



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 171 OF 2013

ELDORET EXPRESS COMPANY LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

DAVID KAMANDE MUIRURI.....DEFENDANT/APPLICANT

RULING

1. On **8th May 2017**, Eldoret Express Limited, (hereinafter referred to as the applicant), filed the notice of motion dated **21st April, 2017** praying that it be granted leave to further amend its plaint in the manner indicated in the draft further amended plaint; that the draft further amended plaint be treated as the plaintiffs plaint duly filed and served; that the defendant be at liberty to amend his defence if he so wishes; that costs of the application be in the cause.
2. The application is premised on the grounds that the proposed amendments are intended to bring before the court the real issues in controversy between the parties and the amendments if allowed, will not occasion any prejudice to the defendant.
3. The application is supported by the affidavit of **Joseph Nganga Thungu**, one of the directors of the applicant, in which the grounds on the face of the application are reiterated. In addition, he deposes that the applicant wishes to join Joseph Arap Maina and Albert Kuloba as defendants in the suit.
4. The application is opposed through the replying affidavit of David Kamande Muiruri, sworn on **23rd June, 2017** in which it is contended the application a delaying tactic and a shortcut to filing a fresh suit against the 2nd and 3rd proposed defendants; that hearing of the suit is at an advanced stage; that applicant has not offered any convincing explanation why the application to amend its plaint was not sought before hearing of the suit commenced; that no specific dates have been given on when the information and documents referred to were received and/or came to the applicant's knowledge and possession. The respondent urges the court to dismiss the application as the same is unmerited and undeserving of the court's discretion.
5. When the application came up for hearing, counsels for the respective parties chose to rely on their pleadings as filed.
6. The general power of the court to amend pleadings draws from **Section 100** of the Civil Procedure Act (CPA) which provides as follows: -
“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”
7. The power is also donated by **Order 8 Rule 3** of the Civil Procedure Rules (CPR) which provides as follows:- **“Subject to Order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as may direct, allow any party to amend his pleadings.”**
8. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in **Central Kenya Limited v Trust Bank limited (2000)2 E.A 365** thus:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

9. Applying the foregoing principles to the instant case, the plaintiff, Eldoret Express Limited instituted this suit against David Kamanda Muiruri (the respondent) on 28th August, 2013. The plaint was amended on 24th March, 2014. In the amended plaint sought to be further amended, the reliefs sought against the defendant are; declaration that the transfer to the defendant is null and void and therefore stands cancelled; that the defendant's occupation of the suit property is wrongful therefore he should be declared a trespasser; a permanent injunction to restrain him from remaining on or continuing to occupy the suit property and or interfering with the plaintiff's peaceful occupation of the suit property.

10. In the proposed further amended plaint, the plaintiff prays for the following reliefs:-

- (a) A declaration that the 3rd defendant acted without instructions from the plaintiff;
- (b) A declaration that the entire transaction was shrouded in fraud and is therefore null and void;
- (c) A declaration that the plaintiff is entitled to exclusive and unimpeded right of possession and occupation of the suit property;
- (d) A declaration that the transfer of the 1st defendant is null and void and therefore stands cancelled and the records at the Nanyuki Lands Registry to be corrected to reflect the same;
- (e) A declaration that the defendant, whether by themselves or their servants or agents or otherwise howsoever, are wrongfully in occupation of the suit property and are accordingly, trespassers on the same and are therefore not entitled to remain on the suit property;
- (f) A permanent injunction restraining the defendants, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing in occupation of the suit property and/or interfering with the plaintiff's peaceful occupation of the suit property;
- (g) Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable court may deem fit to grant;
- (h) Any such other or further relief as this Honourable court may deem appropriate;

11. Upon review of the amended plaint and the intended further amended plaint, I find the reliefs sought in the intended further amended plaint do not substantially differ from those sought in the amended plaint.

12 In my humble view, I do not see what value the amendments sought will add to the plaintiff's case and how these amendments will help the court determine the real question in controversy between the parties.

13. In addition, hearing of this matter commenced on 18th February 2014. The instant motion was filed in 2017 three years after the hearing began. The explanation given by the plaintiff's directors why the application was filed late is not satisfactory. I say this because the court allowed the plaintiff to amend its plaint on 24th March, 2014 when hearing of the plaintiff's case had begun. By this time, 4 witnesses had testified on behalf of the plaintiff. When PW3 gave his evidence, it emerged that in June 2013 (before this case was filed), James Mungai Thungu had filed a complaint with the CID that his land had been transferred to David Mwiraria. On 13th September 2013, Joseph Arap Maina alias Simon Mbugua was arrested, charged and the plaintiffs directors recorded statements. In his evidence, Joseph Nganga Thungu, a director of the company, stated that he did not know Kuloba advocate, did not give him instructions, did not sign a sale agreement and transfer form in his presence. When counsel for the plaintiff sought leave to amend his plaint, although aware that both Kuloba advocate and Joseph Arap Maina were involved in the sale transaction and Maina had been charged, counsel for the plaintiff did not deem it necessary to apply that the two be joined in the suit. In my view, allowing the plaintiff to further amend his plaint at this stage will be a waste of precious Judicial time and an injustice to the defendant.

14. For the reasons given, I find the application unmerited and I dismiss it with costs.

Dated, signed and delivered at Nyeri this 4th day of March, 2018.

L N WAITHAKA

JUDGE.

Coram:

N/A for the plaintiff

Mr. Macharia h/b for Mr. Abwour for defendant/respondent

Court assistant - Esther