



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1784 OF 2007

FORMELY CIVIL CASE NO. 141 OF 2006

HENRY ORYEM OKELLO (SUING IN HIS CAPACITY AS A LEGAL REPRESENTATIVE OF)

LABULE OKELLO LUTWA (DECEASED) PLAINTIFF

VERSUS

SUKHDEV SINGH LALY.....1ST DEFENDANT

LAZARUS KIBUI NDEGWA 2ND DEFENDANT

RULING

The 1st Defendant by a Notice of Motion application dated 10th July 2014 expressed to be brought under Order 8 Rules 3 (1) (2) & (5) of the Civil Procedure Rules 2010 and Sections 3A & 100 of the Civil Procedure Act Cap 21 Laws of Kenya and all other enabling provisions of law seeks leave to amend his defence in terms of the draft amended defence annexed and prays for the costs of the application to be provided for.

The application is supported on the grounds set forth on the face of the application and on the grounds contained in the supporting affidavit by **Susan Nyang Advocate** for the 1st defendant sworn on 10th July 2014. The 1st Defendant's Advocate who has sworn the affidavit in support of the application for leave to amend the 1st Defendant's defence states that further instructions have been given which necessitates the amendment of the defence. The applicant states the amendment is necessary to enable the full facts to be pleaded to enable the court to make a determination having regard to all the facts. The applicant further states the application for amendment has been made before the trial and no prejudice will be occasioned to the plaintiff or the 2nd defendant who could have the liberty to amend their pleadings if they so wished.

The plaintiff opposes the 1st Defendant's application for leave to amend his defence and has filed grounds of objection to the application dated 18th September 2014 and filed in court on the same date. **Mr. Hasmukhrai Manilal Parekh advocate** for the plaintiff has filed a replying affidavit sworn on 18th September 2014 in opposition to the 1st Defendant's application. The plaintiff avers that the fulcrum of the 1st Defendant's application for leave to amend his defence to include a counterclaim is what the 1st Defendant's claim to have been a tenancy agreement between the 1st Defendant and the 2nd Defendant over the suit premises which the plaintiff claims to be the owner. The plaintiff asserts there could not have been any privity of contract between the plaintiff and the 1st defendant as it is not alleged the plaintiff was a party to the alleged tenancy agreement. The plaintiff avers that the 1st Defendant's

application seeks to introduce new causes of action arising from facts and circumstances in respect of which the plaintiff was not a party to. The plaintiff, it is alleged would be greatly prejudiced if the amendment which seeks to introduce new cause of action is allowed as the introduction of new causes of action will serve to cloud and confuse the issues before court for trial.

The plaintiff further states the 1st Defendant had vide an application dated 26th July 2011 filed a similar application seeking leave to amend his defence but which application he withdrew following objection by the plaintiff. The plaintiff avers that the objective of the 1st Defendant's instant application was to delay the hearing of the suit. The plaintiff to illustrate the assertion that the 1st Defendant is bent on causing delay of the suit has annexed a copy of the Order of directions issued by **Lady Justice Okwengu** (as she then was) on 28th June 2011 where directions were issued to facilitate the disposal of the suit as follows:-

1. That as the defendants do not appear anxious to have this trial disposed off expeditiously and are using the pre-trial proceedings to delay this trial the pre-trial directions are hereby dispensed with.
2. That this case be listed for hearing on 26th September 2011.
3. That the parties shall file a statement of agreed issues within 21 days from the 28th June 2011.
4. That failing to file agreed issue each party shall file his list of issues at least 21 days before the date of hearing that is by 4th September 2011.
5. That the plaintiff to serve a copy of this order on both defendants.

The 1st Defendant instead of complying with these directions went ahead to file the application dated 26th July 2011 seeking leave to amend the defence which had the effecting of scuttling the scheduled hearing on 26th September 2011 only for the 1st defendant to withdraw the application on 10th November 2011. That on 16th December 2011 the 1st Defendant filed an application seeking a stay of distress levied by the 2nd Defendant and further one **Resham Laly** who is alleged to be the wife of the 1st Defendant filed an application objecting to the attachment of motor vehicle KAJ 998 X at the instance of the 2nd Defendant. The court record does not show that these two applications have been determined. The 1st Defendant filed yet another application vide the Notice of Motion dated 30th April 2013 where the 1st Defendant sought to have his name struck out from the suit. Honourable **Lady Justice Gacheru**, while dismissing the 1st Defendant's said application observed that there are facts that were in controversy in the suit and that the presence of the 1st Defendant was necessary in order to enable the court effectively adjudicate the matter. The Judge in her ruling delivered on 16th May 2014 noted the suit was fixed for hearing on 26th June 2014 and that for the expeditions disposal of the matter, prudence demanded that the 1st Defendant's application be disallowed.

As fate would have it, on 26th June 2014 when the suit ought to have proceeded for hearing the **Hon. Lady Justice Gacheru** before whom it was to proceed was not sitting and the same was taken out of the hearing list. On 10th July 2014 all the parties appeared before me and I fixed the suit for hearing on 25th and 26th November 2014. The 1st Defendant filed the instant application on 11th July 2014 and as the same had not been heard and disposed off as at 25th November 2014 when the suit came for hearing, the hearing could not proceed. The court instead on the 25th November 2014 gave directions in regard to the 1st defendant's instant application. The court directed the Applicant to file his submissions within 15 days from 25th November 2014 and the plaintiff Respondent to file his within 15 days of being served. The plaintiff/Respondent filed his submissions dated 19th December 2014 on 22nd December 2014. The 1st Defendant's submissions dated 6th January 2015 were filed on 8th January 2015. The plaintiff has urged the court to expunge the submissions by the 1st Defendant from the record for having been filed out of time in contravention of the directions given by the court.

I have considered the 1st Defendant's instant application together with the affidavit in support and the annexed draft amended defence and counterclaim and the plaintiffs grounds of opposition and the affidavit in reply and the annexures thereto. I have also considered the parties filed submissions. The

issue for determination is whether on the facts and circumstances the 1st Defendant is deserving of the court's discretion to grant leave for the amendment of his defence.

The court has a wide and unfettered discretion to grant leave for amendment of pleadings. The general principle when considering an application for amendment is that leave should generally be granted unless the amendment if allowed would occasion injustice or a miscarriage of justice to any and/or either of the parties.

Order 8 Rule 3(1) provides:-

3.(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 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 as 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 to do so.

The 1st Defendant from the pleadings and the annexed draft amended defence and counterclaim was allegedly in occupation of the suit premises as a tenant of the 2nd Defendant. In paragraph 2 of the affidavit sworn by **Susan Nyang** on 10th July 2014 in support of the instant application it is stated thus:-

“That the suit arises out of a tenancy agreement made between the 1st Defendant/Applicant and the 2nd Defendant/Respondent way back in the year 2000 and the occupation thereof”.

The 2nd Defendant in December 2011 levied distress against the 1st Defendant's goods in the suit premises in regard to which the 1st Defendant filed an application for stay of levy of distress. Arising from the same levy of distress a motor vehicle KAJ 998X was proclaimed by **Keysian Auctioneers** which proclamation triggered the objection application filed by **Resham Laly** on 2nd February 2012. The intended counter claim by the 1st Defendant is predicated on his alleged occupancy of the suit premises as a tenant of the 2nd Defendant and my view is that the counter claim introduces a totally separate cause of action which in no way can attach to the plaintiff. The claim arising from the 1st Defendant's occupancy of the suit premises as a tenant of the 2nd Defendant cannot properly be directed against the plaintiff. There is absolutely no nexus as the plaintiff was not a party to the tenancy agreement and the 2nd Defendant was not acting as an agent of the plaintiff. The claim under the counter claim for loss of the motor vehicle and other goods arises from the faulted levy of distress by the 2nd Defendant against the 1st Defendant. Further, the claim for cost of repairs to the suit premises arises out of the alleged tenancy agreement between the 1st defendant and the 2nd defendant.

As earlier observed the 1st Defendant and the objector, **Resham Laly** do not appear to have pursued the prosecution of their respective applications dated 16th December 2011 and 2nd February 2012 respectively which applications were directed against the 2nd Defendant. Is it a coincidence or the applications were designed to frustrate the hearing of the main suit that the plaintiff was pursuing?. There are pointers that the 1st Defendant and the 2nd Defendant may have at some point been acting in concert.

The suit by the plaintiff filed on 15th February 2006 was against the 1st Defendant and the claim was that the 1st Defendant was in illegal and wrongful trespass of the suit property that was owned by the late **Labule Okello Lutwa** and the plaintiff sought the delivery of vacant possession of the suit premises to the plaintiff and payment of mesne profits by the 1st Defendant as from June 2000 when the plaintiff discovered the 1st Defendant was in illegal and wrongful possession. The 2nd Defendant applied and was enjoined as a defendant to the suit vide the order given by **Hon. Justice Mbogholi Msagha** on 13th

October, 2009. After being enjoined to the suit as a defendant, the 2nd defendant has insistently made one application after another whose object was to ensure the matter somehow did not get to trial. The instant application like the previous applications had the effect of ensuring the hearing scheduled for 25th and 26th November 2014 did not proceed. The issue for determination however at this point is whether the instant application is merited to warrant the court to exercise its discretion to grant it.

The plaintiff states that he absolutely had no relationship with the 1st Defendant and that if allowed the proposed amendment by which the 1st Defendant seeks to introduce a counter claim against the plaintiff would totally change the character of the suit and would introduce new causes of action. The 1st Defendant was sued by the plaintiff for being a trespasser. In his initial defence which he now wishes to amend the 1st Defendant pleaded he was in lawful occupation of the property without indicating how he came to be in lawful possession. He never disclosed he was in possession of the premises as a tenant of the 2nd Defendant. In the present application it is stated the 1st Defendant was a tenant of the 2nd Defendant from as far back as the year 2000. **Why did the 1st Defendant not make this disclosure in 2006 when he filed his defence?. The 1st Defendant claims he made repairs to the suit premises of Kshs.4 million. When was this done and on whose authority?.** The 1st Defendant further states the 2nd Defendant caused him to be evicted from the suit premises and in the process he suffered damages assessed at Kshs.6 million. The plaintiff submits that these are separate causes of action that can only attach to the 2nd defendant and cannot be conveniently tried in the instant suit. The plaintiff sees the object of the amendment as being to create confusion and cloud the real issues and urges the court to disallow the application arguing the application has not been brought in good faith and is not bonafide.

To buttress his argument the plaintiff referred the court to the Court of Appeal Judgment in **Civil Appeal NO. 149 of 1991: Joseph Ochieng & 2 others –vs- First National Bank of Chicago (unreported)** where **A.B. Shah, JA** in his judgment while considering whether amendment ought to be allowed where a new cause of action is introduced observed as follows:-

“in my judgment if I were to allow at this late stage the proposed amendments, the defendant would be deprived of its undoubted right to plead limitation. It is to be noted that it is for the very first time that the plaintiffs applied for addition of the claim of Kshs.8,652,438/- some six years after the accrual of the cause of action”.

The learned Judge in laying down the factors a court may consider in exercising its discretion in an application for amendment quoted with approval **Lord Griffith’s** observation in the English case of **Kettman –vs- Hansel Properties Ltd (1988) I ALL ER 38 at page 62** where he stated:-

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a Judge is entitled to weigh and balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way of the other-----“.

Having reviewed the application by the 1st Defendant, the affidavits in support and in opposition I am not persuaded the 1st Defendant is acting bonafide in making the application. While the 1st Defendant knew he was a tenant of the 2nd Defendant in the suit premises he failed to make that disclosure in the first instance when he filed the initial defence yet it was evident from the plaint the plaintiff was claiming ownership of the suit property. The claims the 1st Defendant seeks to introduce through the counterclaim can only be as against the 2nd Defendant and as against the plaintiff the claims would be time barred as they could only have arisen prior to 2006 when the plaintiff filed the instant suit. The 1st Defendant cannot explain the delay in bringing the instant application coming as it is over 9 years since the plaintiff

filed the suit. This suit has severally been fixed for hearing and the court has in the course of disposing of the several applications brought at the instant of the defendants directed the parties to have the suit proceed to hearing expeditiously and indeed **Lady Justice Okwengu** (as she then was) in 2011 dispensed with the requirement for compliance with Order 11 of the Civil Procedure Rules to facilitate the expeditious hearing of the suit. In my view the delay on the part of the 1st Defendant in brining the application for amendment is inexcusable considering that the same defendant in 2011 had brought virtually a similar application which he withdrew. It is a rule of practice that parties ought to make applications for amendment of their pleadings at the earliest opportunity and without delay. In the present case I do not in the circumstances and considering that all the facts and issues which the 1st Defendant wishes now to plead, were all the time within his knowledge, take the view that he has acted without undue delay. To allow the amendment after the expiry of 9 years since the suit was filed would occasion injustice to the plaintiff who since 2011 has been eager to have his suit heard and determined but has been frustrated by applications made at the instance of the defendants leading him even to entertain the notion that the defendants may be acting in collusion to frustrate him perhaps hoping he would give up the quest for justice.

I further hold the view that proposed amendment would not only bring new causes of action which would radically change the character of the suit but would also be prejudicial to the plaintiff as from the nature of the causes of action the same constitute separate causes of action more suited to be tried in a separate action against the 2nd Defendant but not against the plaintiff.

In the premises and for all the foregoing reasons I decline to exercise my discretion to allow the 1st Defendant's application for leave to amend the defence and the application dated 10th July 2014 is accordingly dismissed with costs to the plaintiff.

Ruling dated, signed and delivered this 23RD day of JULY, .2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the Plaintiff
..... for the Defendant
..... For 2nd Defendant