



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 177 OF 2017

BARBARA RIPAYMONTI.....PLAINTIFF

VERSUS

NEIL WADE.....DEFENDANT

RULING

1. I have before me for determination a Notice of Motion application dated 2nd July 2018 and filed herein on 13th August 2018. By the said application the Defendant prays for orders as follows:-

- 1. That leave be granted to the Defendant/Applicant to amend (his) Defence in terms of the annexed draft Amended Defence.***
- 2. That the Amended Defence be deemed duly filed and served upon payment of the requisite Court filing fees.***
- 3. That the costs of the application be in the cause.***

2. The application which is supported by an Affidavit sworn by the Defendant Neil Wade is anchored on the grounds:-

- a) That the Defence dated 16th August 2017 and filed on 18th August 2017 was filed contrary to the Defendant's express instructions and that the same does not represent the correct statement of affairs as between the parties;***
- b) That the Defendant wishes to include a Counter claim to recover various sums owed to the Defendant by the Plaintiff; and***
- c) That no prejudice will be occasioned to the parties and it is in the interest of justice that this application be allowed.***

3. In a Replying Affidavit sworn on 17th August 2018 and filed herein on 20th August 2018, Barbara Ripamonti (the Plaintiff/Respondent) contends that the application amounts to an abuse of the Court process and that it is brought in bad faith and is just but an afterthought.

4. The Plaintiff avers that she recorded a consent with the Defendant settling this matter and the parties were only waiting to return to Court for mention to have the matter concluded. That the said consent compromised the matter and the intention to amend the Defence is ill advised and would amount to wastage of judicial time.

5. I have considered the application and the response thereto. I have also considered the oral submissions made before me by the Learned Advocates for the parties.

6. I think the general rule is 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 (*see Eastern Bakery –vs- Castelino(1958)EA 461*).

7. In the matter before me, the Defendant applies to be allowed to amend his Defence and introduce a Counterclaim on the basis that his previous Advocates on record had filed a Statement of Defence that was contrary to his express instructions and that the same does not represent the correct statement of affairs between the parties.

8. On the other hand the Plaintiff asserts that the Defendant's application is brought in bad faith as the parties had recorded a consent that basically compromised the matter and that allowing the amendment would lead to wastage of precious Judicial time.

9. From the record and the material placed before me, it is apparent that when this matter came before me on 17th August 2017, the parties were given time to consider alternative dispute resolution with a view to reaching a settlement. From annexure "BR2" to the Plaintiffs' Repeating Affidavit, it is evident that indeed parties attempted settlement and executed a letter of consent on 28th January 2018 stating as follows:-

By Consent

- i) The Plaintiff shall apply her security deposit as rent for the month of February 2018;***
- ii) That the Defendant shall pay the sum of Kshs 500,000/- through the Plaintiff's lawyer within 14 days;***
- iii) That the Plaintiff shall vacate the suit premises on or before 28th February 2018 after receiving compensation;***
- iv) The parties shall await the pending ruling and thereafter return to Court to record further settlement terms.***

10. Indeed by a letter dated 2nd February 2019 addressed to the Deputy Registrar of this Court, the Defendants' current Advocates on record requested for a mention date to record the said consent. The said consent was received and filed in Court on 6th February 2018. As at that time the Plaintiff's application seeking to have the Defendant committed to civil jail for disobedience of Court orders was pending for a Ruling. That was the Ruling referred to at paragraph 4 of the consent.

11. As it turned out, that consent by the parties had as at the time of filing the application presently before me not been endorsed by the Court. It cannot therefore in my view be construed to have compromised the matter. It would appear to me that the Defendant changed his mind on the consent having received a reprieve from the Court when the Plaintiff's application to have him jailed for contempt was dismissed by the Court on 19th April 2018.

12. However, while the change of mind may have been actuated by bad faith, I did not think that the same can be used to bar him from amending his pleadings. As it were, the power of the Court to allow amendments is intended to determine fully the substantive merits of the case.

13. That being the case, I think it is only fair and just that the Defendant be granted an opportunity to plead his case in the best manner he deems appropriate. Accordingly, the application dated 2nd July 2018 is allowed in terms of Prayer No. 1 thereof. The Amended Defence and Counterclaim should be filed and served upon the Plaintiff within 14 days from the date hereof.

14. The costs of the application shall be in the cause.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE