



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET

E&L 81 OF 2013

(formerly HCC. 279/2000)

PHILIP C. CHEBII PLAINTIFF

VERSUS

JOSEPH K. CHESIRE DEFENDANT

RULING

INTRODUCTION

This is the ruling for an application dated 26th June, 2014 brought by way of Notice of Motion by the Defendant/Applicant seeking for Orders:-

1. THAT this Honourable Court be pleased to grant leave to the Defendant/Applicant to amend his statement of Defence and Counter-Claim dated 14th February, 2001 in the terms of annexed draft Amended Statement of Defence and Counter-Claim.
2. THAT costs of this application be provided for.

The application is premised on 6 grounds and the annexed supporting affidavit of Joseph K. Chesire Sirma, the Defendant/Applicant herein sworn on 26th June, 2014.

The Defendant avers that he had appointed M/s Kigen & Co. Advocates to act for him in this matter in place of the firm of Chemwok & Co. Advocates. He further states that upon the said change of representation, his Advocates on record perused the Court File and noted that the statement of defence and Counter-Claim on record did not properly capture his prayers.

The Defendant deponed that the pleadings on the Court record do not enumerate his claim and will prejudice him and deny the Court the benefit of having the issues and questions for determination. He further stated that the application for amendment has been made in utmost good faith and the same should be allowed.

DEFENDANT'S COUNSEL'S SUBMISSIONS

This application came up for hearing on 14th March, 2017 when both Counsels were ready to proceed with their arguments.

Mr. Kagunza, Counsel for the Defendant/Applicant submitted that he would rely on the grounds of the

application together with the supporting affidavit, the annexures of Joseph K. Chesire sworn on 26th June, 2014.

Counsel further submitted that the reason for seeking for the amendment is to dispel any misapprehension as parties are bound by their pleadings. He further stated that the Plaintiff would not be prejudiced if the application for amendment is allowed.

He urged the Court to allow the application as it has been brought with utmost good faith.

PLAINTIFF'S COUNSEL'S SUBMISSIONS

Mr Isiji for the Plaintiff/Respondent opposed the application and relied on the replying affidavit of Philip Chebon Chebii sworn on the 15th April, 2015. He submitted that there is a contempt of Court proceedings against the Defendant/Applicant and that the Defendant should purge himself of the Order issued on 19th July, 2006 before he can have audience.

He stated that the Defendant must show cause why he should not be committed to jail. Counsel also submitted that in the event that the Court exercises its discretion to allow the amendment, then he would urge the Court to grant costs to the Plaintiff.

Mr. Kagunza, Counsel for the Defendant in reply submitted that the application before the Court is for leave to amend the Defendants defence and Counter-Claim and not for contempt of Court. He stated that if the Respondent wishes to put up an application for contempt of Court then he can do so. He also took issue with the fact that the same were not averred in the reply affidavit. He reiterated his quest for the grant of the orders as prayed in the application.

ANALYSIS

I have considered the submissions by both Counsels for and against the application for leave to amend the defence and Counter-Claim and the supporting documentation herein and I have come to the conclusion that the issues for determination are as follows:-

1. Whether the amendment of the defendant's defence and Counter-Claim would cause any prejudice to the Plaintiff.
2. Whether the Court would exercise its discretion to allow the amendment.

I am guided by the Principle enunciated in the case of Clarapede -vs- Commercial Union Association (2) (1883), 32 W.R. 262 which stated that:-

“However negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be done without injustice to the other side. There is no injustice if the other side can be compensated by costs”

Courts have been guided by the above Principle in considering applications for amendment of pleadings. I am further guided by the case of Eastern Bakery -vs- Castelino (1958) E.A. 461 in which O'connor P. stated that:-

“It will be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side can be compensated by Costs.”

This reiterates the Principle in the Clarapede case mentioned above. The Court would refuse to amend pleadings if the amendment would result in change of cause of action into a substantially different character as was seen in the case of Raleigh -vs- Goschen. Likewise the Court would not grant leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of

amendment.

After looking at the proposed amendments, I find that in answer to issue number 1 that the amendments would not cause any prejudice to the Plaintiff as they are basically to correct the grammatical errors and articulate the prayers sought properly and comprehensively.

I also find that the proposed amendment would not result in the change of cause of action into a substantially different character.

In answer to issue Number 2 as to whether the Court would exercise its discretion to allow the amendment of the Defendant's defence and Counter-Claim, I find that having said that the amendment would not cause any prejudice to the Plaintiff then it would be in the interest of justice that the Court exercises its discretion in favour of the amendment.

Order 8 rule 5(1) gives the Court general power to amend either of its own motion or on the application of any party to order any document to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just. This is for the purposes of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings.

I will not delve into the issue of contempt of Court as submitted by the Plaintiff's Counsel as this was purely an application for amendment of proceedings. I also noted that this is an old matter and the parties have been fixing dates for hearing without revisiting the issue of contempt of Court.

Consequently the application dated 26th June, 2014 is hereby allowed with the following orders:-

1. The Defendant is hereby granted fourteen (14) days leave from this date hereof to file and serve its amended defence and Counter-Claim.
2. The Plaintiff is granted a corresponding 14 days leave to file a reply to defence and Counter-Claim upon service of the amended defence and Counter-Claim.
3. The costs of this application be in the cause.

Dated and Delivered at Eldoret on this 27th day of March, 2017

M. A. ODENY

JUDGE