



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC SUIT NO. 308 OF 2010

TITUS GETHI NDEGWA.....PLAINTIFF

VERSUS

GICHUHI NDIRANGU MACHARIA.....DEFENDANT

RULING

1. The Defendant/Applicant filed a Notice of Motion dated 16th February, 2018 in which he seeks leave to amend his defence as per the annexed draft. The Applicant contends that his defence was premised on the existence of an arbitration clause and now that the Court has found that the arbitration is not available, he should be allowed to amend his defence and remove any reference to arbitration and plead for appropriate prayers.
2. The Applicant further contends that the Court has already found that there was existence of a second agreement which superseded the first agreement and that he wishes to amend his defence to rely on both agreements. The Applicant argues that the Respondent has only relied on the first agreement in his plaint and therefore failed to disclose that there was a second agreement.
3. The Respondent opposed the Applicant's application through a replying affidavit sworn on 28th May, 2019. The Respondent contends that the Applicant's application has completely changed his defence and introduced a new issue including fraud which is very prejudicial to the Respondent. The Respondent argues that the Applicant is seeking to change his defence as the matter progresses and that the amendments being sought are meant to delay this case.
4. I have considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed herein by the parties. The only issue for determination is whether the amendments being introduced should be allowed.
5. The Applicant is basing his application on the ruling of Lady Justice Gitumbi which was delivered on 6th December, 2013. The Applicant herein had filed a Chamber Summons dated 30th July, 2010 in which he sought stay of proceedings in order to refer the dispute herein to arbitration. The Applicant argued in that application that the parties herein had signed a second agreement which contained a clause which provided that if there was any dispute between the parties, the matter had to be referred to arbitration.
6. In the ruling delivered on 6th December 2013, Lady Justice Gitumbi found that the Applicant herein had waived his right to refer the matter to arbitration as he had already filed a defence contrary to the law which provided that if one wanted to have a matter referred to arbitration, an application ought to have been made at the time of entering appearance and not after a defence had been filed.
7. The Applicant also argues that the Judge found that there was a second agreement which had superseded the first agreement and that it is therefore necessary for him to amend his defence to include particulars of fraud and concealment of the second agreement by the Plaintiff.
8. I have looked at the original defence of the Applicant and the proposed amendments. The Applicant has pleaded the existence of both the first and second agreements in the defence which is sought to be amended. It is misleading for the Applicant to claim that the Court found that arbitration was not available to him. As a matter of fact, the Court found that there was an arbitration clause in the second agreement. The Applicant lost the application on grounds of timing. He should have brought the application immediately after filing a memorandum of appearance and not after filing a defence.
9. The purpose of amendment to pleadings is to allow parties to bring on board all facts which will enable the parties to place their case before the Court for a fair decision of the issues. In the instant case, the grounds upon which the Applicant is seeking to amend have nothing new to bring on board. As I have already said in this ruling, the existence of the two agreements have been pleaded in the defence. If the Applicant feels that the Respondent is concealing the existence of the second agreement in his claim, he can counter that by showing that there is a second agreement as he has already pleaded that in his defence.

10. The principles for grant of leave to amend are very clear. Amendments should be granted freely but where it shown as in this case that the amendment is not brought in good faith and is clearly meant to delay the prosecution of the case, such leave should be rejected. In the circumstances of this case I find that the Applicant's application lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **17th** day of **June, 2019**.

E.O.OBAGA

JUDGE

In the presence of Mr. Waiganjo for Defendant and for M/s Aisha for Plaintiff.

Court Assistant Hilda