



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 38 OF 2015

FAKHRUDDIN AHMEDALI CHAKERA & OTHERS..... PLAINTIFF

=VERSUS=

COUNTY GOVERNMENT OF MOMBASA.....DEFENDANT

RULING

1. For my determination is the notice of motion dated 12th July 2016 filed by the applicant/defendant. The motion is brought under the provisions of order 8 rule 3 (1) (2) and order 5(1) of the Civil Procedure Rules. The defendant seeks order that;

1) That this Honourable Court be pleased to grant the defendant leave to amend its defence and to file a counterclaim against the plaintiffs out of time as set out in red ink in the annexed copy of defence (amended).

2) That such defence (amended) to be deemed as having been duly filed and served.

3) That the costs of this application be in the cause.

2. The application is supported by the grounds listed on the face of the motion and the affidavit deposed to by Jimmy Waliaula sworn on the same date. The defendant deposes that the proposed amendment is relevant to the issue of ownership of the suit premises. Further, Mr. Waliaula deposes that the amendment would aid the court to determine the real question in controversy between the parties. They urged the court to allow the application on such terms as to costs or otherwise as may be just. The defendant also annexed a draft amended defence.

3. The plaintiffs opposed the application and filed a replying affidavit to that effect and also relied on the previous affidavits filed and on record (dated 28th February 2015 and 16th July 2015). The plaintiffs aver that they are the registered owners of the suit property and have been in possession since 1960. The plaintiffs also aver that vide an earlier affidavit sworn on 16th June 2015, the defendant indicated that it was not opposing the plaintiffs ownership of the suit property but was claiming access road outside of the property.

4. The plaintiffs aver that the application to amend intends to include a counter – claim challenging the plaintiffs' title is made in bad faith. Secondly that this court vide a ruling delivered on 12th February

2016 dealt conclusively with the issue of the plaintiffs' title therefore the issues being raised in the counter – claim are *res judicata*. They urged the court to find the application as lacking in merit and dismiss it.

5. Both parties filed written submissions which I have read and considered. The defendant/applicant referred this court to the decision in **Freight Forwarders Kenya Limited vs Aya Investments Uganda limited (2014) eKLR** which quoted the ruling in **Clarapede vs Commercial Union Association (1883) WLR 262** “**that an amendment should be allowed however late as long as it can be done without injustice to the other side.**”

6. The plaintiffs on their part submitted that the amendments sought to be introduced are inconsistent with the defendant's own evidence and pleadings and is tantamount to a probating and reprobating. They quoted **Fursys (K) Limited vs Southern Credit Banking Co-operation Limited (2015)eKLR** that “**a party who in one proceeding avers one thing and in another proceeding the opposite in a related matter as in this case cannot but be said to vexatious.**”

7. The plaintiffs also submitted that the issues sought to be introduced are *res judicata*. The cited provisions of section 7 of the Civil Procedure Act and also placed reliance on the decision of **Domnic E. Lesormat & 336 others vs Machamuka Farmers Co. Limited & 17 others (2008) eKLR**. For the given reasons, they urged the court to dismiss the request for amendment.

8. This application is premised on the provisions of order 8 rule 3(1) and 5(1). Rule 3 (1) allows amendment at any stage of the proceedings subject to order 1 rule 9 & 10; order 24 rules 3, 4, 5 & 6. Rule 5 (1) is the general power to amend. The plaintiffs are attacking the amendment on two fronts. First that the defendant had conceded that the suit property belongs to them by the affidavit they had earlier filed. The second objection is that the issues are *resjudicata* the same having been determined vide a ruling delivered on 12th February 2016.

9. I will begin with the last issue whether the amendments sought are *res judicata*. The plaintiffs vide their application dated 5th March 2015 asked the Court to grant their temporary orders of injunction to restrain the defendant from interfering with the suit parcel pending hearing and determination of the suit. After hearing the parties, I delivered my ruling on 12th February 2016 granting the plaintiffs the orders. The issue before the court for determination was whether to grant the temporary orders of injunction or not.

10. Although the defendant conceded that it did not dispute the plaintiffs' ownership vide the replying affidavit sworn by Lucas Oruko. In paragraph 10 thereof, the issue of ownership was not for determination at the time. The plaintiffs were only required to demonstrate that they had met the principles for granting injunctions. This suit is yet to be heard on its merit. I find that the plea for *res judicata* is premature as the issues raised in the proposed counter – claim were not in issue during the hearing of the application and could not have been substantially determined at an interlocutory stage.

11. The second limb of objection that the defendant having conceded ownership should not be allowed to approbate and reprobate by now introducing amendments to state that they are claiming ownership to the suit land. In the statement of draft defence sought to be amended, the defendant denied all the allegations made by the plaintiffs in their plaint and put them to strict proof. The only thing the defendant admitted is the jurisdiction of this court.

12. The replying affidavit referred to by the plaintiffs was in response to the interlocutory application. The substance of the claim before this court is contained in the plaint and the defence. As I have said in paragraph 10 above, the issue of ownership has not been conclusively determined. The amendment is hereby sought in the same proceedings. I find the facts of this case as distinguishable from the case of **Fursys (K) Limited supra** and therefore the defendant cannot be accused of approbating and reprobating.

13. The hearing is also yet to commence as directions have not been given in terms of order 11 of the Civil Procedure Rules. If any injustice is to be occasioned to the plaintiffs, the same can be cured by

granting their corresponding leave to amend their plaint and or file a reply to the counter – claim together with an award of costs.

14. Since the defendant has not brought this application too late in the day, I find no reason to refuse them the orders. For the reasoning contained in the body of this ruling and the right given by the rules, I find merit in the application and allow it. The draft amended defence is to be deemed as duly filed on payment of the requisite court fees. The costs of the application are ordered in the cause.

Dated and Delivered at Mombasa this 18th day of JAN 2017

A. OMOLLO

JUDGE