



REPUBLIC OF KENYA

IN THE HIGH ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 20 OF 2008

DEDAN KARUGA GICHINGA.....PLAINTIFF

VERSUS

TITUS GETHI NDEGWA.....1ST DEFENDANT

AJAA OLUBAYI T/A OLUBAYI & CO. ADVOCATES.....2ND DEFENDANT

RULING

Coming up for determination is an application filed by the 1st Defendant dated 27th March 2014 wherein he seeks orders that he be granted leave to amend its Defence dated 18th March 2008, in terms of the draft annexed to the Supporting Affidavit, and that the amended Defence be filled within 14 days of the order. The application is premised on grounds that it would be in the interest of justice and for purposes of determining all real issues for the 1st Defendant to be permitted to amend his Defence as proposed. Further that he stands to suffer irreparable loss if the proposed amendments are not allowed. It is also averred that the Plaintiff and the 2nd Defendant will not suffer any prejudice in the event that the application is granted as they will be afforded an opportunity to make responses thereto.

The applications is supported by an affidavit sworn by the 1st Defendant wherein he deposes that at the time of filing the Defence, he did not have in hand the particulars necessary to plead his counterclaim. Therefore, that he reserved the right to amend his Defence at Paragraph 9 of the Defence. It is his deposition that he seeks leave to amend his Defence for purposes of introducing a counterclaim to enable the Court to properly and fully adjudicate upon and determine the rights of the parties in the suit.

In a Replying Affidavit sworn by the Plaintiff on 9th July 2014, he deposed that the Defendant has employed several tactics, such as this application, to pre-empt the hearing of the suit. Therefore, that this application is vexatious, frivolous and abuse of the court process. The Plaintiff deposed that the intended counter-claim is statutory barred since the parties having entered into the Sale Agreements on 27th January 2006, 13th February 2006 and 30th May 2006 whilst the transfer was effected on 19th July 2006. The Plaintiff referred to correspondence between the parties annexed to his affidavit and contended that the amendment sought was not in good faith as the 1st Defendant admitted to be in breach of the contract.

The application was canvassed by way of written submissions. Counsel for the 1st Defendant submitted that they took over the matter from the previous advocates on 18th October 2013, and deemed it necessary to amend the Defence for the proper determination of the dispute. Further that important issues were left out which ought to be pleaded so as to arrive at a fair trial. Counsel cited authorities that restate the

principle that amendment of pleadings ought to be freely allowed by the Courts if it can be done without injustice and that there is no injustice where the other party can be compensated by costs. On the point that the counter-claim is barred by limitation of time, counsel submitted that the Court still had discretion to allow the amendment so long as the amendment is just in facilitating full determination of the disputed issues.

It was submitted for the Plaintiff that the counter-claim seeks to be introduced 8 years after the agreements were entered into and transfer effected and is therefore an afterthought with the intention of delaying the hearing. Further that the 1st Defendant only paid 10 % of the purchase price and admitted to have breached the terms of sale.

Having considered the pleadings and the written submissions the Civil finds that the 1st Defendant seeks leave of this court to amend his Defence so as to introduce a counterclaim. It is his submission that such amendment ought to be allowed to enable the court adjudicate over all the issues in dispute thereby determine the rights of each party. The Plaintiff avers that the application is a mere tactic to delay the hearing and further that the same is statute barred having been introduced 8 years after the parties entered into an agreement. It emerges from the foregoing that the issues are whether the application is nothing but a tactic to derail the hearing process and secondly whether the counter-claim sought to be introduced by the 1st Defendant is statute barred.

The discretion of the court to allow amendment of pleadings flows from Order 8 Rule 3 which permits this court at any stage of the proceedings on such terms as to costs or otherwise as may be just to allow any party to amend his pleadings. Courts have termed this discretion as wide and unfettered save that the same has to be exercised judicially upon some guiding principles. These principles were set out in **Central Kenya Ltd – v - Trust Bank Ltd Appeal No. 222 of 1998 (2000) 2 EA page 365**

- i. ***that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy.***
- ii. ***to avoid a multiplicity of suits, provided there has been no undue delay,***
- iii. ***that no new or inconsistent cause of action is introduced,***
- iv. ***that no vested interest or accrued legal right is affected; and***
- v. ***that the amendment can be allowed without injustice to the other side.***

The Court of Appeal in **Ochieng & Ors v First National Bank of Chicago, Civil Appeal No.149 of 1991** observed that,

the power of the court to allow amendments is intended to determine the true, substantive merits of the case; that amendments should be timeously applied for: that power to amend can be exercised by the court at any stage of the proceedings; and 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 (Emphasis mine).

It follows therefore that the basis for allowing amendments is to enable the court determine the true and substantive merits of the case. Therefore that even where there is delay in bring the application, such amendment can still be allowed. I have perused the amended Defence and counter-claim annexed to the 1st Defendant's application and do find that it will serve the purpose of assisting the court in determining the real question in controversy between the parties. I also do not see any prejudice to be suffered by the Plaintiff other than the delay in bringing the application, which can be compensated by an award of costs.

As to whether the amendments sought to be introduced are time barred, Order 8 Rule 3(2) allows the court, if the court thinks it is just so to do, to grant leave notwithstanding that application is made after any relevant period of limitation has expired. This provision further buttresses the basis of

amendment of pleadings being to determine the real issues in controversy to the extent that it defeats the defence of limitation. The orders of the court are as follows:

1. *The 1st Defendant is hereby granted leave to amend its Defence in terms of the draft annexed to the application dated 27th March 2014, and file the same within 7 days of the date hereof.*
2. *The Defence and Counter-claim together with Bundle of Documents and Witness Statements to be relied upon by the 1st Defendant be served within 14 days of the date of filing.*
3. *The Plaintiff and 2nd Defendant are granted leave to file a reply to the Amended Defence within 14 days of receipt of service.*
4. *The 1st Defendant shall meet the costs of this application.*

Dated, Signed and delivered this **9th** day of **March, 2015**

L.N. GACHERU

JUDGE

In the Presence of:-

Mr Kahuthu for the Plaintiff/Respondent

Ms Githu for the 1st Defendant

None attendance for the 2nd Defendant though served.

Kamau: Court Clerk

L.N. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above counsels.

L N GACHERU

JUDGE