



REPUBLIC OF KENYA
IN THE ENVIROMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 221 OF 2015

WANJIRU MUIRURI NDUAT.....PLAINTIFF/APPLICANT

VERSUS

ERASTUS NDUNGU THUNGU.....DEFENDANT/RESPONDENT

RULING

1. On 10th February, 2016 the plaintiff herein filed the notice of motion dated **9th February, 2016** seeking leave to amend the plaint filed on 7th August, 2015 and the notice of motion brought thereunder, filed on 23rd October, 2015.
2. The application which is brought under **Section 1A, 1B, 3A** and **100** of the Civil Procedure Act; **Orders 8 Rule 3 & 5**, and **Order 51** of the Civil Procedure Rules, is premised on the ground that at the time the suit was filed, the plaintiff had not obtained certain documents needed in support of her case; that the plaintiff has since obtained the said documents. Explaining that the amendment sought are necessary for the purpose of bringing out the real issues in controversy between the parties and for the purpose of enabling the court to determine the real issues in controversy, the plaintiff urges the court to allow the application.
3. The application is supported by the affidavit of the plaintiff/applicant, Wanjiru Muiri Nduati, sworn on **9th February, 2016**. In that affidavit, the plaintiff has in addition to reiterating the grounds on the face of the application, deposed that the respondents will suffer no prejudice if the application is allowed. The intended amendments are flanked out in the draft amended plaint and notice of motion annexed to the affidavit sworn in support of the affidavit, marked **WMN-2**.
4. In reply and opposition to the application, the defendant/respondent filed the grounds of opposition dated **16th February, 2016** where it is contended that an application cannot be amended; the application is unsupported and that if allowed, the application will embarass the court.
5. When the application came up for hearing, counsel for the respondent only opposed the application to the extent that it sought the amendment of the notice of motion. Consequently, the court directed parties to argue the application.
6. Counsel for the applicant reiterated the grounds on the face of the application and based on the authorities cited hereunder, submitted that under **Section 100** of the Civil Procedure Rules, a notice of motion can be amended.
7. Counsel for the respondent, **Mr. Mboha**, reiterated the contention that allowing the application will

embarrass the court. In that regard, he argued that prayer 4 of the intended amended notice of motion is final in nature and can be able to dispose of the suit. Mr. Mboha submitted that such a prayer can only be made in the plaint and not in an application.

8. On whether an application can be amended, Mr. Mboha submitted that, not being a pleading as contemplated under **Section 2** of the Civil Procedure Act, an application cannot be amended.

9. Concerning the authorities cited by the applicant's counsel which intimate that applications may be amended under **Section 100** of the Civil Procedure Act and **Order 8 Rule 5** of the Civil Procedure Rules, Mr. Mboha submitted that the case of Echalia is distinguishable. With regard to the case of Fredrick Mwangi vs Garam Investment and Another, 249 of 2013 he pointed out that the court did not allow the amendment sought. Arguing that the current application offends **Section 9** of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya he urged the court to disallow the application.

10. In a rejoinder, counsel for the applicant, **Mr. Mugo** submitted that paragraph 7 of the affidavit sworn in support of the application is clear on what documents are annexed.

Based on the case of **Fredrick Mwangi Nyaga v. Garam Investments & Another (2013) eKLR** and the wording of **Section 100** of the Civil Procedure Act, he maintained that an application may be amended.

11. In the case of **Peter M. Echaria v. Priscilla N. Echaria (1998) eKLR** . The court of Appeal observed:-

“We agree that the notice of motion is defective but the defect is curable, and, for that reason, and ms. Karua having applied for leave to amend the notice of motion, we grant leave for the respondent to amend the notice of motion so as to comply with the requirements of Rule 42(1) of the Rules of the Court.”

12. In **Fredrick Mwangi nyaga v. Garam Investments & Another (2013) e KLR** at page 5 and 6 **Havelock J.**, stated:-

“with respect, I do not consider that learned counsel for the defendant has read the above provision entirely. The second sentence after the word “or” allows the correction of any defect or error in any proceedings. In my view, a Notice of Motion is part of the proceedings of a suit. I do not consider that the power to amend a proceeding is confined solely for the purposes of determining the real question of controversy between the parties. As a consequence, I agree with counsel for the Plaintiff when he says that this provision of Order 8 rule 5 allows this court to consider an application for amendment to (in this case), the plaintiff’s Notice of Motion dated 14th June, 2013. I believe that the decision in Echaria v. Echaria case (*supra*) is binding upon this court with the slight reservation that the application to amend the Notice of Motion before that Court was brought under the Court of appeal Rules. However, I do not consider that the provision under which the applicatoion is brought would make any difference to my finding as above....As a consequence of all the above, I find that although this court has power to allow an amendment to the plaintiff’s said notice of motion dated 14th June, 2013 under the provisions of Order 8 Rule 5 as well as Section 100 of the Civil Procedure Act, the fact that the plaintiff has breached Rule 9 as I see it, his only option is withdraw the same and file a fresh application.”

13. In determining the question as to whether an application may be amended, I associate myself with the sentiments of **Havelock J.**, cited hereinabove and those of **Omondi J.**, in the case of **Samwel Barkoiyet Kangogo & 3 others vs. Daniel Ndung’u (2009) eKLR** where she stated:-

“My considered view is that the court has a duty to ensure the ends of justice are met and that Section 3A gives this court wide discretion for that purpose.....I have a duty to put a stop to such mischief and rule that the misheading of the application to read chamber summons instead of notice of Motion causes no prejudice to the respondent and under section 100 Civil Procedure Act,

I amend the title to read Notice of Motion.”

14. Having determined that this court has power under **Sections 3A, 100** and **Order 8 Rule 5** of the Civil Procedure Act and Rules respectively, the issue to determine is whether there is any reasonable cause for denying the amendment herein sought.

15. As pointed out above, the amendment sought to be effected in the current proceedings is said to be incapable of being granted because the prayer sought has the potential of determining the suit preliminarily.

16. With regard to that contention, I wish to point out that having read the notice of motion sought to be amended, the impugned amendment is not the only prayer with a possibility of preliminarily determining the suit. Prayer 3, if granted will similarly determine the suit preliminarily.

17. Conscious of the fact that orders with the potential of determining a suit can, in special circumstances be granted and being of the view that before such orders can issue, parties would have been given an opportunity to present their cases for and against such orders, I am not persuaded that by allowing that amendment or the prayer in respect thereof, the court would embarrass itself or occasion any prejudice to any of the parties to the dispute.

18. On whether the affidavit sworn in support of the application offends **Section 9** of the Oaths and Statutory Declarations Act to warrant taking the direction taken in the case of **Fredrick Mwangi nyaga v. Garam Investments & Another** (*supra*), I find that unlike in that case where the annexure, in contravention of **Rule 9** of the Oaths and statutory Declaration rules was not marked, in the circumstances of this case, the plaint and the notice of motion intended to be introduced through the amendment are marked as one document.

19. In my view, the mere fact that the draft amended plaint and the draft amended notice of motion were rubbed together and marked **WMC-2** does not mean that either of them was not marked as suggested by counsel for the respondent.

20. Being of the view that the amendment sought is unlikely to occasion any prejudice to the respondent incapable of being compensated by award of costs, I exercise the discretion vested in me in favour of the plaintiff and allow the amendment sought. The amendment shall be as per annexure **WMC-2** annexed to the affidavit the plaintiff/applicant swore in support of the application dated 9th February, 2016.

21. The respondent shall have the cost of the application.

Dated, signed and delivered at Nyeri this 12th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Ms Wambui h/b for Mr. Nyoro for the applicant/plaintiff

Ms Muhoro h/b for Mr. Mboha for defendant/respondent

Court assistant - Lydia