



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 554 OF 2008

NANCY WAJIRU WANGAI..... PLAINTIFF/APPLICANT

VERSUS

NATIONAL SOCIAL SECURITY FUND..1ST DEFENDANT/RESPONDENT

DAVID NJOROGE NGURU.....2ND DEFENDANT/RESPONDENT

PATRICK NYAMU.....3RD DEFENDANT/RESPONDENT

FRED OYUDI.....4TH DEFENDANT/RESPONDENT

JOSEPH OLE KIAMBU5TH DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 6th December 2013 in which the Plaintiff/Applicant is seeking for the following orders:

1. That the Applicant be granted leave to further re-amend the Further Amended Plaintiff herein.
2. That the Draft Further Re-Amended Plaintiff be deemed to be properly filed upon payment of the requisite filing fees.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Nancy Wanjiru Wangai, sworn on 6th December 2013 in which she averred that she has led evidence and called witnesses to prove the loss of rental income and mesne profits in respect of her proposed and approved building on the suit premises. She further averred that the Defendants had opportunity to contest the evidence and cross-examined all the witnesses. She further averred that the evidence on loss suffered by her had not been seriously challenged or contested. She further stated that she had not specifically pleaded the special damages as relates loss of rental income or mesne profits and that the amendment sought is to fix that omission and does not substantially affect the case or the evidence on record. She further stated that no prejudice, hardship or embarrassment shall be caused to any party as a result of the intended amendment.

The Application is opposed. The 3rd Respondent filed his Grounds of Opposition dated 10th January 2014

as follows:

1. That the motion as taken out, drawn and filed is a non-starter, incurable defective and unsustainable in law.
2. The motion is an afterthought intended to remedy, cure and/or otherwise correct the plaintiff's case weakness that have emerged at trial at the great expense and prejudice of the 3rd Defendant.
3. The effect of the intended amendment will be to wholly change the nature and character of the plaintiff's case by introducing a claim for Kshs. 162,774,082/- without affording the 3rd Defendant a chance to cross examine the plaintiff on it.
4. It is trite law that special damagers must be specifically pleaded and proved and that to the extent that the plaintiff has closed her case, allowing the amendment sought will be an act in futility.
5. This is the 3rd application for amendment being mounted by the plaintiff which act constitutes litigation by installments coupled with unexplained delay.
6. The amendment sought seeks to introduce a totally different, new and inconsistent case and the application is made at a very late stage which demonstrates *malafides* on the part of the plaintiff.

The 1st Defendant filed its Grounds of Opposition dated 15th January 2014 as follows:

1. The Application is incurably defective and unsustainable in law.
2. The Application has been brought too late in the day, is an afterthought and prejudices the 1st Defendant/Respondent.
3. The Application seeks to substantially and materially alter the Plaintiff's case after the Plaintiff has closed her case.
4. The Plaintiff has not brought this Application in good faith and the same is brought to defeat the interest of justice.

The issue which I am called upon to determine is whether to allow the Plaintiff to further re-amend her Further Amended Plaintiff. In determining this issue, I wish to note that this suit commenced being heard by this court before Justice Muchelule who took the evidence of two Plaintiff's witnesses. I commenced hearing this suit on 5th February 2013 and have so far heard five more witnesses on the part of the Plaintiff who closed her case on 29th May 2013. The Defence commenced their case on 1st July 2013 and I have so far taken the evidence of two defence witnesses and expect to take the evidence of two or three more defence witnesses before the conclusion of the hearing of this suit.

The guiding law on the issue of amendment of pleadings is to be found in **Order 8 rule 5(1)** of the **Civil Procedure Rules, 2010** which provides as follows:

“For the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

This legal provision gives power to this court to allow amendment of pleadings on such terms as are just on all parties concerned. To my mind, it is necessary to consider the purport of the amendment requested for the court to consider whether or not it is just to allow it. In this particular Application, the Plaintiff is requesting this court to allow her to amend her Further Amended Plaintiff by the introduction of a claim for Special Damages amounting to **Kshs. 162,774,082/-** being loss of rental income and a further claim for **Kshs. 50,000,000/-** being mesne profits. There is no doubt in my mind that introducing claims of this proportion fundamentally changes the nature of this suit and the case facing the Defendants particularly having regard to the stage reached in the hearing of this suit. Allowing such amendments to the Plaintiff will no doubt require for this suit to be heard de novo in order to avail the Defendants an opportunity to properly defend themselves from the Plaintiff's new claims. This is not just on the part of the Defendants particularly because there is no guarantee that the Plaintiff will not request for a fourth chance to further amend her plaintiff as the case progresses seeing that she has already amended her plaintiff twice before. It is unjust to subject the Defendants to an endless claim. I do not consider it just to permit this. It must also be

noted that the court itself is also burdened by a never ending suit if it allows the Plaintiff's requests to amend her plaint *ad infinitum*. The hearing of this suit has already been conducted by more than one Judge and the case is now in its final stages of hearing. The Plaintiff has called 7 witnesses and has closed her case. The Defence has called 2 witnesses and will only be calling 2 or 3 more witnesses before closing their case. I am of the view that in the circumstances, it is not just on the Defendants to allow this Application to further re-amend the Plaint. It is incumbent upon the Plaintiff to fashion her case conclusively in the first instance in order to allow the Defendants ample opportunity to prepare their defence. To that extent therefore, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED AT NAIROBI THIS 26TH DAY OF SEPTEMBER 2014.

MARY M. GITUMBI

JUDGE