



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC 578 OF 2010

LANDLORDS LIMITED & ANOTHER.....PLAINTIFFS

=VERSUS=

WAYMAX COMPANY LIMITED & 2 OTHERS.....DEFENDANTS

RULING

1. This is a ruling in respect of a Notice of Motion dated 12th April 2011 filed by the plaintiffs seeking leave of court to amend the Plaint. This application has been pending unprosecuted due to disappearance of the court file. The file was re-constructed on 28th July 2017.
2. The parties appear to have been directed to file written submission. I cannot see any submissions by the applicant in the re-constructed file but there are further submissions by the plaintiffs filed on 14th September 2015. The second defendant filed their submission on 3rd June 2011 and further submissions on 8th March 2013. The first defendant was granted leave to file submissions within 7 days from 13th June 2018 but they did not file any. In order to expedite this matter I will not postpone the ruling to await submissions from plaintiffs Advocate.
3. The affidavit in support of the application for amendment has been sworn by Lydia Kwamboka Ogwoka, counsel for the plaintiff. The counsel depones that when the suit was filed, it was filed under certificate of urgency and due to that, there was omission to include important aspects of the case. The Advocate further states that there has been a letter from Ministry of Lands dated 25th February 2011 which confirmed that the suit property had been fraudulently transferred from Uganda Airlines Corporation into the first defendant which in turn transferred the same to the second defendant. The letter also indicated that the fraudulent entries in the register had been expunged.
4. The deponent of the supporting affidavit therefore sought leave to include particulars of fraud in the proposed amended plaint.
5. The first defendant opposed the applicants affidavit based on a replying affidavit sworn on 11th May 2018. The second defendant opposed the application based on a replying affidavit sworn on 5th May 2011 and a further affidavit sworn on 25th February 2013. The affidavits by the first and second defendants basically raise similar grounds in opposition to the application. The grounds are that the affidavit in support of the application is defective in that it was sworn by an advocate who did not disclose the source of her information. The other ground is that the letter which is the basis of the amendment sought was subject to Judicial Review application filed in the High Court and that therefore the plaintiff could not rely on it before its legality is determined. It is important to note that the judicial review matter has since been determined and a judgement delivered.
6. I have carefully considered the applicants' application as well as the opposition to the same by the defendants. This being an application for amendment, the principles regarding the same are very clear and have been stated in a number of decision. Amendments should be given freely unless the same will result in prejudice to the other party. However before I address the issue of the principles to be considered, I have to determine whether the affidavit of the deponent of the supporting affidavit is defective.
7. There is no doubt that it is the plaintiffs' counsel who swore the affidavit in support of the application. The application herein is seeking amendment of the plaint. The Advocate has not sworn on any matter which is contentious. It is common knowledge that pleadings are drawn by Advocates and there is nothing wrong in an advocate swearing an affidavit in support of an application for amendment.
8. The plaintiff's case is clear that their contention is that title to the suit property was fraudulently transferred to the first defendant which in turn transferred the same to the second defendant. The proposed amendment is seeking to introduce the particulars of fraud. The counsel who drafted the plaint has explained the reason for non-inclusion of those particulars. The plaint was filed under certificate of urgency.
9. A report had been made to Kilimani Police Station regarding the alleged fraudulent transfer. The letter which was annexed to the application is in form of a report addressed to the Divisional CID office with a copy to the second defendant. The issue of that letter was not therefore a secret and it does not mean that because it was not addressed to the plaintiffs, it should not have been referred to in the

application. I therefore do not find any defect in the affidavit. Failure to disclose the source of information by the deponent is a procedural lapse which cannot invalidate the affidavit.

10. Coming back to the principles for grant of leave to amend, as I said, before, amendments ought to be given freely at any stage as long as they do not prejudice the other party. In the instant case, there is no prejudice which will be suffered by the defendants if the amendments are granted. The law is clear that particulars of fraud ought to be pleaded. If the particulars of fraud were not to be pleaded, it would mean that the plaintiffs case would be as good as lost even before it starts. The defendants are not being deprived of any defence. They will have the opportunity to file defence and deny the alleged particulars of fraud.

11. The second defendant has submitted at lengthy on the issue of the letter annexed to the plaintiff's application. Before the judgement in Misc application No.39 of 2011, the second defendant had submitted that the legality of the said letter had not been ascertained. After the Judgement, the second defendant contends that the said letter has been invalidated. The second defendant's submissions are missing the point. It is not the letter which was invalidated. It is the process by which the decision contained therein was arrived that was faulted. The ownership of the suit property as correctly pointed out by the Judge in that judgement is yet to be determined. It can only be determined in these proceedings.

12. The object of amendment of pleading was aptly captured in the case of **Institute for Social Accountability and Another Vs Parliament of Kenya & 3 others (2014) eKLR** where a bench of three Judges held as follows:-

“ The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed , but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings”.

13. The merits of the case will not be addressed if the present application was to be rejected. I therefore find that the applicant's application for amendment is well merited. The same is allowed. The amended plaint shall be filed within 14 days from the date this ruling is served upon the plaintiff's counsel by a process server of this Court. I have made this order because i found it strange that an advocate would operate an office with no secretary as per an affidavit of service sworn on 11th June 2018 and filed in court on the same day by a process server. The defendants shall file their defence within 14 days after service of the amended plaint. Costs of this application shall be in the cause.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 18th day of September 2018.

E.O.OBAGA

JUDGE

In the presence of;-

Mr Ndolo for M/s Makobu for 2nd defendant

Mr Ogutu for Mr Oonge for 1st defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE