



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 1149 OF 2015

METRA INVESTMENTS LIMITED.....PLAINTIFF/RESPONDENT

=VERSUS=

EQUITY BANK LIMITED.....1ST DEFENDANT/RESPONDENT

PETER KAMURU KIBERA.....2ND DEFENDANT/RESPONDENT

JOHNSON MUTHEE NDEGWA.....3RD DEFENDANT/APPLICANT

STEPHEN NYAMU MBIJIWE

T/A LIFELINE TRADERS.....4TH DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 7th November 2017 brought under order 8 rule 3 and 5, order 51 rule 10 of the Civil Procedure rules, 2010, sections 1A, 1B, 3A and 3B of the Civil Procedure Act, Cap 21 Laws of Kenya and Article 159 (2) (d) of the Constitution of Kenya .

2. It seeks orders:-

(1) That this Honourable court be pleased to grant leave to the 3rd defendant/applicant to amend the statement of defence as per the draft Amended Statement of Defence and Counterclaim as annexed hereto.

(2) That if leave is granted, the respondents herein be granted commensurate leave to amend their pleadings (if necessary) within 14 days of service of the Amended Statement of Defence and Counterclaim.

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

3. The grounds are on the face of the application and are:-

(1) That several issues have arisen as enumerated below since the filing of the statement of defence and it is necessary to reflect the same as shown in the draft Amended Defence and Counterclaim.

(2) That the 3rd Defendant is desirous of claiming for loss of rental income which was wrongfully collected by the plaintiff and it is therefore necessary to amend the defence.

(3) That there is rental income held in joint interest earning account of the advocates of the 3rd defendant and the plaintiff and it is necessary to amend the defence in order to apply to have the said income released to the 3rd defendant.

(4) That it is necessary for the 3rd defendant to amend the statement of defence so as to bring out the real issues in controversy between the 3rd defendant and the plaintiff.

(5) That this honourable court has jurisdiction to grant leave to amend pleadings at any stage of the proceedings.

(6) That no prejudice will be suffered by the parties herein since the hearing of the suit has not began.

(7) That the 3rd defendant will suffer prejudice should the orders sought not be granted by this honourable court as he has suffered financial loss.

4. The application is supported by the affidavit of Johnson Muthee Ndegwa the 3rd defendant/applicant, sworn on the 7th November 2017.
5. The application is opposed. There are grounds of opposition filed by the plaintiff/respondent dated 13th September 2018.
6. The 1st and 2nd defendants told the court that they did not oppose the application.
7. On the 18th September 2018, the court directed that the application be canvassed by way of written submissions.
8. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the written submissions of counsel and the authorities cited. The issue for determination is whether this application is merited.
9. Order 8 rule 5(1) of the Civil Procedure Rules provides:-

“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”

10. In the case of **Martin Wesula Machyo vs Housing Finance Company of Kenya Ltd & Another (2015) eKLR**, Mutungi J relied on the case of **Central Kenya Ltd vs Trust Bank Limited & 4 Others [2000] 2EA 365** where the Court of Appeal stated:-

“that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

Mutungi J further observed that:

“thus the overriding consideration in an application for leave to amend is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs”.

11. The 3rd defendant/applicant contention is that the amounts due in rent continue after he obtained ownership of the suit property hence the reason for the need to amend the defence and include a counterclaim.
12. The plaintiff/respondent has not demonstrated what prejudice it is likely to suffer if these amendments are allowed. It will have an opportunity to amend the plaint if need be. I agree with the applicant’s counsel submissions that this court has a wide discretion to allow any party to amend his pleadings at any stage of the proceedings to enable the real issue in controversy to be determined.
13. I have considered the authorities cited by the plaintiff/respondent. I am of the view that they are distinguishable from the facts in this case. The 3rd defendant/applicant’s interest is on the rent accruing from the suit property. He is not seeking orders against a person who is not a party to this suit.
14. In conclusion, I find merit in this application and I grant the orders sought namely:-

(a) That leave is hereby granted to the 3rd defendant/applicant to amend the statement of defence as per the draft Amended Statement of Defence and Counterclaim as annexed hereto.

(b) That the draft Amended Statement of Defence and Counterclaim be deemed to be duly filed upon payment of the requisite fees and that the same be served upon the respondents within 14 days.

(c) That the respondents do have leave to amend their pleadings (if necessary) within 14 days upon service of the Amended Statement of Defence and Counterclaim.

(d) That costs of this application be borne by the 3rd defendant/applicant.

It is so ordered.

Dated, signed and delivered in Nairobi on this 7TH day of MAY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd Defendant

.....Advocate for the 3rd defendant

.....Court Assistant