



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 243 OF 2017

PAOLO DEFANO.....PLAINTIFF

VERSUS

OLIVA ROCCO.....DEFENDANT

RULING

1. This suit was filed on 8th December 2017. In his Complaint dated 7th December 2019 Paolo Da Fano sought inter alia an order directing the Defendant to vacate Plot No. 3084 Malindi, an order of injunction in relation to the said parcel of land as well as General Damages for breach of contract.

2. The Defendant, Oliva Roco entered appearance through a Memorandum of Appearance dated and filed on 19th December 2017 through Kupalia, Fondo Mwangunya & Associates Advocates. The Defendant did not however file a formal Defence to the suit and the Plaintiff therefore caused the matter to be placed before the Deputy Registrar of this Court in order to have the same certified ready for hearing. On 23rd April 2018, the Deputy Registrar certified the matter ready for hearing and it was subsequently fixed for hearing on 17th September 2018.

3. Before the date for hearing however, the Defendant moved to Court on 28th June 2018 and filed an application dated the previous day seeking leave to be allowed to file a defence out of time and to unconditionally defend the suit.

4. On 31st July 2018, this Court granted the Defendant leave to file his Defence within 14 days. He was also required to pay 50% of monthly instalments that were due as per an Agreement executed by the parties within 30 days from the date of the Ruling. Accordingly the Defendant filed an elaborate Statement of Defence herein dated 7th August 2018 on 8th August 2018. On the same day the Defendant filed a List of Witness Statements and a separate List of Documents.

5. Subsequently the matter was set down for hearing and the Plaintiff proceeded to give his evidence and was cross-examined thereon on 21st January 2019. The Plaintiff having closed his case, the matter was set down for defence hearing on 1st April 2019.

6. Before that date however on 14th February 2019, the Defendant moved to Court and filed the application presently before me dated 12th February 2019 in which he prays for an order that this Court be pleased to grant him leave to amend his defence and introduce a Counterclaim herein.

7. The application supported by an Affidavit sworn by the Defendant's wife one Daniela Venturelli is premised inter alia on the grounds stated on the body thereof as follows:-

a) That the Defendant filed his Defence on 18th August 2018.

b) That the pleadings have been closed.

c) That the Defendant/Applicant seeks to make amendments that can only be allowed with leave of this Honourable Court that will account for substantive changes in his defence;

d) That the Defendant intends to introduce a Counterclaim against the Plaintiff;

e) That the amendments will assist this Honourable Court to deal effectively and completely with the subject matter that is before this court;

f) That the Plaintiff stands to suffer no prejudice if leave to amend defence is granted; and

g) That it is in the interest of justice that the orders herein sought are granted.

8. In response to the said application, the Plaintiff through a donee of a Power of Attorney one Grace Laika in a Replying Affidavit sworn and filed herein on 21st March 2019 avers that the Defendant was granted conditional leave to defend this suit but has to-date failed to abide by the said conditions as a result whereof the sum of 69,222 Euros remains outstanding and is due.

9. The Plaintiff further accuses the Defendant of seeking to amend his pleadings after the Plaintiff has testified and closed his case in order to cover up and delay the case further as he continues to occupy the suit premises.

10. I have considered the application and the response thereto. I have also considered the oral submissions by the Learned Advocates for the parties as well as the authorities to which I was referred.

11. The general rule as far as I can recall 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 there is no injustice if the other party can be compensated by costs (*see Eastern Bakery –vs- Castelino(1958) EA 461*).

12. I think in a situation like this where parties have gone for pre- trial and the Plaintiff has proceeded to testify and close his case, the Defendant must put before the Court persuasive grounds why the amendment is not only necessary but also why it was not brought earlier before the matter was set for trial.

13. In the matter before me, the Defendant avers that they had filed the Defence on the knowledge that once the boundary dispute were resolved, they would pay the balance of the purchase price and dispense with the suit. They however commissioned an engineer to confirm the best possible manner of dealing with the structure in order to re-align the boundaries and the report they got appears to suggest that the subject of the Agreement of Sale will have to be broken down completely and may cease to exist.

14. From the history of this matter as enumerated herein above, the conduct of the Defendant herein has been at best lackadaisical and dilatory. Be that as it may, going by the nature of the dispute herein, it cannot be said that the proposed amendments are immaterial or useless. The issues do not certainly appear to me to be of such substantially different character as to require the Defendant to mount a fresh and different action against the Plaintiff.

15. As it were, the powers of the Court to allow amendment is to enable the Court to effectually and completely determine the true, substantive merits of the case. While the timing thereof is suspect, I think to preclude the Defendant from relying thereon at this stage may occasion a miscarriage of justice. As the Court of Appeal stated in *Mbati & Others –vs- Macharia & Another (2005) 2 EA 206:-*

“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”

16. In the result, I shall allow the Defendant to amend his pleadings and to voice his sentiments thereon at the trial. It must however be noted that the Defendant while being dilatory in these proceedings continues to reside in the subject property long after he stopped paying the agreed instalments therefor.

17. In my Ruling allowing the Defendant’s application to file a defence on 31st July 2018, I had directed that the Defendant makes certain payments. According to the Plaintiff, no such payments have been made thereafter and the Defendant was in arrears as at 31st July 2018 in the sum of 69,222 Euros. I have looked at the Defendants generalized assertions that payment has been made and I am more inclined at this stage to believe the Plaintiff. I shall allow the application on condition that the Defendant makes payment of half the sum claimed by the Plaintiff.

18. Accordingly I make the following orders:-

i) Leave is hereby granted to the Defendant to amend his Defence and introduce a Counterclaim as per the draft amended defence annexed to this application within 14 days from today.

ii) The said leave is conditional upon payment within 30 days from today by the Defendant to the Plaintiff of

a) Euros 34,611 being half the arrears outstanding as at 31st July 2018.

b) Kshs 35,000/- being thrown away costs.

iii) In default of the said payments or any of them, the application dated 12th February 2019 shall stand dismissed.

iv) The Plaintiff shall have the costs of this application.

Dated, signed and delivered at Malindi this 24th day of October, 2019.

J.O. OLOLA

JUDGE