



**REPUBLIC OF KENYA**

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

**AT NYERI**

**ELC NO. 237 OF 2013**

**FLOORING & INTERIORS LIMITED.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**PETER NDEGWA MURIITHI.....DEFENDANT/1<sup>ST</sup> RESPONDENT**

**THE CHIEF LAND REGISTRAR.....2<sup>ND</sup> RESPONDENT**

**THE DIRECTOR OF SURVEY.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. On **15<sup>th</sup> June, 2015** the plaintiff filed a notice of motion of even date praying that it be granted leave to amend its plaint.
2. The application is premised on the grounds that addition of 2<sup>nd</sup> and 3<sup>rd</sup> respondents has necessitated the amendments sought; that allowing the amendment will enable the court to determine the real question in controversy between the parties. The plaintiff (applicant) contends that, in the circumstances of this case, it is fair and just that the orders sought be allowed.
3. The application is supported by the affidavit of Wahome Gitonga sworn on 15<sup>th</sup> June, 2015 in which the grounds on the face of the application are reiterated.
4. In opposition to the application, the 1<sup>st</sup> defendant Peter Ndegwa Mureithi, swore and filed the replying affidavit sworn on **9<sup>th</sup> September, 2015** in which he contends that the application lacks merit, is scandalous and an abuse of the process of the court. In this regard, the 1<sup>st</sup> respondent contends that there has been inordinate delay in bringing the application; that allowing the application will be prejudicial to it as it will be tantamount to allowing the plaintiff institute a new cause of action against him and that allowing the amendments will only serve to delay the hearing and determination of the case instituted against him.
5. The 1<sup>st</sup> and the 2<sup>nd</sup> respondent did not file any responses to the application.
6. When the application came up for hearing, counsel for the applicant, **Mr. Muthoni** told the court that he was relying on the grounds on the face of the application and the supporting affidavit.
7. Counsel for the 1<sup>st</sup> respondent, **Mr. Nderi**, contended that paragraph 10 of the amended plaint

introduces a new cause of action even against persons who are not parties to the suit. Mr. Nderi further submitted that paragraph 10 totally changes the cause of action.

8. Mr. Nderi reiterated the contention that there has been inordinate delay in bringing the application (application brought two years after the suit filed). He opined that the applicant should consider filing a new suit.

### **Analysis and determination**

9. It is trite law that courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and if prejudice (if any) can be compensated by an award of costs.

10. The general power to amend pleadings is donated by **Section 100** of the **Civil Procedure Act** and its handmaiden, **Order 8 Rule 5 of the Civil Procedure Rules**, which provides as follows:-

**“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”**

11. The above provision of the law expressly provides that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case.

12. In **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014]eKLR** it was observed:

**“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”**

13. In the case of **Eastern Bakery v. Castelino [1958] E.A. 461**, **Sir Kenneth O’Conner**, President of the then Court of Appeal for Eastern Africa, at page 462 stated –

**“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 there is no injustice if the other side can be compensated by costs.....The main principle is that an amendment should not be allowed if it causes injustice to the other side.”** (Emphasis supplied).

14. In applying the foregoing principles to the instant case, the plaintiff, Flooring & interiors Limited instituted this suit against Peter Ndegwa Muriithi (the 1<sup>st</sup> respondent) on 20<sup>th</sup> November, 2013. The plaint sought to be amended shows that the relief sought against the 1<sup>st</sup> defendant is an injunction to restrain him from carrying out or omitting to carry out a number of actions enumerated in that prayer.

15. The gist of the plaintiff’s claim is found in paragraph 4 of the plaint sought to be amended where the plaintiff contends that the 1<sup>st</sup> defendant without any colour of right invaded, encroached and trespassed into the parcel of land known as L.R 9395/103 (the suit property) and excised a portion thereof measuring approximately 0.6 hectares.

16. On or about 19<sup>th</sup> January, 2015 the plaintiff obtained orders allowing him to join the Chief Land

Registrar and the Director of Survey as interested parties to the suit.

17. On 15<sup>th</sup> June, 2015 the plaintiff brought the instant application praying that he be granted leave to amend his plaint as per the draft amended plaint filed alongside the application. One of the reasons provided for the intended amendment of the plaint is the joinder of the Chief Land Registrar and the Director of Survey to the suit. The plaintiff also contends that the amendment sought will enable the court to determine the real question in controversy between the parties. That contention is contested by the 1<sup>st</sup> defendant who thinks that the amendment is meant to strengthen or breathe life to the suit. The 1<sup>st</sup> defendant also contends that the plaintiff seeks to introduce a new cause of action through the amendment.

18. I have reviewed the plaint filed in this suit and the intended amended plaint, with particular emphasis on paragraph 10 of the amended plaint, through which the plaintiff is accused of introducing a new cause of action.

19. Upon review of the initial plaint and the amended plaint, I found that the issues raised in paragraph 10 of the amended plaint are basically the same as the issues raised in paragraph 4 of the initial plaint. I say so because the two paragraphs merely bring into question the propriety of the process through which the 1<sup>st</sup> defendant obtained title to the portion of the property in question. In my view, all that the impugned paragraph of the amended plaint has done is to widen the scope of the reliefs sought against the respondents as opposed to introducing a new cause of action. The cause of action remains that identified in paragraph 4 of the initial plaint, which is, alleged invasion, encroachment and trespass into the suit property.

20. Although there has been a delay of about two years in bringing the application for amendment, cognisance of the fact that hearing has not commenced, I find and hold that allowing the amendment will not occasion prejudice to the 1<sup>st</sup> defendant which is incapable of being remedied by award of costs. I also hold the view that the amendment sought will assist the court to determine the real issues before it and arrive at a just conclusion.

21. The upshot of the foregoing is that the notice of motion dated 15<sup>th</sup> June, 2015 has merit and is allowed in terms of prayer 1.

22. The costs of the application shall be in cause.

**Dated, signed and delivered at Nyeri this 22nd day of February, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. Muthoni for the applicant/plaintiff

N/A for the 1st respondent

N/A for the 2nd & 3rd respondents

Court assistant - Lydia