



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 320 OF 2014

ISLAM K. ISLAMPLAINTIFF

-versus-

ZAMZAM M. HASSAN alias ZAM ZAM ALIDEFENDANT

RULING

1. The Plaintiff in his Notice of Motion dated 15th June 2015 seeks to amend his Plaint by introducing five more defendants and pleading fraud against the intended defendants.
2. The Plaintiff averred that the Defendant in collusion with the 2nd, 3rd, 4th and 5th Intended Defendants fraudulently forged the Plaintiffs signature and illegally transferred property number Block XXV/106-Kizingo to children of the Defendant's first marriage being the 2nd, 3rd and 4th Intended Defendants. The Plaintiff further averred that the Defendant in collusion with the 2nd and 5th Intended Defendants forged the Plaintiff s signature in Lease Agreement dated 9th September 2002 to the effect that the Plaintiff had leased his property to on Plot Number 6293 (Original No. 6291/3) Section 1/MN-Nyali to the 2nd Intended Defendant. The Plaintiff stated that he was not aware of the said Lease at the time of filing of this suit and only learnt of the same during interpartes hearing of the Application dated 30th April 2014 when the said Lease was made an annexure in the Defendant's Replying Affidavit.
- 3.The Plaintiff also stated that he learnt of the registered transfer document over property number Mombasa Block XXV/106-Kizingo in favour of the 2nd to 4th Intended Defendants after he had filed this suit.
4. The Application is opposed by the Defendant. In her Replying Affidavit sworn and filed on 8th July 2015, the Defendant avers that the proposed amendments should be declined because the same do not seek to correct any error or defect in the proceedings and are made late after a couple of hearings have been conducted and over one year after the case was filed.
5. The Defendant also oppose the application on the basis that the proposed amendments introduce new set of facts, new cause of action as well as new parties and thereby creating a totally new suit. The Defendant contend that the amendments are intended to defeat her Defence.
6. According to the Defendant, the Plaintiff should wait for the suit as originally filed to be finalised then file a new suit to deal with the new facts. The Defendant avers that allowing the amendments will make her suffer prejudice and injustice which cannot be compensated by costs.
7. In his oral submissions before court, Mr. Omwenga, learned counsel for the Defendant submitted that the Defendant is opposed to the amendments because the parties sought to be enjoined are the Defendant's witnesses who have filed their statements and served on the Plaintiff and therefore the Defendant will

suffer prejudice. Counsel further submitted that the proposed amendments relate to a transaction which took place in 2009 and is therefore time-barred.

8. In response to the issues raised by Mr. Omwenga, Ms. Rajab, learned counsel for the Plaintiff submitted that **Order 8** of the Civil Procedure Rules provides that time limitation is not a bar to amendment of a Plaintiff.

9. I have carefully considered the Plaintiff's application, affidavits in support and the documents annexed thereto and more specifically the Draft Amended Plaintiff. I have also considered the Defendant's Replying Affidavit and the documents attached thereto. The main issue for the court's determination is whether the Plaintiff should be allowed to amend his Plaintiff as proposed.

10. **Order 8 Rule 3** of the Civil Procedure Rules provides as follows in the following relevant sub-rules:

"(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3)...

(4)...

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

11. The Court of Appeal in the case of **CENTRAL KENYA LTD v. TRUST BANK LTD & 5 OTHERS [2000] eKLR** stated succinctly that the overriding consideration in applications for leave to amend a plaintiff is whether the amendments are necessary for the just determination of the controversy between the parties. The Court of Appeal further stated that it is the policy of the law that amendments to pleadings are freely allowed unless by allowing such amendments the opposite side would be prejudiced or suffer injustice which cannot be compensated for in costs.

12. The amendments proposed by the Plaintiff seek to introduce parties that the Plaintiff allege to have colluded with the Defendant to defraud him of his properties. I do not think that the Defendant will suffer prejudice for the reason that the proposed Defendants are her witnesses. The fact that they are being introduced as Defendants will not bar them from testifying for the Defendant even as they testify on their own behalf. That, in my view is not a good reason to decline the amendments.

13. On the issue of limitation, **Order 8 Rule 3 (1)** of the Civil Procedure Rules is clear that limitation is not a bar to an amendment.

14. The facts pleaded in the Draft Amended Plaintiff are substantially related to the original cause of action. They relate to the same properties and how the Plaintiff was deprived of his share of the same or proceeds accruing therefrom. **Order 8 Rule 3 (5)** of the Civil Procedure Rules permits this court to allow an amendment notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the original cause of action. The Defendant's opposition on the basis that the amendments seek to introduce a new cause of action does not therefore lie.

15. The overriding objective of the Civil Procedure Act as espoused in **Section 1A** of the Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. That overriding objective will be defeated if this court adopts the Defendant's proposal to allow the suit to proceed without amendments so that the Plaintiff can file a new suit after conclusion of this one. In my view it will be just, expeditious, proportionate and affordable if the issues in contention are determined together in this suit. I will not forget to point out that the Defendant will have an opportunity to respond to the new issues by way of an Amended Defence. The circumstances herein therefore militate in favour of allowing the amendments.

16. In the end, the orders that commend themselves to me and which I hereby grant are:

- i. The Plaintiffs Notice of Motion Application dated 15th June 2015 be and is hereby allowed.
- ii. The Plaintiff to file an Amended Plaintiff in terms of the Draft Plaintiff annexed to the Supporting Affidavit within 14 days of today.
- iii. The Defendant be at liberty to file an Amended Defence within 14 days of being served with the Amended Plaintiff.
- iv. Costs be in the cause.

Ruling dated and delivered in **Mombasa** this 12th day of February 2016.

A. OMOLLO

JUDGE