



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 113 OF 2014

JANE WANGARI MURAYA

DORCAS GATHONI

JADOR ENTERPRISES LTD.....PLAINTIFFS

VERSUS

KENYA COMMERCIAL BANK LTD

SHALOM HOMES LTDDEFENDANTS

RULING

(Application seeking leave to amend plaint; suit having been filed against a bank to stop an auction; auction proceeding and later suit amended to include the purchaser as 2nd defendant; plaintiffs now wishing to proceed in respect of damages as against the bank and wishing to withdraw suit against the 2nd defendant; plaintiffs seeking to amend to include the prayer for damages and omit 2nd defendant from the suit; application allowed; 2nd defendant to have costs of the suit save that no orders are made in respect of costs of the application)

1. The application before me is that dated 10 July 2019 seeking leave to further amend the plaint.
2. To put matters into context, this suit was commenced through a plaint which was filed on 20 May 2014 against Kenya Commercial Bank Limited (KCB) as sole defendant. In the original plaint, the plaintiff averred that she was at all material times the registered proprietor of the land parcel Subdivision Number 12101 (Original 7599/9) Section 1, Mainland North (the suit property). She averred that sometimes on 12 August 2010, she, jointly with one Dorcas Gathoni, being directors of Jador Enterprises Limited, acquired a mortgage facility from KCB for Kshs. 50,000,000/= and the suit land was offered as security together with another property belonging to Dorcas Gathoni. By a further charged dated 2 September 2011, KCB advanced to Jador Enterprises a further Kshs. 10,000,000/= over the same securities. There was default and the bank issued a statutory notice. The plaintiff averred that she embarked on negotiations to sell the suit land to one Joseph Wainaina Muraya through a private treaty and that a deposit of Kshs. 5,000,000/= was made but the bank set unreasonable conditions for completion of the sale. For the other property of Dorcas, a purchaser was secured for Kshs. 50,000,000/=. The plaintiff complained that despite this, KCB proceeded to advertise the property for sale. When the suit was filed, the plaintiff asked for orders to stop the intended auction.
3. For obvious reasons, the plaintiff filed an application for injunction together with the plaint, The applicant did obtain interim orders stopping the sale. Subsequently an application dated 22 September 2014, an application for contempt, was filed. It was alleged that in breach of the order of injunction, the bank proceeded to sell the property on 21 May 2014.
4. Later, an application dated 13 November 2011 was filed by Shallom Homes Limited to be enjoined to the proceedings as 2nd defendant. Shallom Homes Limited sought to be enjoined as defendants as they were the purchasers in the auction sale of 21 May 2014. That application was allowed on 24 November 2014.
5. The application for injunction and that of contempt were argued together on 24 March 2015 and ruling delivered on 27 May 2015. Both applications were dismissed.
6. There followed an application dated 16 May 2016 to enjoin Dorcas Gathoni and Jador Enterprises Limited as co-plaintiffs. That application was allowed through a ruling delivered on 30 November 2017.

7. This application was then filed on 10 July 2019. I have gone through the application and the annexed draft further further amended plaint. The plaintiffs aver that they have reflected on their suit and appreciate that the remedy of a chargor who is aggrieved by an auction sale is that of damages against the seller. They thus wish to remove the 2nd defendant, the purchaser at the auction sale, from the proceedings, and add a prayer for damages against the bank, now as sole defendant. The application is not opposed, though Mrs. Omondi, learned counsel for the 2nd defendant, did ask for costs of the application and of the suit given that her client was being removed from the matter. Ms. Murage for the plaintiffs did not oppose the prayer for costs of the suit to the 2nd defendant but was of opinion that the 2nd defendant does not deserve the costs of the application.

8. I have considered the matter. First, the plaintiffs wish to amend their pleadings. Generally, the court is fairly liberal when it comes to allowing a party to amend his/her pleadings so long as no prejudice is going to be caused to the other parties. Looking at the matter, I do not see any prejudice that will be caused to the now sole remaining defendant if the plaintiffs are allowed leave to amend. The defendant will have an opportunity to amend its defence and plead any matters aimed at defending their suit. The option to remove the 2nd defendant is the choice of the plaintiffs, and if they feel that they have no cause of action against the 2nd defendant, that is well and good, and I will not stand in their way. I therefore grant leave to amend the plaint as demonstrated in the annexed further amended plaint. The result is that the 2nd defendant is no longer in these proceedings, and it is now prudent for me to turn to the issue of costs.

9. Through this application, the plaintiffs propose to remove the 2nd defendant from the suit and amend the plaint. There is no other way that they could do this other than through the filing of this application. I therefore do not think that the 2nd defendant should benefit with costs because the 2nd defendant could not have been removed from the proceedings save through this application.

10. On the costs of the suit, the plaintiffs concede that they are ready to pay the 2nd defendant the costs of the suit. I have no issue with this concession.

11. The result therefore is that leave to amend is allowed and the costs of the withdrawn suit will be to the 2nd defendant save that in respect of this application, there will be no orders as to costs.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Ms. Murage for the plaintiffs/applicants.

Mr Hamisi holding brief for Mr Omondi for the 1st defendant.

Mrs Omondi for the 2nd defendant.

Court assistant; Koitamet