



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 210 OF 2015

(FORMERLY KERUGOYA ELC 467 OF 2013)

CHARLES NJERU MUGANE.....1ST PLAINTIFF

JOSEPH MUTHEE MURATHI.....2ND PLAINTIFF

VERSUS

HENRY NDWIGA KIURA.....DEFENDANT

RULING

1. The record shows that the hearing of the suit was concluded on 22nd November 2018 whereupon the court granted the Plaintiffs 30 days to file and serve his written submissions whereas the Defendant was granted 30 days upon service to file and serve his. The suit was thereupon fixed for judgement on 9th May 2019.

2. Whilst the suit was pending judgement the Defendant filed a notice of motion dated 11th December 2018 brought under **Order 8 Rule 3, Order 8 Rule 8 of the Civil Procedure Rules** (hereinafter *the Rules*) **sections 20, 21, 22 and 23 of Environment and Land Court Act No. 19 of 2011, and sections 3 and 3A Civil Procedure Act (CAP 21 Laws of Kenya) and all other enabling provisions of the law** seeking the following orders;

- a. *This application be certified urgent and be heard ex-parte in the first instant.*
- b. *The applicant herein be granted leave to amend his defence and counter claim and to add more evidence in form of documents.*
- c. *Costs be in the case.*

3. The said application was based upon the grounds set out on the face of the motion and supported by an affidavit sworn by the Defendant on 11th December 2018. It was contended that the Defendant's former advocates did not conduct the suit properly in that they left out crucial evidence and documents to the prejudice of the Defendant. It was further contended that the Plaintiff's father had obtained a grant in *Embu High Court Succession No. 886 of 2002* in a fraudulent and unprocedural manner in consequence of which his grandfather was deprived of a portion of the suit property.

4. The 1st Plaintiff filed a replying affidavit sworn on 18th February 2019 on his own behalf and on behalf of the 2nd Plaintiff in opposition to the Defendant's said application. It was contended that the

application was an abuse of the court process since the Defendant was all along represented by an advocate until the tail end of the proceedings. It was contended that the suit had been pending in court for a long time and that re-opening the hearing would cause further delay. It was further contended that the Defendant had not demonstrated what new documents or evidence he intended to produce upon amendment. The Plaintiffs consequently urged the court to dismiss the said application.

5. The record further shows that, without leave of court, the Defendant filed a further affidavit sworn on 25th March 2019 in response to the Plaintiffs' said replying affidavit. The said affidavit did not raise any new issues but it was merely argumentative. It did not add any value to the Defendant's said application.

6. When the said application was listed for hearing on 18th February 2019, it was directed that it shall be canvassed through written submissions. The Plaintiffs were given 14 days to file a response thereto whereas the Defendant was to file and serve his written submissions within 14 days thereafter. The Plaintiffs were to file and serve their submissions within 14 days upon service. The application was thereupon fixed for ruling on 9th May 2019 and the judgement date of 9th May 2019 was vacated.

7. By the time of preparation of this ruling, however, none of the parties had filed any written submissions on the application. The court, nevertheless, proceeded to consider and determine the said application.

8. The key provisions on amendment of pleadings are contained in **Order 8 Rule 3 of the Rules** which stipulates as follows;

“3(1) Subject to Order 1, rules 9 and 18, 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.”

9. Some of the principles to be considered in granting or refusing an application for leave to amend pleadings were considered in the case of **Eastern Bakery Vs Castellino [1958] EA 461 at p. 462** as follows;

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs...”

10. Similarly, in the case of **Central Kenya Ltd Vs Trust Bank Ltd & 5 Others [2000] eKLR**, the Court of Appeal pronounced the following principles;

“...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 compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

11. The court has considered the Defendant's said application in light of the above guiding principles. The courts are generally liberal in granting applications for leave to amend pleadings sought before the hearing. As indicated earlier, the instant application was filed after the conclusion of the hearing. All the parties had already closed their respective cases and the matter was pending judgement.

12. It is not altogether clear what issues the Defendant intends to raise in the proposed amendment. Although he purported to annex a copy of the draft amended defence and counterclaim, he only annexed the first page which merely gave a description of the parties. The Defendant's supporting affidavit only raised the alleged fraud on the part of the Plaintiff's parents. The court has noted that this issue is already

in the Defendant's further amended defence and counterclaim filed on 23rd January 2018.

13. The Defendant also attached a draft further list of documents dated 11th December 2018 listing the documents or evidence allegedly left out of the case by his former advocates. He did not attach copies of the listed documents to the list except an affidavit sworn by his late father, Munyi Njeru, on 11th April 1994 which appeared to have been sworn in support of an application for setting aside an arbitral award in *Embu Succession Case No. 87 of 1985*. (now *Embu High Court Succession Case No. 886 of 2002*)

14. The court has noted that most of the documents listed by the Defendant were actually contained in the Defendant's earlier list of documents. Some of them were indeed produced at the trial hereof and others could, with due diligence, have been produced by the Defendant before the conclusion of the hearing. The record shows that the Defendant took over the conduct of his defence on 22nd November 2018. He thereupon sought an adjournment to enable him produce additional documents. The application was rejected since the court did not see any justification to adjourn a suit which had been pending for more than eleven (11) years.

15. The court is thus far from satisfied that the amendment sought is justified in terms of seeking to bring out the real issues in controversy. The main issues in controversy are already contained in the pleadings and evidence on record. The mere fact that the Defendant was unhappy with the manner in which his former advocates conducted the matter cannot be a good reason to seek to reopen a matter which is pending judgement. The fact that the Defendant was denied an adjournment to marshal and tender additional evidence cannot justify the instant application either.

16. The court is of the opinion that the Defendant was accorded a reasonable opportunity to defend the suit, including the opportunity to amend his pleadings twice. There is no justification to re-open this old suit and to delay its conclusion at the convenience of the Defendant. The suit has been pending for about twelve (12) years now. The court finds no merit in the Defendant's said application for leave to further amend his defence and counterclaim and to tender additional evidence. The application bears the hallmarks of a delaying tactic.

17. The upshot of the foregoing is that the court finds no merit in the Defendant's notice of motion dated 11th December 2018 and the same is hereby dismissed with costs to the Plaintiffs. The court shall proceed to fix a judgement date upon delivery of the ruling.

18. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **23RD** day of **MAY, 2019**

In the presence of Mr. Mureithi holding brief for Ms Muthoni for the Plaintiff; the Defendant present in person.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

23.05.19