



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO 106 OF 2017**

**MOHAMED GODANA JARSO**

**T/A DAL INTERNATIONAL HOTEL.....PLAINTIFF**

**VERSUS**

**MAXWELL OTIENO ODONGO.....DEFENDANT**

**RULING**

1. Before me for determination is the Plaintiff's Application by way of a Notice of Motion dated the 17<sup>th</sup> May 2017 wherein the plaintiff inter alia seeks to amend his plaint in terms of draft amended plaint so as to enable the court to determine the real issues in controversy between the parties.
2. The Application is brought under Order 8 rule 3(1), order 51 Rule 1, of the Civil Procedure Rules and Section 1A, 1B of the Civil Procedure Act, as well as section 3 of the Environment and Land court and all other enabling Provisions of the law and is supported by an affidavit sworn by Mr. Mohamed Goanna Jarso on the 17<sup>th</sup> May 2017.
3. Mr. Mohamed Goanna Jarso deposes that;
  - i. The proposed amendments will assist the court to determine the real issues in controversy between the parties herein and arrive at a just conclusion.
  - ii. That the amendment will not raise any new issues(s) except amending the Plaintiff's prayers in the plaint.
  - iii. That the amendments will not prejudice the defendant.
  - iv. The Court has the discretion to allow amendments sought
4. In response to the plaintiff's application the Defendant filed his Grounds of Opposition dated the 22<sup>nd</sup> May 2017 in which he deponed that;
  - i. The application was brought after inordinate delay.
  - ii. The amendment introduces new claim which is barred by operation of the law.
  - iii. The application is not made in good faith and as such, it should be dismissed.
5. On the 2<sup>nd</sup> May 2017 and this court gave directions that the Plaintiff's Application dated 17<sup>th</sup> May 2017, for leave to amend the plaint be heard together with the defendant's Ground of Opposition.
6. The application was argued by Miss Waititu, counsel for the plaintiff, while Mr. Yogo represented the defendant.
7. Briefly, the background of the Plaintiff's case referred to land parcel No. KSM Municipality/block7/297 wherein the parties had entered into an agreement for lease of the premises for 3 years with one of the terms being that the plaintiff renovates the premises and informs the defendant of the said renovations after which parties would reach an agreement on how the monies used for the renovations was to be recovered.

8. That although the plaintiff met his terms of agreement on the renovation and tried to reach out to the defendant, there was no response and that next thing the plaintiff saw were auctioneers who had gone to levy for distress for rent to recover rent arrears.

9. The plaintiff filed the present suit together with an Application seeking orders of injunction against the defendant from levying for Distress for Rent.

10. That on the 16<sup>th</sup> October 2007 an order was issued following a consent recorded by the parties that the Plaintiff pays a monthly sum of Ksh. 100,000/= as rent to the Defendant which he has continued to pay, and further that he pays a sum of Ksh.1,000,000 to Defendant the as rent arrears. The issue of the rent arrears was therefore resolved and the plaintiff has continued to pay his rent but the plaint was not amended.

11. The plaintiff's prayer is therefore to amend his plaint more so on prayer (a) so as to cater for monetary value as compensation for all the improvement and/or renovations carried out on the suit premises.

12. That any judgment rendered at this stage based on the plaint, as it now is, shall only be academic and would not really determine the controversy between the two parties.

13. The application was opposed by counsel for the Defendant while relying on their filed grounds of opposition to the effect that the application has been brought after inordinate delay the plaint having been filed in the year 2007. That the amendment introduces a new claim which is barred by the law. That the lease agreement was signed in the year 2005 and was to expire after 3 years in 2008. That the Plaintiff has been in occupation of the suit premises after the expiry of the lease by virtue of the order made of status quo being maintained pending the hearing of the suit.

14. That the application has been filed to enable the plaintiff to continue his stay on the suit land beyond the lease period. There has not been any offer to vacate the premises as they pursue the issue of the so called cost of repair which shows lack of good faith.

15. The defendant then invited that court to look at the lease agreement so as to satisfy itself that nowhere was the issue of cost of repairs to be recovered from the rent factored.

16. That the application was to further prolong the case to enable the Plaintiff to continue staying on the suit premises beyond the lease period.

17. A rejoinder by counsel for the plaintiff was that the issues raised were already before court for adjudication and is not a new claim and as such that the application is time barred is unmerited.

18. The Plaintiff has continued paying rent which is not a sign of bad faith and in his draft plaint he has stated that he is willing to vacate the suit premises within 90 days of the determination of the suit or upon any day determined by the court. His continued stay at the suit premises as per the orders of the court for parties to maintain the status quo until determination of the suit and to ensure that the money spent on the renovations is refunded by the defendant.

19. The plaintiff objected to the defendant's grounds of oppositions and prayed for their application to be granted.

20. I have considered arguments by counsel for both parties, as well as the law on this subject. In essence, the court has been called upon to either allow the application to an amendment to the plaint or deny leave to amend the same and strike out the application altogether.

21. The Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. The general power to amend pleadings is granted by **section 100** of the *Civil Procedure Act* which is the substantive law and its handmaiden **Order 8 Rule 5 of the Civil Procedure Rules** which reads 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.*

22. The above provision of the law expressly provides that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case. However, the said discretion must be exercised judiciously.

23. The discretion of the court should thus be guided by the following broad criteria:

24. That the amendment would be necessary for purposes of determining the real question or issue raised by the parties; and

25. If it is just to do so. Section 3A of the Civil Procedure Act which stipulates the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the court's process.

26. In the case of **Eastern Bakery vs. Castelino [1958] E.A. 461**, Sir Kenneth O'Conner, President of the then Court of Appeal for Eastern Africa, said at p. 462 –

*“It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”*

27. I have looked at paragraph 7 and 8 of the plaint as well as paragraph 12 of the draft amended plaint and I am in agreement with counsel for the plaintiff the said draft amended plaint does not introduce new issues and/or claim to the suit as submitted by counsel for the Defendant.

28. Further, the Respondent has not demonstrated what injustice, if any he will suffer if the applicant is granted leave to amend his plaint. On the contrary, if such leave is granted, the respondent will be granted corresponding leave to amend its defence, if he so wishes.

29. The continued stay at the suit premises by the Plaintiff is as per the orders of 16<sup>th</sup> October 2007 for parties to maintain the status quo until determination of the suit.

30. Lastly, I find that the amendment of pleadings is necessary for determining the real question in controversy which in turn will avoid a multiplicity of suits.

31. On the issue of delay, this court is guided by the holding of the Court of Appeal in the case of **Central Bank Limited vs. Trust Bank Limited (2000) 2EA 365**, where the Court of Appeal observed as follows:-

“The overriding consideration in applications for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.” Emphasis my own.

32. The up short of all the above is that I exercise my discretion and dismiss the defendant’s grounds of opposition. I allow the plaintiff’s application to amend his plaint and grant him leave of 21 days from the date of this ruling to file a properly amended plaint. I also grant him leave, on the court’s own motion, to file amended witness statements, if need be.

33. The defendant is also granted corresponding leave to file his amended defence, if need be, within 14 days from the date of service of the amended plaint.

*Dated and delivered at Kisumu this 31<sup>st</sup> day of July 2017.*

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**