



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 172 OF 2016

JOSEPH KITHINJI GITONGA (suing as the legal representative of the estate of

M'ITHINJI M'MWAMBIA ALIAS FREDRICK M'ITHINJI- Deceased).....PLAINTIFF

VERSUS

JENIFFER NKIROTE.....1ST DEFENDANT

JULIUS KIAMBATI M' MBURA.....2ND DEFENDANT

RULING

1. The plaintiff/Applicant herein has filed the application dated 29th April 2018 seeking leave to amend the plaint in terms of the draft amended plaint (annexure JKG1). The application is supported by the grounds set out on the face of the application and the supporting affidavit of the applicant. The gist of the application is that the applicant needs to claim for the money unaccounted for by the 2nd Defendant, that the applicant's prayers for accounts is not in the initial pleadings having been granted during the pendency of these proceedings, and that the amendments are necessary to enable this court to effectively adjudicate on the matter before it for a just determination thereof.

2. The applicant filed a supplementary affidavit on 24th May 2019 denying that he is occasioning delay in this matter but apportioned the delay to both parties. He averred that the court gave clear orders on where the proceeds of rent should be put so that no party should be disadvantaged in the course of the hearing.

3. It was argued for the applicant that an account was to be opened where 2nd defendant was to be depositing rent. He did deposit the rent for some time and he then stopped. The applicant further avers that there is a need to incorporate the prayers in the amendments so that the estate of the deceased is not wasted. Further, it is contended that this court will not have the opportunity to effectively determine this dispute if the amendments are not allowed.

4. In support of his claim, the applicant relied on the case of **Bosire Ogero vs. Royal Media Services HCC NO 292 OF 2013 NBI**.

5. The application was opposed by defendants/respondent through the affidavit dated 8th May 2019 sworn by **Julius Kiambati M' Mbura** where he avers that the application has been brought purposely to occasion delay and with the main objective of interfering with the date fixed for pre-trial so that the filing of pleadings is re-opened and then to further delay the hearing of the matter. The Respondent further opined that leave had been granted to the plaintiff to amend the plaint on diverse dates i.e. 26/11/2018 and on 29/02/2019 but the applicant failed to amend the same. That the plaintiff/applicant has not given a reasonable explanation for their failure to amend the plaint despite leave being granted on several occasions.

6. It was argued for the for the 2nd respondent that the issue of rent was dealt with in the application dated 28.9.2018.

7. The 1st respondent opted to associate herself with the claim of the 2nd respondent.

Analysis and Determination

8. The plaintiff and 1st Defendant are a son and daughter of **Fredrick M'Ithinji (deceased)**, hence they are siblings. The plaintiff pleads in his plaint that the defendant acquired the parcel of land Meru Municipality Block II/51 fraudulently because the same belonged to his father who passed on before the transfer was effected. The plaintiff averred that the 1st defendant caused half share of the suit land to be transferred and to be registered in the name of 2nd defendant. The 1st defendant denied the averments made by the plaintiff and contends that her father transferred the suit premises during his lifetime.

9. On 6th April 2017, this Court gave Orders to the effect that rental proceeds arising from the suit premises should be deposited in a joint account in the names of the plaintiff's and 2nd defendant's advocates.

10. The plaintiff now seeks to amend the plaint to include particulars of fraud and the lack of remission of the rental income arising from the suit premises into the account which was jointly opened by the advocate for the plaintiff and advocate for the 2nd defendant.

11. I have perused the record and I do confirm that the applicant has previously been granted leave to amend the plaint, specifically on 26.11.2018. He didn't comply. The orders of 28.2.2019 however did not give any specific directions on the filing of the application for amendment as the matter was before the Deputy Registrar who only directed the matter to be mentioned before the Judge.

12. In **Bosire Ogero v Royal Media Services [2015]** the court held that courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. The general power to amend the pleadings is donated by section 100 of the Civil Procedure Act which is the substantive law and its handmaiden Order 8 rule 5 of the Civil Procedure Rules. That Rule reads as follows;

“(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”.

13. In **Rubina Ahmed & 3 others v Guardian Bank (Sued in its capacity as a successor in title to First National Bank) [2019] eKLR**, the court cited **Halsbury Laws of England 4th Edition 9 re-issue, Wol 36 (1) at paragraph 76** where the author stated thus;

“the person applying the amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis, it is intended for the first time thereby to advance a new ground of defence, if the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness. Leave to amend may be granted if the amendment can be made without injustice to the other side.”

14. I find that rental dispute is part of the controversy in relation to the suit premises which has prominently featured in the litigation history of this case vide several applications starting with the one dated 5.12.2016, the one dated 21.2.2017 and the one of 28.9.2018. For the application of 21.2.2017, the same was settled through consensus where by, it was agreed that rent collected was to be deposited in a joint account opened by the advocates of the two warring parties that is plaintiff and 2nd defendant. Despite this agreement, the dispute appears to be simmering. Considering that the dispute is still live and applications have not done much to deal with the same, then it is only fair and just that the dispute be dealt with in the main trial. This would however pose a challenge if the claim is not factored in the pleadings. I do not see any prejudice that shall be occasioned unto the Defendants/Respondents. After all, the respondents would have an opportunity to challenge the amendments through their own amended pleadings.

15. This court however cannot close its eyes to the indolence of the Applicant. Way back On 26.11.2018, the plaintiff was directed to file his application to amend his pleadings within 21 days. The court did not give any sanctions. Court orders ought to be obeyed with or without sanctions. It is not only a waste of judicial time but an affront to the decisions made by this Honourable Court when orders and directions of the court are not obeyed. Delay is also another end result of failure to comply with court's orders. It is not lost to this court that the lifespan of this suit is littered with numerous applications, most of them filed by the applicant. The applicant must now focus on the trial so as to bring this litigation to an end.

16. Upon balancing the injustice and hardships of allowing the amendment against the injustice and hardship of refusing it, I deem it fit to make the following Orders;

1) That the plaintiff be and is hereby granted leave to amend the plaint within fourteen (14) days subject to him paying throw away costs of Kenya Shilling Five Thousand (Kshs.5,000/=) each, to the 1st and 2nd Defendants.

2) The Defendants are at liberty to file their Defence within 14 days after Service thereof.

3) This matter is to be mentioned for Pre-trial Directions within 45 days from the date of closure of the amended pleadings.

4) Parties to ensure compliance with order 11 prior to the date of Pre-trial Directions.

5) A hearing date on Priority basis to issue thereafter.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 7TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Mwanzia for plaintiff

Muthomi holding brief for Ondari for 1st respondent

Mutuma holding brief for M. Kariuki for 2nd defendant

HON. LUCY. N. MBUGUA

ELC JUDGE