



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA
AT NYERI
ELC NO. 122 OF 2015
(Formerly Nyeri HCCC No. 109 of 2009)

KASTURI LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

NYERI WHOLESALERS LIMITED.....DEFENDANT/APPLICANT

RULING

1. On **7th April, 2015** Nyeri Wholesalers Limited, hereinafter referred to as the applicant), filed the notice of motion of even date praying that it be granted leave to amend its statement of defence in the manner indicated in the draft amended statement of defence and counter-claim annexed to the affidavit sworn in support of the application.
2. In alternative to the prayer for leave to amend its statement of defence and counter-claim, the applicant seeks leave to file a fresh suit to claim damages and costs allegedly occasioned on the suit premises during the period the plaintiff/respondent (Kasturi Limited) stayed in the suit property.
3. The application is premised on the grounds that the cause of action arose after the respondent was forcefully evicted from the suit property; that the current suit is partially heard; that the amendment sought will assist the court address all pertinent issues and comprehensively determine the real issues in controversy between the parties and that no injustice/prejudice will be occasioned on the respondent if the orders sought are granted.
4. The application is supported by the affidavit of **Pravin S. Shah**, one of the directors of the applicant, in which the grounds on the face of the application are reiterated.
5. The application is opposed through the replying affidavit of one of the directors of the respondent, **Bipinchandra P. Shah**, sworn on **19th June, 2015** in which it is contended that the application should not be granted. Terming the application a delaying tactic, the respondent explains that it has already closed its case and the applicant's case is about to be closed (only one witness waits to be cross-examined).

6. When the application came up for hearing, counsel for the applicant, **Mr. Kihara** informed the court that the need to amend the applicant's pleadings arose after the respondent moved out of the suit property but in doing so occasioned damage to the suit property.

7. In opposing the application, counsel for the 1st respondent, **Mr. Gori**, reiterated the averments contained in the affidavit sworn in opposition to the application and submitted that no evidence has been adduced to show the damages allegedly occasioned by the respondent. Terming the alleged infractions a different cause of action, he opined that the applicant should file a fresh suit, if it so wishes.

Analysis and determination

Law on amendment of pleadings

8. The general power of the court to amend pleadings draws from **Section 100** of the Civil Procedure Act (CPA) which provides as follows:-

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

9. The power is also donated by **Order 8 Rule 3** of the Civil Procedure Rules (CPR) which provides as follows:-

“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 may direct, allow any party to amend his pleadings.”

10. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited v Trust Bank limited (2000)2 E.A 365* thus:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

11. The aforesaid principles were buttressed in the case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014]eKLR** where 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.”

12. Also see **Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition** which provides as follows concerning amendment of pleadings:-

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a

fresh action...”

13. It is quite clear from the above cited provisions of the law, case law and treatises that the discretion of a trial court to allow amendments of pleadings is wide and unfettered except that it should be exercised judicially upon the foregoing defined principles.

Application of the foregoing legal principles to the instant case

14. In applying the foregoing principles to the instant case, the applicant seeks leave to amend his pleadings to include a cause of action which it claims arose during the pendency of the current proceedings.

15. Whereas it is not in dispute that the application for amendment is sought at the tail end of the proceedings, when the applicant remains with only one witness, and when the said witness has already testified, and whereas I am conscious of the fact that amendment of the pleadings at this stage will require re-opening of the applicant's case, in order to, possibly allow adduction of evidence in support of the new allegations and amendment of the respondent's statement if the amendment sought is allowed; nevertheless, having considered the nature of the amendment sought, I hold the view that it flows from the cause of action pleaded in the applicant's cause of action (that is to say alleged breach of the terms of the lease agreement executed between the parties to this dispute).

16. Although counsel for the respondent is not opposed to the applicant's plea to be allowed to file another suit if the amendment is denied, upon considering the provisions of **Section 7** of the CPA, I find and hold that if the current suit is heard and determined without the amendment sought, the plaintiff would be barred from instituting a fresh suit to raise the issues it wants addressed through the amendment sought.

17. It is noteworthy that whilst the law allows for amendment of pleadings at any stage of the proceedings, it does not allow the court to issue orders which would in effect amount to defeating the objectives of **Section 7** of the CPA by allowing parties to lodge parallel proceedings. Allowing the applicant to institute parallel proceedings as opposed to amending its pleadings will in my view, also offend the overriding objectives of this court under **Sections 1A and 1B** of the Civil Procedure Rules.

18. Owing to the fact that the amendment sought only affects the applicant's Counter-claim to which the plaintiff is yet to offer its defence if any, I hold the view that the overriding objective of this court will best be served by allowing the applicant to amend its defence and counter-claim. That way, the court will get an opportunity of hearing and determining all issues in controversy between the parties once and for all.

19. Whereas the respondent contends that no evidence has been adduced to show the alleged damage, my view of that contention is that the issue of evidence to support the alleged new cause of action can only be considered during trial.

20. The upshot of the foregoing is that the notice of motion dated 7th April, 2015 has merit and is allowed in terms of prayers 1 and 3. The costs of defending the application are awarded to the respondent.

21. To avoid delay in compliance with the orders issued, the applicant is granted 15 days within which to pay the requisite court fees, failing which the application shall automatically stand dismissed.

22. The respondent shall file an amended reply to defence, if need be, within 15 days of being served with the amended statement of defence and counter-claim.

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

L N WAITHAKA

JUDGE.

In the presence of:

Ms Wambui h/b for Mr. Gori for the respondent

N/A for the applicant

Court assistant - Lydia