



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAROK**

**ELC CAUSE NO. 588 OF 2017**

**OLONANA LIMITED.....PLAINTIFF**

**VERSUS**

**MARA RAFIKI LIMITED.....DEFENDANT**

**RULING**

By an Application dated 5<sup>th</sup> March, 2019 and brought under Section 100,1A,3A of the Civil Procedure Rules the Applicant sought for the following orders: -

1. That the Application be certified as urgent and be heard ex parte in the first instance.
2. That the Defendant/Applicant be granted leave to amend the Statement of defence and counter claim dated 25<sup>th</sup> April, 2018 and filed on the 25<sup>th</sup> day of May, 2018.
3. Costs be in the cause.

The Application was based on the grounds that the execution of a court order issued on 21<sup>st</sup> December, 2017 resulted in the complete demolition of the Plaintiff's/Applicant's property consequence which they had suffered loss and damage and that the Applicant was to provide a list of all the damages it suffered and hence the instant suit where it seeks the leave of the court to amend its Statement of Defence and counter claim and that the aforesaid amendment will not prejudice the Respondent and that the same will serve in the interest of justice.

To the Application the Applicant annexed a supporting affidavit and a draft amended statement of defence. In the supporting affidavit sworn by one Uwe Heerdes he averred that pursuant to an order of the court, the Respondent in its execution had annihilated and demolished structures and he wishes to be give leave to amend the statement of his defence to include the damages and loss that he suffered.

The Application was opposed by the Respondent who filed a Replying Affidavit sworn by one Muriu Waiganjo on 26<sup>th</sup> March, 2019. The Respondent on his affidavit averred that the instant Application was filed late and is only meant to alter the character of the suit introduction of previously unpleaded and inflated particulars of special damages. He stated that though the court has power to grant amendments the court should never allow amendments that will alter the character of the suit.

The Application was disposed by way of written submissions that both parties filed. In its submissions the Applicant stated that the position on law that the Applicant be allowed to amend their pleading so as to assist the court in properly determining the real question but in controversy between the parties. The Applicant averred that the amendment sought will not be prejudicial to the Respondent and that the proposed amendment is only meant to assist the court.

The Applicant further averred that the proposed amendment contrary to the allegations by the Respondent will not alter the character of the suit but will facilitate the court in determining the real question in contrary and that the Respondent has not demonstrated any prejudice or injustice that they will suffer and thus pray that the application be allowed.

The Respondent contend that the orders sought are discretionary and the court is vested with wide powers to allow amendments of pleadings. However, the Applicant intended amendment is not supported by any evidence and that the special damage sought have not been particularized and further that there are no witness statements and the amendment sought will further delay the hearing of the matter.

I have read and carefully considered the application before me and the submissions filed by counsel and this being an application for amendment the same is sufficiently addressed by the provisions of Order 8 Rule 3 and 5 of the Civil Procedure Rules and the parameter with which the court can exercise its discretion already defined. The Applicant wishes to amend his defence to include losses he suffered when

the Respondent enforced an order that was issued by the court. The amendment sought in my mind is important to the Applicant's defence and in any event the suit in which the amendment is sought has not even commenced for hearing nor pretrial directions taken and in the circumstances I don't see any prejudice the Respondent will suffer in the event that the amendment sought is allowed.

From the foregoing it is my finding that the instant Application is worthy of benefiting from the discretion of the court and I will thus allow the Notice of Motion dated 5<sup>th</sup> March, 2019 in the following terms: -

(i) That leave is granted to the Defendant/Applicant to amend its statement of defence and counter claim dated 25<sup>th</sup> April, 2018 and the draft amended defence and counter claim dated 25<sup>th</sup> April, 2018 be deemed as properly filed subject to the payment of the requisite fees.

(ii) That the amended defence be served on the Plaintiff within the next 14 days and the Plaintiff be at liberty to reply to the statement of defence.

(iii) Each party to bear its own costs.

**DATED, SIGNED and DELIVERED** in open court at **NAROK** on this 25<sup>th</sup> day of **July, 2019**

**Mohammed Kullow**

**Judge**

**25/7/19**

In the presence of: -

Mr Kiptoo holding brief for Kere for the plaintiff

Mr Kilele for Omollo for the Defendant/Applicant

CA:Chuma/Kimiriny