



REPUBLIC OF KENYA
IN THE ENVIROMENT & LAND COURT OF KENYA

AT KERICHO

CIVIL SUIT NO 18 OF 2015

EUNICE CHEPKORIR SOI.....PLAINTIFF/RESPONDENT

VERSUS

BOMET WATER COMPANY LTD.....RESPONDENT

RULING

This ruling is in respect of the Application dated 5th September 2016. The application filed by way of Notice of motion seeks the following orders:

- i. That there be a stay of proceedings pending further orders of this honourable court and pending the hearing and determination of this application.
- ii. That the Honourable court do set aside the hearing proceedings herein and all consequential orders thereto
- iii. That the Honourable court be pleased to grant leave to the Defendant/Applicant to amend the Defence as shown in the draft amended Defence.
- iv. that the annexed draft defence be deemed as duly filed upon payment of court fees
- v. That the costs of this Application be provided for.

The application is supported by the Affidavits of **JOHN KIPKEMOI KOECH** and **ROGERS MUGUMYA** and is based on the following grounds:

- a. That the amendment is necessary to enable the court effectually and completely adjudicate and settle all questions in dispute involved in the suit.
- b. That the matter proceeded for hearing when pleadings herein were not closed.
- c. That the advocates on record failed to include other pertinent issues in the earlier defence filed.
- d. That it is in the interest of justice that the application be allowed.
- e. That no prejudice will be occasioned to the Plaintiff/Respondent herein if the Application is allowed

f. That the Plaintiff/Respondent has never filed and/or served a reply to the Defence upon the Defendants Advocates. Further to the same, no statement of agreed issues and or Pre-trial questionnaire has ever been filed and/or served upon the Defendant.

g. That it is a settled principle of law that the mistake of an advocate should not be visited upon his client

h. That the Defendant/Applicant has moved with speed to make this application seeking the court's indulgence in allowing it to participate in the merits of the suit upon realization of all the issues as stated above

i. That the Honourable Court has jurisdiction to hear and determine this application and to make such orders as are just in the circumstances herein.

j. That the Defendant/Applicant is ready to abide by any terms that the Honourable court may find fit to make.

k. That the Defendant/Applicant stands to suffer irreparable harm and prejudice. If this application is not allowed while the Plaintiff/Respondent's prejudice, if any can be compensated by way of damages.

In his supporting affidavit **John Kipkemoi Cheruiyot** who is the Managing Director of Bomet Water Company Limited, the Defendant herein, depones that the Plaintiff set the case down for hearing prematurely as pleadings had not yet closed. He further depones that this was occasioned by an error or mistake on the part of the Defendant's advocates. Having noticed the mistake, the Defendant now requests this honourable court to grant them leave to file an amended Defence in order to bring out all the matters in controversy so as to effectually and completely adjudicate all questions in dispute.

The application is further supported by the Affidavit of **Rogers Mugumya**, who is the Defendant's Advocate. He avers that through some inadvertence, he failed to notice that the Defence needed some amendment. He avers that it is necessary to amend the Defence in order to bring out the real issues in dispute in order for the court to effectually and completely adjudicate and settle all questions in dispute involved.

The Respondent **Eunice Chepkorir** opposes the application and has filed a replying affidavit in which she avers that:

1. The application is unmerited
2. The application has been overtaken by events as the matter is at an advanced stage of hearing since both the plaintiff and the defendant have testified
3. The case was certified as ready for hearing
4. The proposed amendments are prejudicial to the plaintiff/ respondent
5. The Applicant has not come to court with clean hands as there is inordinate delay in filing this application

The suit herein is part-heard as the hearing commenced on 26/4/2016. The Plaintiff has closed her case while the Defendant has also testified and called one witness. At the close of the Defendant's case the Plaintiff applied to re-open the Plaintiff's case to avail a copy of the register to land parcel no. **KERICHO/MOGOGOSIEK/527**. Before this could be done, the Applicant filed this application seeking leave to amend the Defence.

Issues for Determination

1. Whether the Application is merited
2. Whether the application has been overtaken by events
3. Whether allowing the Amended Defence will cause injustice to the Respondent
4. Whether the application has been made timeously.

The 4 issues herein will be analyzed on the basis of the applicable law and relevant authorities.

1. Whether the application is merited

The thrust of the Applicant's application is for leave to file an amended Defence out of time.

Order 8 Rule 5 (1) of the Civil Procedure gives the court a wide discretion as far as amendment of pleadings is concerned. This section provides that for the purpose of determining the real question in controversy between the parties or 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 a manner as it directs as to costs or otherwise as are just. This discretion may be exercised at any stage of the proceedings, that is to say, before or at the trial, after the trial, after judgment or on appeal. This position has been restated in various cases notably; **Bosire Ongero Vs Royal Media Services 2015 KLR**. In my considered view, the application is merited as it meets the required standard.

2. Whether the Application has been overtaken by events

The events referred to here are that both the Plaintiff and the Defendant have testified and closed their case although the Plaintiff has applied to recall the Plaintiff for purposes of producing a certain document. The other event is that the matter was prematurely certified as ripe for hearing pursuant to the mandatory provisions of Order 11 Rule 1 of the Civil Procedure Rules.

As stated earlier, Order 8 rule 5 gives the courts a very wide discretion to allow parties to amend their pleading at any stage of the proceedings.

In an attempt to narrow this discretion the High Court in **Nairobi HCCC NO 159 of 1981 PATEL VS AMIN** held that an application for amendment should be made at the earliest possible moment. The Applicant herein has given a satisfactory explanation for the delay in incorporating the proposed amendments in the initial Defence which was occasioned by a change of advocates and inadvertence on the part of his advocate.

Regarding the second issue touching on Order 11 of the Civil Procedure Rules, certification of a case as ready for hearing does not take away the court's inherent discretion under Section 3A of the Civil Procedure Act. In this case it is clear that there was no Reply to Defence filed hence pleadings had not closed when the suit was certified as ready for hearing. This was an error on the part of the Defendant's counsel. It is trite law that the error of an advocate should not be visited on his client.

3. Whether allowing the Amended Defence will cause injustice to the Respondent

The courts would normally not grant a request for amendment of pleadings where the proposed amendment would have the effect of creating a new cause of action which is time-barred. This was stated in **Nzirane V Lukwago 1971 EA 328**.

Furthermore an amendment should ordinarily not be disallowed on the ground that it introduces a new case. However, the court has no power to substitute a cause for another

cause or change the subject matter of the suit as per **Sir Kenneth O’Conner J in Eastern Bakery V Castelino 1958 EA 461.**

The main principle is that amendment should not be allowed if it will cause injustice to the other side. In **Institute for Social Accountability & Another V Parliament of Kenya and 3 Others 2014 KLR** a three judge bench of **Lenaola, Mumbi and Majanja J** stated that *“the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings”*

Lastly, amendments should be freely allowed provided they are not done in bad faith and they do not occasion injustice to the other party which cannot be compensated by way of costs. Justice J.B Havelock in the case of **Daniel Ngetich & Another Vs KRep Bank Limited 2013 KLR** stated that

“Normally the Court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the court.”

Amendments ought to be allowed when

- a. They do not work injustice to the other side
- b. They are necessary for the purpose of determining the real questions in controversy between the parties.

All the authorities lay down precisely the same doctrine that amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are really brought out, the other party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work an injustice.

The proposed Defence raises a fundamental triable issue, namely, whether the suit is statute barred in accordance with S.7 of the Limitation of Actions Act. This question can only be answered if it is pleaded in the Defence. In my considered view this will assist the court in determining once and for all, the real issues in controversy.

I have carefully considered the application, supporting affidavits, Replying affidavit and submissions made by counsel both orally and in writing and I am persuaded that the application is merited and I allow it. In so doing I have relied on the above cited authorities as well as Section 1A and 1B of the Civil Procedure Act.

I accordingly allow the application and direct that the Applicant file their Amended Defence within 7days. The Plaintiff will have the costs of this application.

Delivered, dated and signed at Kericho the 24th day of February 2017.

JANE M. ONYANGO

JUDGE

In the presence of:

1. Mr. Miruka for the plaintiff/Respondent
2. Mr. Mugumya for the Defendant/Applicant