



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI**

**ELC CIVIL SUIT NO. 1049 OF 2007**

**MIREMA DRIVE ESTATE LTD.....PLAINTIFF**

**VERSUS**

**THE CHURCH OF JESUS CHRIST OF LATTER DAY.....DEFENDANT**

**RULING**

1. The application under consideration is the Plaintiff's Notice of Motion dated 1/8/2016. The Plaintiff seeks leave to file a further amended plaint in terms of the draft further amended plaint attached to the Application. The Application is supported by an affidavit sworn by the Plaintiff's director, Ann Kajuju, on 1/8/2016. The question to be answered in this Ruling is whether, in the circumstances of this case, leave should be granted to the plaintiff to amend the plaint in the manner proposed.

2. The Plaintiff's case is that contrary to the status quo order previously made in relation to the suit property, the defendant continues to be in occupation of the suit property. This has necessitated a substantive prayer for eviction. Further, the plaintiff contends that since the date of filing this suit, the market value of the suit property has risen and that a claim for damages at Kshs 10,000,000/- is no longer tenable. According to the plaintiff, the proposed amendments will enable the court to determine the real issues raised in the proceedings and that the defendant will be at liberty to amend its pleadings and will not be prejudiced in any way.

3. The defendant opposes the application through a replying affidavit sworn on 20th February 2017 by Hesbon Usi, the defendant's secretary/trustee. The defendant contends that the plaintiff's application to further amend its plaint is not made in good faith and is intended to further delay the disposal of this suit. The defendant contends that the plaintiff's non-disclosure of the mode of calculation justifying the exorbitant increase in market value of the suit property constitutes material misrepresentation and if granted, the plaint will include an unsubstantiated increased market value of the suit property which will be prejudicial to it.

4. The application was canvassed by way of written submissions. Oral highlights were also made. The plaintiff, in submissions dated 22nd February, 2017, invoked **Article 50 of the Constitution, Section 100 of the Civil Procedure Rules and Order 8 Rule 3 of the Civil Procedure Rules** and urged the court to grant the Application. Counsel for the plaintiff stated that the court's discretion to grant leave to amend pleadings is wide and unfettered and that such discretion ought to be exercised judiciously.

5. The plaintiff referred the court to various cases, among them;

1) **CENTRAL KENYA LTD V TRUST BANK AND 4 OTHERS, CA No. 222 of 1998;**

2) **BOSIRE OGERO V ROYAL MEDIA SERVICES, (2015) eKLR;**

3) INSTITUTE FOR SOCIAL ACCOUNTABILITY & ANOTHER V PARLIAMENT OF KENYA & 3 OTHERS, (2014) eKLR;

4) AAT HOLDINGS LTD V DIAMOND SHIELDS INTERNATIONAL, (2014) eKLR; and

5) MARIA ROSITA CARDOZO V ROBERT KIBAGENDI OTACHI & ANOTHER, (2013) eKLR.

The gist of the court's findings in those cases was that amendments to pleadings should be freely allowed if they will enable the court determine the issues in controversy provided such amendments do not occasion prejudice to the respondent.

6. The defendant in submissions dated 31st March 2017 argues that the court's discretion in an application for amendment of pleadings ought not be exercised in favour of an applicant if it is likely to cause prejudice to the other party. The defendant relies on EASTERN BAKERY V CASTELINO, (1958) EA 461 and KASSAM V BANK OF BARODA (KENYA LTD), (2002) eKLR. The defendant argues that allowing the proposed amendments would prejudice it owing to the delay caused and the attendant costs.

7. Counsel for the defendant submits that the application before court has not been brought in good faith because it is aimed at delaying justice. The defendant relies on the case of IQUIP LIMITED V EAST AFRICAN MARINE SYSTEMS LTD, (2009) eKLR for the proposition that the applicant should not be granted leave because the application is not made in good faith. The defendant further submits that the proposed amendments go against the legal principle that facts ought to be pleaded concisely.

8. The question which this Ruling seeks to answer is whether in the circumstances of this case, the court should grant the Plaintiff leave to further amend the Plaintiff.

9. The legal framework on amendment of pleadings is set out in **Order 8 of the Civil Procedure Rules**. The guiding principle on amendment of pleadings are well settled. Sir Kenneth O'Conner, the then President of the Court of Appeal for Eastern Africa captured the guiding principle on amendments in EASTERN BAKERY V CASTELLINO, (1958) EA 461 in the following words:

***“It will be sufficient....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 and that the other side can be compensated by costs.”***

The Learned Judge further observed that:

***“The main principle is that an amendment should not be allowed if it causes injustice to the other side.”***

10. The Court of Appeal in the case of PETER NGANGA MUIRURI V HOUSING FINANCE COMPANY OF KENYA LIMITED & 2 OTHERS, Nairobi CA 101 of 2011 echoed the above principle in the following words:

***“It is trite that applications for amendment of pleadings, or joinder of parties should be liberally allowed.”***

11. In CENTRAL KENYA LIMITED V TRUST BANK AND 4 OTHERS, CA No. 222 of 1998 (2000) eKLR, the court reiterated the above principle in the following words:

***“All amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder, as the case may be, will not result in prejudice or injustice to the other party, which cannot be properly compensated by costs.”***

12. The defendant has stated that the proposed amendments will be prejudicial to it in that it will cause

delay. The defendant has also argued that the proposed amendment will be prejudicial because it will cause it to incur costs by having to defend the plaintiff's unsubstantiated claims. In my view, there is no evidence that the intended amendments are aimed at delaying the cause of justice. Further, there is no evidence that an award of costs cannot properly compensate the defendant if the application is allowed. The defendant will have the opportunity to respond to the amendments. The defendant will also have an opportunity to rebut the plaintiff's claim during trial. The application dated 1<sup>st</sup> August 2016 should in my view be allowed and the defendant granted corresponding leave to amend its defence if need be.

13. In light of the foregoing guiding principles and particular facts of the present dispute, I hereby grant the plaintiff leave to further amend the plaint subject to the law on limitation of actions. The plaintiff's further amended plaint shall be filed and served within 14 days from today. The defendant shall have corresponding leave to amend its defence. The defendant shall have costs of the application assessed at KShs.20,000/=, to be paid by the plaintiff within 30 days from today. In default, the amendments shall stand struck out.

**Dated, signed and delivered at Nairobi on this 22<sup>nd</sup> day of September, 2017.**

**B. M. EBOSO**

**JUDGE**

**In the presence of:**

..... Advocate for the Plaintiff

..... Advocate for the Defendant

..... Court Clerk