



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 29 OF 2018

(Formerly Nairobi ELC Case No. 130 of 2013)

CHAMPION KENYA LIMITED.....1ST PLAINTIFF

WESLEY J. KAMAU.....2ND PLAINTIFF

VERSUS

AGRICULTURAL FINANCE CORPORATION LIMITED.....DEFENDANT

RULING

What is before Court for determination is the Defendant's application dated the 13th June, 2017 brought pursuant to Section 3A and 63 (e) of the Civil Procedure Act and Order 51 Rule 15 of the Civil Procedure Rules where it seeks the following orders:

1. Spent
2. THAT the court be pleased to set aside, vary or review the ex parte orders of the Hon Barasa I. N (SDR) made herein on 27th April, 2017.
3. THAT the court be pleased to strike out the Amended Plaint filed by the 2nd Plaintiff/ Respondent on 27th April, 2017.
4. THAT the costs be provided for.

The application is premised on the grounds that the Plaintiff filed an application dated the 13th September, 2016 which application had been listed for mention before Hon. Barasa Deputy Registrar for purposes of taking a hearing date. The Plaintiff withdrew the application but the Court proceeded to make substantive orders on a mention date and in any event is a matter fixed for mention, it cannot be heard unless by consent of parties. Further, that upon a matter being fixed for mention, the Presiding Officer cannot make any determination of the substantive issues unless the parties so agree and upon compliance with the elementary procedure of hearing the submissions that Counsel may wish to make on behalf of the parties. The Consent or submissions from Counsel for the Defendant, was never granted, and neither were the submissions tendered.

The application is supported by the affidavit of WANGARI KAMAU who is an Advocate in conduct of the Defendant's case where she explains that on 27th April, 2017 she was seated outside of the Chambers waiting for the instant suit to be called out but the said matter was double listed, which she did not notice until the Clerk to the Deputy Registrar, skipped it in the first instance. She states that on inquiring from the Clerk who informed her that the matter had already been dealt with and a date given for 20th June, 2017. She contends that despite the Plaintiffs withdrawing the Application for leave to file an amended Plaint, the Deputy Registrar proceeded to grant orders allowing the Plaintiff to file and serve the Amended Plaint stating that pleadings were not closed. She confirms that the Plaintiffs' filed the Amended Plaint on 27th April, 2017 which was served upon the Defendant on 3rd May, 2017 together with an accompanying letter detailing what transpired on the 27th April, 2017. She insists the Plaintiff's Amended Plaint should have been struck out, since it raise issues which are time barred.

The Plaintiffs' opposed the application and filed a replying affidavit sworn by JOHN KIBET who is an Advocate in conduct of the suit where he deposes that the Plaintiffs' application dated the 13th September, 2016 sought leave to amend their Plaint dated the 20th December, 2012 which had at the time of filing was not particularized and set out the specifics of special damages. Further, that the said application was slated for directions, on 27th April, 2017. He confirms that vide their letter dated the 25th April, 2017, the Plaintiffs' informed the Defendant's to withdraw the aforementioned application as there was no need to file it since pleadings had not closed. He claims that on 27th April, 2017, the Plaintiffs' attended Court but the Defendant was absent, and they informed the Deputy Registrar of their intention to withdraw their application dated the 13th September, 2016, then sought for the draft amended Plaint to be deemed to be duly filed. He

explains that the Deputy Registrar, concurred with the Plaintiffs and directed that the Amended Plaintiff be filed and served upon the Defendant since the pleadings were not yet closed. He reiterates that there is no order of the Deputy Registrar made on the 27th April, 2017 at all capable of being set aside as no orders were made since no such prayer seeking leave to amend Plaintiff was ever presented to him, in the first instance. He avers that the Amended Plaintiff was filed on 3rd May, 2017 and served upon the Defendant. He insists that an application to withdraw an application does not need to be made on the date of hearing the Application and can be withdrawn at any time upon informing the other parties in the suit. He reiterates that the Defendant has liberty to file an amended Defence if need be and denies the fact that the Amended Plaintiff raises issues which are time barred. He contends that the Defendant will not suffer any prejudice and the Defendant's counsel's argument that she did not hear her case being called out is not only reckless but an abuse of the Court's process.

Both parties filed submissions that I have considered.

Analysis and Determination

Upon considering the instant application including the supporting as well as replying affidavits and submissions from the parties herein, the only issue for determination is whether the orders of the Court dated the 27th April, 2017 should be set aside.

The order of the Deputy Registrar Barasa seeking to be reviewed read as follows: ' **the application dated the 23rd September, 2016 is marked as withdrawn, The Pleadings had not closed. The amended Plaintiff to be filed and served upon the Defendant who may file their amended Defense within a time stipulated under the law. '**

The Defendant submitted that the Pleadings were closed and any subsequent pleadings can only be filed with leave of court. He reiterated that no substantive orders could be granted in a mention. The Defendant relied on the cases of **Central Bank of Kenya vs Uhuru Highway Development Ltd & 3 Others Civil Appeal No. 75 of 1998; Mrs Rahab Wanjiru Evans Vs Esso (K) Ltd. Civil Appeal No. 13 of 1995 (1995 – 1998) 1EA; Peter Nzioki & Another Vs Aron Kitusa Civil Appeal No. 54 of 1982; (1984) KLR 487; and Onyango Oloo Vs Attorney General (1986 – 1989) EA 456** to support its arguments.

The Plaintiff opposed the application and submitted that there is no order capable of being varied or set aside. They insist that the jurisdiction of the Deputy Registrar under Order 49 rule 7 (1) (vi) has not been challenged. Further, that the Court had no power to prevent the Plaintiff to withdraw its application. The Plaintiffs reiterate that the Defense Counsel was absent from Court and that they failed to respond to their letter dated 25th April, 2017 informing them of their intention to withdraw the application. Further, the Defendant has not given any reasons to demonstrate how the amended Plaintiff introduces new issues that are time barred.

I opine that the issues being raised by the Defendant as to whether substantive orders should be issued in a mention or not are matters of procedure.

According to section 19(1) of the Environment and Land Court Act it provides that in any proceedings to which this Act applies, the Court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159 (2) (d) of the Constitution stipulates that ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.

In the case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR**, the Supreme Court held as follows: ' **The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48),The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities"**.

In relying on this judicial authority from the apex Court including the provisions of the Environment and Land Court Act as well as relying on the facts as presented, I find that the Defendant seeks to rely on technicalities of procedure by claiming that substantive orders were made during a mention and should hence be set aside. I opine that justice is about doing the right thing and not to rely on technicalities of procedure which offends the provisions of article 159 (2) (d) of the Constitution as well as the Environment and Land Court Act. I find that the Defendant has not demonstrated the prejudice it will suffer if the Amended Plaintiff forms part of the record and has failed to state which amendments are statute barred. The rules of amending a pleading is very clear, that at any time parties can amend pleadings with or without leave of Court. Since the amended Plaintiff is already part of the Court record, I will exercise my discretion and adopt it, to be properly on record. I will further direct the Defendant to file and serve an amended Defence within 21 days from the date hereof.

It is against the foregoing that I will decline to allow the application dated the 13th June, 2017.

Costs will be in the cause.

Dated and delivered at Ngong this 18th Day of October, 2018.

CHRISTINE OCHIENG

JUDGE