



**REPUBLIC OF KENYA**

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

**CASE No. 118 OF 2016**

**M W K.....PLAINTIFF**

**VERSUS**

**H G ..... 1<sup>ST</sup> DEFENDANT**

**T W ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

***(Application for leave to amend defence and counterclaim; allowed)***

1. By Notice of Motion dated 24<sup>th</sup> May 2017, the defendants seek leave to amend the statement of defence “to properly describe the 2<sup>nd</sup> defendant as a female person of unsound mind.”

2. The application is supported by an affidavit sworn by the 1<sup>st</sup> defendant. He deposes that at the time the defendants’ advocates drafted and filed the defence and counterclaim, he mistakenly failed to inform the advocates that the 2<sup>nd</sup> defendant who is his sister and a niece to the plaintiff is a person of unsound mind and was born with the said disability. As a result, the advocates while drafting the defence, admitted that the 2<sup>nd</sup> defendant is a person of sound mind.

3. The application is opposed through a replying affidavit sworn by the plaintiff. In it, she states that she knows the 2<sup>nd</sup> defendant and that the 2<sup>nd</sup> defendant is a person of sound mind who fends for herself, manages and controls her life like any other normal person, she thus urged the court to dismiss the application.

4. The application was argued by written submissions. The defendants/ applicants filed their submissions on 23<sup>rd</sup> October 2017 while the plaintiff filed her submissions on 3<sup>rd</sup> November 2017. I have considered the application, the affidavits filed, the submissions and the authorities cited.

5. Order 8 rule 5 (1) states as follows:

***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.***

6. As a general rule therefore, amendments sought before judgment should be allowed so long as no prejudice which cannot be remedied by an award of costs is caused to the other party.

7. In the present case, the application for amendment is made before commencement of hearing of the suit. Indeed, even directions under Order 11 have not been taken. The defendants cannot therefore be accused of bringing the application at a late stage.

8. As regards the nature of the amendment sought, I note that the defendants wish to merely change their response to the description given to the 2<sup>nd</sup> defendant in the plaint. The result of the amendment will be that the defendants will not only deny the description of the 2<sup>nd</sup> defendant but will further assert that the 2<sup>nd</sup> defendant is a person of unsound mind.

9. Needless to state, the descriptions of the parties will just remain averments in pleadings. The plaintiff will have a right to file a reply to the amended defence. Further, any disputes arising from the pleadings will have to be resolved by way of evidence at the hearing. I see no prejudice to the plaintiff if the amendment sought is allowed.

10. In the end, I make the following orders:

- a. I grant the defendants leave to amend the defence and counterclaim so as to describe the 2<sup>nd</sup> defendant as a female person of unsound mind.
- b. The amended defence and counterclaim to be filed and served within 14 (fourteen) days from the date of delivery of this ruling.
- c. The plaintiff is granted corresponding leave to file and serve a reply to the amended defence and counterclaim within 14 (fourteen) days of service of the amended defence and counterclaim.
- d. Costs to the plaintiff.

**Dated, signed and delivered in open court at Nakuru this 13<sup>th</sup> day of February 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Chege holding brief for Mr. Olonyi for the plaintiff/respondent

Ms. Kinuthia holding brief for Mr. Karanja for the defendants/applicants

Court Assistants: Gichaba & Lotkomoi