



Shepherd Catering Ltd v Nairobi Holdings Limited & 2 others; Steel Son Limited (Plaintiff); Shepherd Catering Ltd & 2 others (Defendant) (Environment and Land Case Civil Suit 359 of 2004) [2023] KEELC 15799 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 359 OF 2004
LN MBUGUA, J
FEBRUARY 23, 2023**

BETWEEN

SHEPHERD CATERING LTD PLAINTIFF

AND

NAIROBI HOLDINGS LIMITED 1ST DEFENDANT

CHIEF LAND REGISTRAR OF TITLES 2ND DEFENDANT

STEEL SON LIMITED 3RD DEFENDANT

AND

STEEL SON LIMITED PLAINTIFF

AND

SHEPHERD CATERING LTD DEFENDANT

NAIROBI HOLDINGS LIMITED DEFENDANT

CHIEF LAND REGISTRAR OF TITLES DEFENDANT

RULING

1. The 3rd Defendants' (Plaintiffs in the counterclaim) Notice of Motion application dated June 24, 2022 is for determination before this court.

It seeks leave to amend its statement of defence and counterclaim in terms of the draft dated May 15, 2020 filed on September 9, 2020 as well as leave to file and serve witness statements and any other necessary documents.



2. The application is based on grounds on its face and on the supporting affidavit of its principal officer one Joseph Muchoki Waigwa sworn on June 24, 2022. He deposes that the 3rd Defendant requires to amend the defence and counterclaim to include an updated claim for damages following receipt of a report and valuation done on the suit property, adding that they have suffered loss and damages in the last 15 years to date valued in the sum of Ksh 101,161,204.31/=
3. He further deposes that the 1st Defendant in the counterclaim persistently continued to commit acts of trespass, attempted conversion, and acted entirely in breach of the 3rd Defendant's constitutional right to property. To this end, it is necessary to include the report and valuation done on the suit property.
4. In opposition, the Plaintiff who is the 1st Defendant in the counterclaim filed grounds of opposition dated September 19, 2022. It states that it will be deprived of its right to rely on the limitation of actions Act in the event that the amended defence is allowed as the amendments raise an updated claim for damages and loss suffered by the 3rd Defendant in the last 15 years more than 6 years after the period of limitation of such actions. It also contends that the amendments depart from the original pleadings and introduces new claims.
5. The parties did not file their submissions as directed by the court on January 17, 2023.
6. The issues falling for determination are; Whether the amendments sought by the 3rd Defendant departs from the original pleadings and introduce new claims and whether the proposed amendments are time barred under the Limitation of Actions Act.
7. The court has discretion to allow amendments under the provisions of Section 100 of the Civil Procedure Act and Order 8 Rule 5 and 7 of the Civil Procedure Rules. In Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR, the Court of Appeal held that;

“The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”
8. The 3rd Defendant had pleaded that it had suffered loss and damage in its original statement of defence and counterclaim dated February 27, 2009. It particularized mesne profits at Ksh 350, 000/= per month. It has now pleaded additional mesne profits amounting to Ksh 47, 200,000/= and claimed a further Ksh 32 million as costs for damaged items. It is quite apparent that all that the applicant has done is to simply compute the claim for mesne profits in an updated format noting that this case has been in court for close to 19 years! Thus the amendments sought do not by and large change the character of the suit.
9. On the issue of time bar, I find that this is an issue which can be raised in the pleadings and or during the trial. After all, the 1st defendant in the counterclaim will be at liberty to raise the said issue as a response to the amended counterclaim.
10. In H Young & Co (E.A) Ltd & another v James Mwangi & another [2017] eKLR the Court stated as follows;

“In the instant case, I note that the only part of the plaint that the plaintiffs seek to amend is the pleading on special damages. It is trite law that special damages must not only be pleaded but must also be proved. In my humble view, the amendment sought by the plaintiffs is within the same set of facts already pleaded in the plaint in which case, the defence of limitation of actions does not arise and even if it did, limitation of actions is a matter of



evidence which the Defendants will still have an opportunity to raise at the hearing as has been stated”

11. In the final analysis, this court allows the application dated June 24, 2022 in the following terms;

1. Leave is hereby granted for the draft Amended defence and Counter Claim dated May 15, 2020 to be deemed as properly filed and served upon payment of the requisite fees; the same to be paid within 15 days from the date of this ruling, otherwise the leave granted herein shall lapse.
2. The plaintiff in the CounterClaim is granted leave to file and serve any further witness statements and documentary evidence by March 10, 2023.
3. The 1st defendant in the Counterclaim is at liberty to file and serve their defence to the CounterClaim and any witness statement and documentary evidence by March 24, 2023.
4. The costs of the application shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF FEBRUARY, 2023
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

CN Kihara for 3rd Defendant

Hasnah holding brief for Guto Mogerie for plaintiff

