



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC. CIVIL CASE NO. 74 OF 2018**

**FELIX MECHA NYAKUNDI.....1ST PLAINTIFF**

**STELLA NYABOKE OTWORI.....2ND PLAINTIFF**

**FESTEMAGRA INVESTMENT LIMITED.....3RD PLAINTIFF**

**=VERSUS=**

**NATIONAL SOCIAL SECURITY FUND.....1 ST DEFENDANT**

**MORARA NGISA & CO. ADVOCATES.....2 ND DEFENDANT**

**RULING**

1. The application under consideration is the 1st defendant's notice of motion dated 21/12/2018 through which the 1st defendant (**the applicant**) seeks leave to amend both its defence and counter-claim. Through the envisaged amendments, the applicant seeks to join, as defendants in the counter-claim, additional parties against whom it seeks various orders.

2. The case of the applicant is that its counter-claim raises issues as between it, the plaintiffs, the 2nd defendant in the principal claim, and the persons intended to be introduced as additional defendants in the counter-claim. Secondly, the applicant contends that the intended amendments are necessary for the determination of the real questions in controversy in the suit.

3. The application was supported by an affidavit sworn on 21/12/2018 by Caroline Odera-Rakama, in which she deposed that the proposed additional defendants were key players in the transaction that culminated in this suit. She added that the said persons entered into a tenant purchase agreement for the suit properties with the 1st defendant, and subsequently thereafter entered into a subsequent sale agreement with the plaintiffs hence they are necessary parties to this suit.

4. In a replying affidavit sworn by the 1st plaintiff on 3/3/2019, the 1st plaintiff opposed the application. He deposed that the 1st defendant's application did not disclose any cause of action or liability it wished to share with the 3rd, 4th, 5th and 6th defendants. He deposed that the proposed additional defendants were tenants of the 1st defendant before the 1st defendant sold the houses to the plaintiffs. He added that the role of the proposed additional defendants was only to give vacant possession of the suit properties. He further deposed that the contract between the proposed additional defendants was extinguished when the 1st defendant revoked its agreement with the parties and sold the houses to the plaintiffs. He further deposed that the only available remedy for the 1st defendant was to enforce the professional undertaking given by the 2nd defendant. He added that the intended defendants were not known to the 1st defendant and the 1st defendant had not disclosed the prejudice it stood to suffer if they were not joined as parties to this suit.

5. The 2nd plaintiff opposed the application through a replying affidavit sworn on 4/2/2019. She deposed that the 1st defendant did not have any cause of action against the proposed additional defendants. She contended that a separate suit should be filed against the proposed additional defendants. She further deposed that the proposed additional defendants were strangers to the sale contracts. She added that grant of the application will cause inordinate delay and introduce a new cause of the action which the plaintiffs are not party to. She deposed that the plaintiffs' claim against the 1st defendant was that of trespass. She averred that the only available remedy for the 1st defendant was to enforce the professional undertaking given by the 2nd defendant because the plaintiffs paid the full purchase price to the 2nd defendant. She further averred that the intended proposed defendants were strangers to the 1st defendant.

6. The 2nd defendant filed grounds of opposition on 21/1/2019. The grounds of opposition were that: (1) the application was incurably defective and bad in law and ought to be struck out with costs because it had no basis in fact and/or law; (2) that no basis had been laid out for joinder of the proposed parties; (3) the parties sought to be joined to this suit would not help the court to decide the matters in controversy between the parties; (4) grant of the orders sought would cause inordinate delay and unnecessarily cloud the issues at hand; (5) the parties proposed to be joined would not add any value to the case; and (6) the application ought to be dismissed with costs.

7. The application was canvassed by way of both oral and written submissions. Mrs Mbabu, counsel for the 1st defendant, submitted that

joinder of parties was provided for under Order 8 rule 3 of the Civil Procedure Rules. Counsel contended that the said legal framework allowed the 1st defendant to join other parties to the suit. It was further submitted that the proposed additional defendants were necessary parties in the suit. It was also submitted that this application should be allowed because the plaintiffs will not suffer any prejudice. Reliance was placed on **Central Kenya Ltd vs Trust Bank & 4 others Civil Appeal No. 222 of 1998** where the Court of Appeal held that amendments should be allowed at any stage provided that the amendments or joinder will not result in prejudice or injustice which cannot be compensated by way of an award of costs. Reliance was also placed on **Evanson Mbutia Gitahi vs Priscilla Wanjiku Muruthi ELC No. 812 of 2013, Eastern Bakery vs Castelino 1958 E.A 461** and **Tulip Properties Ltd vs Mohammed Koriow and Others ELC No. 1403 of 2007**. Counsel for the 1st defendant submitted that the replying affidavit by the 1st plaintiff was not sworn. She added that the 2nd plaintiff's replying affidavit was not signed and the annexures thereto were not marked.

8. Mr Ayora, counsel for the 2nd and 3rd plaintiffs, submitted that the application did not disclose any cause of action against the proposed additional defendants. Reliance was placed on **John Mulwa Kang'aatu vs Pan African Insurance Co. Ltd [2015]eKLR** where the court declined to allow proposed amendments because they sought to introduce a new cause of action and were likely to affect the defendant's accrued defence of limitation. He further submitted that the professional undertakings which facilitated the transfer had never been enforced. He argued that the amendments were going to delay the disposal of the suit.

9. I have considered the application in the context of the pleadings which contain the parties' respective cases in this suit. I have also considered the rival affidavits and submissions. Similarly, I have considered the relevant legal framework and jurisprudence on this court's jurisdiction to grant a plea for leave to amend pleadings and to bring on board additional parties. Two key issues fall for determination in the application under consideration. The first issue is whether the application under consideration satisfies the criteria upon which this court exercises the jurisdiction to grant leave to amend pleadings. The second issue is whether the intended defendants in the counter-claim are necessary parties for the purpose of enabling the court to effectually and completely adjudicate upon and settle key questions involved in the dispute. I will make brief pronouncements on the two issues sequentially in that order.

10. Jurisdiction to grant leave to amend pleadings is contained in Order 8 rule 3 of the Civil Procedure Rules. That legal framework grants the court discretionary jurisdiction to allow amendments at any stage of the proceedings on such terms as to costs or otherwise as the court considers just. Over the years, our courts have developed jurisprudential principles which guide the exercise of that jurisdiction. Firstly, amendments would be allowed if such amendments are necessary for determining the real questions in the suit. Secondly, amendments would be allowed to avoid a multiplicity of suits over the same cause of action or transaction. Thirdly the plea for leave to amend ought to be brought without undue delay. Fourthly, no new or inconsistent cause of action should be allowed through amendments. Lastly, where there is no injustice to be suffered by the other party, amendments should be allowed. See **Central Kenya Limited v Trust Bank Ltd (2000) and Ochieng and 2 others v First National Bank of Chicago Civil Appeal No. 149 of 1991**.

11. The suit herein was filed in 2016. The 1st defendant filed its defence and counter-claim in August 2016. The present application was filed on 21/12/2018. Hearing of this suit has not commenced. The intended amendments do not introduce any new claim against persons who are already parties to the suit. It seeks joinder as defendants in the counter-claim, of persons whom the applicant contends are necessary parties for the effectual and full determination of all the questions in the dispute. The respondents have not demonstrated to the court what injustice they stand to suffer if the plea for leave to amend is granted at this stage when hearing has not commenced. In the circumstances, I find no good reason for denying the applicant leave to amend their pleadings. My finding on the first issue therefore is that the applicant has satisfied the criteria for grant of leave to amend pleadings.

12. The second issue is whether the intended additional defendants in the counter-claim are necessary parties for the effectual and complete determination of all the questions arising in the dispute. From the materials placed before the court, it does appear that the intended defendants procured executed transfer instruments from the applicant by presenting to the applicant purported undertakings. The applicant contends that the said undertakings were forgeries and hence the resultant transfers should be cancelled. Given the above background, the court takes the view and finds that, the intended additional defendants in the counter-claim are necessary parties for the purpose of effectually and completely adjudicating upon all the questions arising in this suit. The question as to whether or not there was fraud cannot be fully answered without making the said persons parties to the suit. It is therefore my finding that the said persons are necessary parties who will enable the court to effectually and completely adjudicate upon key questions arising in the dispute.

13. The net result is that the 1st defendant's notice of motion dated 21/12/2018 is allowed in the following terms:

***a) The 1st defendant is allowed to amend its defence and counterclaim in terms of the draft amended defence and counter-claim annexed to the application within 14 days.***

***b) The applicant is granted leave to effect service of summonses upon the joined parties through a prominent notice in either the Daily Nation or the Standard Newspaper***

***c) Costs of the application shall be in the cause and shall await determination of the suit.***

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mrs Mbabu Advocate for the 1st defendant

Mr Katee Advocate for the 2nd defendant

Court Clerk - June Nafula