



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E & L CASE NO. 389 OF 2015

SYKE ENTERPRISES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

MOI TEACHING AND REFERRAL HOSPITAL STAFF

PENSION SCHEME.....DEFENDANT/RESPONDENT

RULING

The plaintiff/applicant seeks leave of the court to amend the plaint dated 18.07.2017. The applicant intends to include general damages in the plaint which was as a result of the defendant's breach of contractual obligation. According to the plaintiff, the amendment shall seek to clarify the real issues in controversy between the parties. That no harm shall be occasioned to the respondents herein as the amendment will only be confirming the cause of action as it arose therefore assisting in the proper determination of this suit. That the amendment is made in the interest of justice and fairness and that the application for amendment has been made timeously. Lastly, that this application has been brought in good faith.

The application is supported by the affidavit of Dr. Jacqueline C. Korir who states that she sued the defendant/respondent over the parcel of land known as Eldoret Municipality Block 4/332 measuring approximately 0.0462 hectares in which it has caused to be erected an eight storey building consisting of a hotel block, basement parking, a ground floor restaurant, mezzanine floor bar, 60 suite accommodation rooms and other developments.

That upon seeking legal advice from her advocate, Mr. Mathai whose advise she verily believes to be true that it is necessary to amend the plaint. That the amendment is not meant to cure holes exposed by the defendant but rather clarify the real issues surrounding this case. The amendment is intended to clarify the real issues for determination. That she is being advised by her counsel on record that the defendant will suffer no prejudice should this amendment be allowed as they have an opportunity to respond to the amended plaint.

In the replying affidavit, Dr. Felix Tarus states that the application is clearly intended to forestall their defence and counterclaim and to prejudice the defendant. That they filed their defence and counterclaim on 1st December, 2015 and on 25th May, 2016 they filed their amended defence and counterclaim pursuant to leave granted by the court on 16th May, 2016.

That in their amended counterclaim, they have sought for the following prayers:

(a) Kshs.18,975,000.00 due on account of the accrued rent from July, 2013 when the lease started to 24th January, 2016 when the 1st defendant left the tenanted premises and Kshs.140,000 in respect of unpaid service charge; total Kshs.19,115,000.

(b) Kshs.70,000,000.00 due as rent for the remainder of the lease period from 24th January, 2016 to 30th December 2018, together with its attendant V.A.T., Kshs.11,200,000.00 total Kshs.81,200,000.00.

(c) Kshs.15,000,000.00 due on account of repair costs the Plaintiff is incurring to repair the premise upon the 1st Defendant's exit, and damage inflicted in its wake.

(d) Kshs. 570,000.00 due on account of 1st Defendant's unpaid water, [Kshs.250,000] and electricity [Kshs.320,000] and other bills the Plaintiff was forced to settle.

(e) Kshs. 6,188,000.00 on account of unpaid V. A. T taxes.

(f) Kshs.500,000.00 on account of legal fees for the preparation of the lease.

(g) Interest on all above at the rate of 6% above Barclays Bank base interest rates per annum; (i) On rent from the date the rent became due, (ii) On the other claims from the date of the filing of the suit in respect to the other claims of the filing of the suit.

(h) Costs

(i) Any other or further orders and or directions the Court may deem fair and just to grant.

The Plaintiff was granted leave to file reply to the amended defence and counterclaim. That so far, the Plaintiff has not filed any reply to the said amended defence and defence to the counterclaim as such there is no basis for the prayer to amend the plaint to sneak in a prayer whose basis has not been laid. That in his view, the prayer for amendment of plaint is made in bad faith and the motive is to react to the Defendant's counterclaim by reproducing the defendant's prayers in the counter-claim in a brazen abuse of court process.

That the proposed amendment is at variance with the Plaintiff's case in that the Plaintiff has not denied the facts pleaded in paragraph 26 of the amended defence and counterclaim to the effect that on the night of Saturday 23rd January, 2016 into the morning of Sunday 24th January 2016, the Plaintiff removed all goods including goods already proclaimed from the rental premises and sneaked out of the premises with a view to evade payment of rent and to obstruct justice.

That there is no basis for the Plaintiff's apprehension of the Defendant's counterclaim for the sum of Kshs. 70,000,000 due as rent for the remainder of the lease period from 24th January, 2016 to 30th December, 2018 together with its attendant VAT of Kshs.11,200,000 as vide paragraph 21 (v) of the amended counterclaim, the Defendant averred that in the event they get another tenant within the five-year lease period the Defendant shall give the Plaintiff credit for the rent obtained from a such tenant. The court will take that into account while computing rent due to them by the Plaintiff on account of them moving out of the premises on the night of 23rd January, 2016 and the morning of Sunday 24th January, 2016 illegally and without notice as they enjoyed the benefit of interim orders then while the sneaking out was meant to avoid payment of rent and to obstruct and abuse the court process.

According to the respondent, there is no for the new prayer sought by the Applicant. After all, the lease period is almost coming to an end (30th December 2018).

That in any event, the application is brought after a long and inordinate delay as all facts material to this case have been in the knowledge of the Plaintiff since the year 2015 when they instituted this suit.

That it is gross abuse of court process for a party who quit the Defendant's premises illegally and without notice to purport to amend their pleadings to claim for damages for alleged breach of contract.

That the Plaintiff's application dated 19th November, 2018 lacks merit, is made in bad faith and ought to be dismissed with costs.

I have considered the application and do find that the defendant/respondent has not demonstrated any prejudice he is likely to suffer if the plaint is amended. Under 8, Rule 3, the court has unfettered discretion to allow an amendment of pleadings. It is trite that the discretion ought to be exercised judiciously and not capriciously. The defendant will be at liberty to amend his defence. I do find that the amendment will assist the court to resolve the real controversy. Application is hereby allowed. Costs in the cause.

Dated and delivered at Eldoret this 9th day of April, 2019.

A. OMBWAYO

JUDGE