLICANT

RULING

1. This is the Notice of Motion dated 8th November 2017 brought under Order 8 rule 3 (1) and 5(1) order 51 rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B, 3A and 100 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of the law.

2. It seeks order:-

(1) That the defendant/applicant be granted leave to amend her defence and counterclaim to appear in the draft amended defence and counterclaim attached hereto and marked "A".

(2) That the honourable court do give directions as to the filing and service of the amended defence and counterclaim and the plaintiff's right to reply.

(3) That costs of this application be in the cause.

3. The grounds are on the face of the application and are set out in paragraphs 1 to 10.

4. The application is supported by the affidavit of Priscilla Wanjiku Muruthi, the defendant/applicant sworn on the 8th November 2017.

5. The application is opposed. There are grounds of opposition by the plaintiff/respondent dated 18th June 2018.

6. On the 27th June 2018 the court directed that the application be canvassed by way of written submissions.

The Defendant's/Applicant's Submissions

7. The defendant/applicant is the registered owner of the suit property for a leasehold period of 99 years from the City Council of Nairobi (as it then was) commencing from 1st July 2001. It has emerged from the pleadings that the defendant's/applicant's previous advocates failed to pray for payment of rent arrears for the period that the plaintiff has been in occupation of the suit premises without paying any rent to the registered owner of the property. That this would only have been a result of oversight and/or human error.

8. That the current application has been brought under the provisions of order 8 rule 3(1) of the Civil Procedure Rules. She has relied on the cases of **Kuloba vs Oduor [2001] 1EA 101** and **Wamuiga vs Central Bank of Kenya [2002] 1EA 314**.

She urges the court to exercise its discretion in her favour and allow the application.

The Plaintiff's/Respondent's Submissions

9. The application contradicts paragraph 11 of the defendant's/applicant's statement of defence where she states that she never at any time asked the plaintiff/respondent to pay her any additional rent over and above the rent payable to the City Council Nairobi and/or National Housing Corporation. There is no factual basis of introducing a claim for rental income which had never been in the contemplation of the

parties from the onset. The defendant/applicant was a trustee who cannot be entitled to rent payment from the beneficial owner of the property. The defendant/applicant is trying to introduce a completely new and contradictory cause of action.

10. The plaintiff/respondent will be gravely prejudiced as he filed a reply to statement of defence and counterclaim. This averment will delay the fair trial of the suit herein. He had relied on the case of **Kyalo vs Bayusuf Brothers Ltd [1982] eKLR**. The defendant/applicant has been guilty of laches. He prays that the application be dismissed with costs.

11. I have considered the notice of motion and the affidavit in support. I have considered the grounds of opposition, the written submissions of counsel and the authorities cited. The issues for determination is whether the application is merited.

12. Order 8 rule 3(1) of the Civil Procedure rules provides that:

“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.”

Order 8 Rule 3(5) of the Civil procedure Rules provides that:-

“An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action. If 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 on the suit by the party applying for leave to make the amendments”

13. In the case of **Wamuiga vs Central Bank of Kenya [2002] 1EA 314**, Mbahito J (as he then was) held that:-

“Amendment to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other party however negligent and careless may have been in the first omission and however late the proposed amendment. If no injustice is occasioned the amendments should be allowed....”

14. I am guided by the above authority in finding that no prejudice will be occasioned to the plaintiff/respondent herein if the amendment is allowed.

15. I am further guided by order 8 rule 5(1) of the Civil Procedure Rules which provides that:-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of 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”

16. All in all I find merit in this application and grant the orders sought namely:-

(a) That the defendant/applicant be and is hereby granted leave to amend the defence and counterclaim as per the draft amended defence and counterclaim attached and the same to be deemed as duly filed upon the payment of the requisite fees.

(b) That, upon service the plaintiff/respondent do file a reply to amended defence and counterclaim within (21) twenty one days.

(c) That costs of this application be borne by the defendant/applicant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 23rd day of January 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant