



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 439 OF 2009

BENCASTER INVESTMENT LIMITED..... PLAINTIFF

VERSUS

JOHN MURITHI.....1ST DEFENDANT

SANTINO BENEDETHINO.....2ND DEFENDANT

JOHN NJOROGE CHEGE.....3RD DEFENDANT

JOSEPH NG'ANG'A CHEGE.....4TH DEFENDANT

THE ATTORNEY GENERAL.....1ST INTERESTED PARTY

COMMISSIONER OF LAND.....2ND INTERESTED PARTY

LAND REGISTRAR-NAIROBI.....3RD INTERESTED PARTY

CITY CHICKEN & EGGS DEALERS

CO-OPERATIVE SOCIETY LTD.....4TH INTERESTED PARTY

REGISTERED TRUSTEES OF CHRIST IS THE

ANSWER MINISTRIES (SUED THROUGH ITS

REGISTERED OFFICERS, DAVID OGINDE,

MARGARET HUTCHINSON &

KARIUKI KIGO.....5TH INTERESTED PARTY

RULING

The Plaintiff's Application

The Plaintiff filed a Notice of Motion dated 11th February 2014 pursuant to the provisions of section 3A of the Civil Procedure Act and Order 8 Rule 3(1), and 5(1) the Civil Procedure Rules, seeking leave to amend its Reply to the Defendant's Amended Defence and Defence to Counterclaim. Further, that its

draft Amended Reply to the Defendants' Amended Defence And Defence to the Counterclaim, which is annexed to its supporting Affidavit be deemed as filed and served upon payment of the requisite filing fees.

The main grounds for the application are that it is fair and just that the suggested amendments be allowed for the purpose of determining the real issues in controversy between the parties herein, and that the proposed amendments will not cause any prejudice to the Defendants or any other party. The application is supported by an affidavit sworn on 11th February, 2014 by the Plaintiff's Advocate, Mutimu Lukas Kang'atta,. He states therein that it has become necessary to amend the Plaintiff's Reply to the Defendant's Defence and Counterclaim in light of the Defendant's Further Re-Amended Statement of Defence And Counterclaim dated 4th April 2013 and filed on 10th April 2013.

The Plaintiff's Advocate filed written submissions on the instant application dated 14th March 2014, and a reply to the Defendant's submissions dated 7th April 2014. He argued that Order 8 Rule 3(1) of the Civil Procedures Rules gives the Court discretion at any stage of the proceedings, to allow any party to amend its pleadings. He submitted that there is no substance in any of the grounds cited in the Defendant's Grounds of Opposition dated 18th February, 2014 to warrant a rejection of the Plaintiff's application, and urged the Court to take note of the fact that, since the filing of the Plaintiff's Reply to the Defendants Amended Defence and Counterclaim on 11th July 2011, the Defendants have amended their pleadings twice, the last amendments being the ones they filed on 10th April, 2013.

The Plaintiff's counsel submitted that it has not been stated, or demonstrated in what way the proposed amendments will prejudice the Defendants, considering that they would be entitled to recall and further cross-examine any of the witnesses who have already testified, if they wanted to do so. Further, that any delay and inconvenience caused to the Defendants by the proposed amendments can adequately be compensated by an award of costs of the application.

The counsel also submitted that an examination of the proposed amendments, as compared with the previous pleadings by the Plaintiff will show that they are not in any way inconsistent with the Plaintiff's previous pleadings, and that the Defendants have not pointed out the alleged inconsistencies. The counsel also distinguished the application of the text **Mulla's on the Code of Civil Procedure**, which is on the Indian Civil Procedure Code which under Order 6 rule 17 thereof expressly prohibits amendments to pleadings after commencement of the trial, unlike the position in Order 8 Rule 3(1) of the Kenyan Civil Procedure Rules.

The counsel also sought to distinguish the application of the judgment of the Court of Appeal in the case of **Kyalo –vs- Bayusuf Brothers Limited (1983) KLR 299** on the ground that the principle stated therein has been overtaken by the overriding objectives set out in sections 1A and 1B of the Civil Procedure Act and Article 159(2) (d) of the Constitution, that require justice to be administered without undue regard to procedural technicalities. He submitted that allowing the proposed amendments will enable the Court to do substantive justice in this case and enable the Court to properly investigate the question of fraud as pleaded by the Defendants, and to make substantive findings on the matter.

The 1st – 4th Defendants Response

The 1st - 4th Defendants filed Grounds of Opposition dated 18th February 2014 and opposed the Plaintiff's application on the ground that the application was frivolous, vexatious and an abuse of the court process. Further, that the application had no merit and is meant to delay the finalization of this matter and will add no value to the Plaintiff's case. Lastly the 1st – 4th Defendants asked to be paid their costs before the orders sought are granted.

The 1st – 4th Defendants' Advocate filed written submissions dated 27th March 2014, wherein he contended that the jurisdiction of this Court to grant or refuse leave to amend pleadings ought to be exercised judiciously, and without causing prejudice or hardship to any of the party in the proceedings.

Further, that it is trite law that amendments to pleadings sought before the hearing of the suit has commenced ought to be freely allowed. However, that where the hearing of the suit has commenced, the Court ought to reject the amendments sought, as they will be prejudicial to the Defendants herein.

The 1st – 4th Defendants' Advocate further submitted that the amendments sought are quite substantial, in that the Plaintiff has introduced eight (8) new paragraph in the reply, purporting to deny the averments made in the Re-amended Defence and Counter claim, and which are inconsistent with the earlier pleadings, which is a ground for refusing to grant leave to amend as held in **Kyalo vs. Bayusuf Brothers Limited (1983) KLR 229**.

Further, that the allegation sought to be introduced in the proposed amendment would require to be supported by evidence of the Plaintiff, who is looking for an opportunity to re-open its case and tender fresh evidence, with the hope that its witness will be recalled to make amends on the issues brought out by the cross-examination. The 1st – 4th Defendants' Advocate further submitted that this eventuality will occasion prejudice to the Defendants and relied on **Mulla on The Code of Civil Procedure** and the case of **Eastern Bakery vs Castelino (1985) EA 461** in this respect.

The Issues and Determination

I have read and carefully considered the pleadings and submissions by the Plaintiff and 1st – 4th Defendants. The main issue for determination is whether or not this court should exercise its discretion in the Plaintiff's favour and grant it leave to amend their Reply to the Amended Defence and Counterclaim. The applicable provision of the law is Order 8 Rule 3 of the Civil Procedure Rules which grants this court wide discretion to grant leave to amend pleadings at any stage of the proceedings, notwithstanding that the effect may be to add a new party, or change the capacity in which a party is suing or to add or substitute a new cause of action provided such action arises out of the same facts.

I am also guided by the decision of the Court of Appeal in **Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365** and the judicial authorities cited by the parties, that the overriding consideration in circumstances as arise in this case is whether the amendments sought are necessary for the determination of the suit, and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

The real prejudice that is likely to be caused by the proposed amendment by the Plaintiff in the present application not only arises from the delay in bringing the application, but also from the fact that the suit herein is part heard and the Plaintiff closed its case on 16th September 2013 after calling two witnesses who testified in court. In these circumstances this court is faced with two actions that it can undertake. The first is to disallow the amendment sought by the Plaintiff in light of the prejudice alluded to that will be caused to the 1st -4th Defendants The alternative course of action available to the court is to allow the proposed amendment, and mitigate the prejudice that it may cause by allowing any further evidence the Plaintiff may call to be subjected to further cross-examination. The court is in this regard also granted the discretion under Order 8 Rule 3(1) to grant costs or otherwise as may be just and in such manner as it may direct.

It is my opinion that as the overriding principles of Article 159 (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act require that disputes before the courts be heard on their merits, and the just, expeditious, proportionate and affordable resolution of civil disputes, it would be more prudent to allow the Plaintiff's application to amend its pleadings and call any additional witnesses that may be necessary in this regard. Any prejudice caused in this regard to the 1st - 4th Defendants will be mitigated by giving the said Defendants the opportunity to subject any additional witnesses that may be recalled or called by the Plaintiff to further cross-examination. The 1st – 4th Defendants will also in this regard be entitled to the payment of costs caused by the delay on the part of the Plaintiff in applying for the amendments of its pleadings or by the calling of further witnesses to testify on its behalf.

It is therefore accordingly ordered as follows:

1. The Plaintiff is granted leave to amend its Reply to the Defendant's Amended Defence and Defence to Counterclaim on the terms of the draft annexed to its Notice of Motion dated 11th February 2014, and to recall and/or call any additional witnesses to give evidence in this regard.
2. The Plaintiff shall file and serve the Amended Reply to the Defendant's Amended Defence and Defence to Counterclaim within 15 days of the date of this ruling.
3. The Plaintiff shall meet the 1st - 4th Defendants' costs of the Notice of Motion dated 11th February 2014, and the costs that shall be incurred by the 1st- 4th Defendants at the hearing of any additional witnesses recalled or called by the Plaintiff.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____1st____ day of ____July____, 2014.

P. NYAMWEYA

JUDGE