



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 170 OF 2016

PAUL MWANGI NJOROGE.....1ST PLAINTIFF

PHYLIS W. NJOROGE.....2ND PLAINTIFF

SUSAN NYAMBURA NJOROGE.....3RD PLAINTIFF

VERSUS

WAFULA SIKUTA.....DEFENDANT

RULING

1. The application dated 4/1/2017 seeks leave to amend the defence as per the terms of the draft annexed thereto and that the draft be deemed as properly filed and served upon payment of the requisite fees. The grounds upon which the application is made are that the proposed amendment will enable the efficient determination of the facts in issue and the prejudice will be occasioned to the plaintiffs.

2. The application is opposed. Grounds of opposition were filed on 15/12/2017. It is stated in those grounds and in the submission that the deponent in the affidavit filed to support the application is a person other than the defendant. It has been submitted that under **Order 19 (3) (3)** affidavits shall be confined to facts which the deponent can of his own knowledge, prove and with the defendant introducing a counterclaim, the counsel cannot verify that and thus, the application should be struck out.

3. Objection is also raised to the application on the ground that the application is brought under **Order 8 Rule 1** and **3** and **Order 51**. It is urged that **Order 8 Rule 1** governs application made before pleadings are closed. The counsel for the plaintiff has also faulted counsel for the defendant for the delay in bringing the application 10 months after the defence was filed, which he terms as an unreasonable delay. He urges that a counterclaim will be subject to the Rules of Limitation.

4. In response to these arguments counsel for the defendant cited **Order 19** of the **Civil Procedure Rules** and urged that an advocate is allowed to swear an affidavit on behalf of his client where the advocate has the facts. He also urged that limitational issues should be heard on the merits and not in this application. Whereas I agree with him on the last point, I must examine the other objections of the plaintiffs to the defendants' application.

5. In respect of the objection relating to citing of the wrong rule this court will refer to **Article 159** of the **Constitution** and **Order 51 Rule 10 (1)** and **(2)** of the **Civil Procedure Rules**. The latter provision provides that failure to cite the proper Order, Rule or Statutory provision under which an application is sought shall not afford a defence to the application. In my view, that is a mere technicality. I therefore dismiss that ground.

6. As to the objection that counsel has sworn the affidavit instead of the defendant, I observe that it is trite that a deponent shall only depone to such facts in an affidavit as he is able to prove. It has not been denied that counsel swore the affidavit dated 4/12/2017 in support of the application. Should he have done that? The first paragraph acknowledges that consultations took place between him and his client and a decision was reached to amend the defence and include a counterclaim. It is clear that there was an agreement, and this we must believe to be the case otherwise we may have to doubt even counsel's authority to handle the matter on behalf of the defendant.

7. Has counsel sworn to matters that he cannot prove? The contents of paragraphs 2, 3 and 5 of the affidavit are the only paragraphs which may require some proof and I find that by dint of his handling of the matter on behalf of the client, an advocate may in any case, swear to such matters as they relate purely to what can be observed from the court record or what he has learned from his client. The only great flaw with the said affidavit is that it appears to have been drafted with the defendant in mind as the swearer thereof and when the deponent changed, the contents of paragraphs 2 and 3 were not amended to suit the identity of the new deponent. This is a wakeup call to the deponents to be careful of what they execute on oath. Nevertheless, this court has discretion to admit any affidavit despite any anomalies they may have under **Order 19 Rule 7**.

8. In addition affidavits based on statements of information and belief are allowed in interlocutory proceedings under **Order 19 Rule 3 (1)**. It is therefore not a fatal flaw for the application to be supported by the counsel's affidavit. I therefore dismiss that objection too. Having said that, I find no good ground to deny the applicant the prayers sought. The application dated **4/12/2017** is therefore allowed in terms of prayers No. 1 and 2. Costs shall be in the cause.

Dated, signed and delivered at Kitale on this 21st day of March, 2018.

MWANGI NJOROGE

JUDGE

21/3/2018

Coram:

Before -Mwangi Njoroge, Judge

Court Assistant - Picoty

Ms. Cheloti holding brief for Chepkwony for the Applicant

N/A for the Respondents

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

21/3/2018