**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 347 OF 2015**

**GRAIN BULK HANDLERS LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JUJA COFFEE EXPORTERS LIMITED.....DEFENDANT/APPLICANT**

**RULING**

1. For my determination is the defendant's application dated 2nd November 2016 and brought pursuant to the provisions of section 63 (e) of the Civil Procedure Act, Order 8 & 36 Rule 1 (1) (b) and rule 2 of the Civil Procedure Rules. The applicant seeks the grant of the following orders :

**1. The Defendant be granted leave to Amend the Statement of Defence dated 14th January 2016 and filed on 15th January, 2016 to include a counterclaim.**

**2. Upon grant of prayer (1) above, the Amended Statement of Defence and Counterclaim dated 31st October, 2016 and filed on 2nd November, 2016 be deemed as duly filed and properly on record.**

**3. On grant of prayers (1) & (2) above, summary judgment be entered on the counter-claim in the following terms;**

**a. The plaintiff to forthwith, or within ten (10) days from the date of judgement, or within such other period as the Court may deem reasonable, deliver vacant possession of MOMBASA/BLOCK 1/392 and demolish at its own costs the perimeter wall constructed around the said property.**

**b. In default of compliance with (a) above, an eviction order do issue, without need to apply, to the Court bailiff to evict the plaintiff, its employees, agent and servants from the suit premises and in that regard to demolish any wall necessary to grant the Defendant free access to the suit premises.**

**c. The plaintiff to pay mesne profits of Kshs. 550,750.00 per month from 1st July, 2014 till the date of delivering vacant possession.**

**d. Interest on (c) above at commercial rates of 20% per annum from the due date till payment in full.**

4. **Costs of this application be awarded to the Defendant in any event.**

2. The application is supported by the grounds listed on its face inter alia that the defendant is the legal and registered owner of the suit property; The suit property was leased to the Plaintiff /Respondent pursuant to a lease dated 17th July 2007 and registered for a period of six (6) years effective 1st June 2008 which lease expired on June 2014; An offer to purchase the property was made which did not fall through and that inspite of the affluxion of the lease, the plaintiff has failed to give vacant possession of the suit premises.

3. The application is further supported by the affidavit of Tahir Sheikh Said. Mr Said reiterated the facts pleaded on the grounds and deposed further that the plaintiff has resolved to lock out the defendant from the premises by instructing its employees to deny the defendant any entry. That despite the plaintiff's continued use of the suit premises it has not paid the monthly rent from the time the lease expired todate. That the plaintiff has continued to remain in possession of the suit premises without the consent of the applicant and the applicant is equally entitled to mesne profits. Consequently it is necessary that the defence be amended to include all the claims for vacant possession, mesne profits and damages for trespass. Mr Said deposes that it is in the interest of justice and fairness that the application be allowed.

4. The application is opposed by the plaintiff vide a replying affidavit sworn on its behalf by Joseph Mwella. Mr Mwella deposed that he is the legal officer of the plaintiff. He states that it is not lost to the Court that the larger suit seeks declaratory orders which can only be granted upon parties being allowed to ventilate their respective cases through viva voce evidence. Further that is procedurally unsound for a Court to issue an eviction order through summary procedure while the plaintiff is seeking declaratory orders.

5. Mr Mwella deposed further that the impugned perimeter wall was built with the blessings of the defendant. He continues that the defendant has not sought to vacate and or set aside the orders of interim injunction which it cannot purport to achieve through the instant application. According to Mr Mwella, it is the defendant who is in control and possession of the suit premises which prompted the granting of the injunction relief. Lastly that mesne profits have to be proved by way of evidence which evidence the Court has not been shown. He therefore urged the Court to strike out the application with costs.

6. The parties thereafter filed written submissions together with case laws to support them. I have read through them and need not reproduce their contents herein. I will refer to them as need arises. I do agree that the issues taken by the applicant in its submissions is what is necessary to determine his application i.e.

a. **Whether the application is capable of being granted for being an omnibus application.**

b. **Whether leave to amend is merited**

c. **Whether the prayer for summary judgement is merited**

7. The plaintiff submitted that the application is omnibus and should not be allowed because the prayers for amendment and summary judgement cannot be deemed to be contingent or related in procedure. Secondly that there cannot be a hearing for summary judgement until there is properly filed on record the amended defence and counter – claim. That putting the two prayers together denies them the opportunity to respond wholly to the prayers sought. The plaintiff relied on the case of **Odera Obar & Co Advocates vs Aly Enterprises Ltd & 3 others (2015) eKLR** to support this argument.

8. The applicant on its part submit that the application is capable of being granted for the reasons of **the special facts of this case, the need to ensure that cases are handled fully and finally and that the existing law relating to summary judgement cannot allow the application to be filed in any other way as no such application can be made once a defence is filed**. Further that no prejudice will be suffered as the plaintiff has filed a detailed replying affidavit which has responded to the issues raised in the application.

9. On the face of this application it is not in doubt that the prayer for summary judgement does not lie unless leave to amend is first granted. It is also not in doubt that the principles of law governing the grant of the two sets of orders are different and are not inter- dependent. Lastly it is not in doubt that the orders for amendment and summary judgement are not correlated. The justification the applicant has given is that this is a special case without expanding what is special about it. Further the applicant avers that the respondent has substantially replied to the matters in issue through the replying affidavit. I am persuaded by the dictum of Ringera J (as he then was) in the case of **Pyaralal Mhand Nheru Rajput vs Barclays Bank & others Civil case No 2004** and quoted by Gikonyo J in the case of **Odera Obar** supra thus:

> *"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the Court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the Court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."*

10. Given the fact that the orders sought are independent of each other, I am persuaded that the nature of this application is an omnibus. It is incapable of being granted as the issues cannot be properly adjudicated. Be that as it may, I will consider the merits on whether or not to grant the orders sought. On the prayer for leave to amend; the plaintiff submitted on the principles and rules governing amendments to wit that amendments should be allowed for all issues between the parties to be determined provided that the amendment does not result in prejudice or injustice to the other party.

11. However the plaintiff still opposed the proposed amendment because according to it, the same is made in bad faith as it is intending to introduce all issues that were within the purview and knowledge of the applicant. The Respondent went on to urge that if the leave to amend is granted then it should be given equal opportunity to respond. The parties have sufficiently cited case law that have laid the principles for the Court to consider whether or not to grant an amendment e.g. **Beoco Ltd vs Alfa Laval & Co Ltd (1994) 4 AER 465 and Rose Kandie & Another vs Esther Jepkemboi Kiplagat (2016) eKLR** which summarized that amendments should be freely given . In the circumstances of this case, the application was brought with delay but which delay in my view is not unreasonable since the pleadings have not closed. The plaintiff still has an opportunity to reply to the counter – claim whether by filing a defence and or filing a replying affidavit to an application for summary judgement as the case may be. The issue of whether the amendments seek to introduce issues that were within the knowledge of the applicant is not one of the guiding principles to be considered for refusing an amendment. Accordingly I find no reason to refuse the defendant leave to amend as prayed in No 1 & 2 of the application.

12. The last issue is on prayer 3 for summary judgement. In my opinion and I so hold, an amendment introducing a counter – claim is equivalent to filing of a new suit by the defendant. Once the prayer 2 is granted as above, the defendant under the law as provided in Order 5 rule 1 and Order 7 rule 8 of the Civil Procedure Rules has an obligation to serve the plaintiff. That is only after service of amended defence and counter – claim can the applicants right under the provisions of Order 36 rule 1 (1) (b) of the Civil Procedure Rules accrue. Further It is my considered opinion that this prayer is pre – mature and ambushes the respondent by going against the provisions of Order 36 rule 1 (3) that provides thus; *"sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days."* The notice in my understanding lies from the date when the application for summary judgement is filed which application in this case should be filed after the filing and service of the amended defence and counter – claim.

13. This Court also notes that even if the requirement to serve the plaintiff with the amended defence and counter – claim does not lie, the fact that there is on record a plaint filed stating the plaintiff's claim for specific performance. Consequently this Court is obligated to determine whether the plaintiff's claim is merited or not before the application for summary judgement by the defendant can be allowed. Such determination cannot be ventilated under the procedure provided for under Order 36 rule 1 (1) (b) and not on the grounds upon which this application is premised. As a consequence the cases referred to by the

defendant in support of the order for summary judgement are distinguishable. For instance both in the case of **Katsuri vs Nyeri Wholesalers Ltd Civil Appeal No 248 of 2012** notice was duly served and **Mega Garment Ltd vs Mistry Jadva Parbat & Co Ltd (2016) eKLR,** the Court of Appeal reversed my decision on account that the notice of termination of lease served was not in accordance with the law. In this instance also no indication is made that a notice to vacate was duly served.

14. In addition the applicant has introduced in prayers (c), (e) and (f) in the counter – claim and prayer 3 (c) & (d) of the application a claim for mesne profits and interest to be awarded at 20% per annum. The respondent has deposed that the issue of mean profits has to be proved by evidence and which evidence the applicant has not laid before the court. The Court of Appeal in the Mega Garment Ltd case supra referred to the case of **Kundanlal Restaurant vs Devshi (1952) 19EACA 77** stating that **" It has repeatedly been stated that in an application for summary judgment even one triable issue, if *bona fide*, would entitle the defendant to have unconditional leave to defend".** Similarly, Order 36 rules 2, 5 & 7 qualifies rule 1 by providing that a defendant may show cause either by oral or affidavit evidence that he should be given leave to defend the suit. Therefore the submission by the applicant that if the order for summary judgement was not put together with the request for leave to amend then the plaintiff would file their defence is defeated as the rules do provide that where cause is shown a party would still get an opportunity to defend depending on the circumstances of each case. In this instance, the issue of mesne profits is raised as well as the existence of the respondent's claim which is yet to be struc out if at all. For these reasons I find the prayer for summary judgement as premature and without merit and hereby dismiss it. Since the application partially succeeds, I do direct each party to bear their cost of this application.

**Dated, signed & delivered at Mombasa this 17th day of May 2017**

**A. OMOLLO**

**JUDGE**