

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CIVIL SUIT NO. 264 OF 2012

DAVID MWANGI NDIRANGU.....PLAINTIFF/APPLICANT

-VERSUS-

ANN WAITHERA WANYOIKE.....1ST DEFENDANT/RESPONDENT

JACINTA WANGUI T/A SILVER BUTCHER.....2ND DEFENDANT/RESPONDENT

CATHERINE NJOKIT/A BACK STREET PUB.....3RD DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant moved this Court vide a notice of motion dated 6th October 2016. In the motion, the applicant seeks leave to amend the plaint to bring in two new defendants. He also sought for an order of temporary injunction restraining the Respondents from erecting, renovating or altering the building which is located on plot No 2848 pending the hearing and determination of this suit.

2. The application is opposed by the defendant and the intended 2nd defendant. The defendant deposed that this application was filed after 4 years from date of filing the suit which is undue delay. That pre – trial directions have closed and the amendment would change the character of the suit against her. She denied being a trespasser or that she is erecting structures on the property.

3. The proposed 2nd defendant on her part deposed that she is a lawful tenant since 2007. That the proposed amendment is intended to deprive her of her rights as a protected tenant as the alleged renovations are mere routine maintenance works of the premises. She urged the Court to strike out the application for being incompetent.

4. Both advocates submitted on the application and I have read the said submissions. I have also perused the record and noted that the defendant filed her defence on 18th December 2012. On 16th June 2015 the defendant was given 21 days to comply with order 11 of the Civil Procedure Rules. She is yet to do so and therefore cannot allude to the fact that pre – trial directions was undertaken and closed. Although the matter was subsequently listed for hearing, the same was adjourned on account of illness of the defendant's advocate. So in as much as the application for leave to amend was filed 4 years late, the matter is still fresh.

5. I have also looked at the proposed amendments. It is only introducing two additional parties but the prayers remain the same. It is thus not true for the defendant to plead and submit that the intended amendment will alter the cause of action against her. The plaintiff is in essence seeking orders of vacant possession on account of a claim as a purchaser. This means that the cause of action is the same. Further the issue raised by the proposed 2nd defendant that she is a protected tenant can be taken up in her defence. Before she is joined as a party to this proceedings it is my considered opinion that she has no basis to oppose the application for amendment.

6. It is well settled in law that Courts will generally not refuse leave to amend unless the intended amendment will prejudice the defendant and or deny a party the defence of limitation. In regard to

prejudice, all the defendants will have an option of leave to amend their defence and/or file a statement of defence as the case may be. As regards defence of limitation none has been disclosed in the replying affidavits filed. Accordingly I find no reason to refuse the request for amendment. Consequently the plaintiff is granted leave to amend his plaint and file and serve the same within 15 days of the delivery of this ruling.

7. On the prayer for temporary injunction, no evidence was put before the Court to show the so-called illegal ongoing constructions and or wasting of the suit property. In any event the applicant has asked for an order for demolition of the structures in the main suit. There is no proper basis laid out to support this limb of the application. The same is disallowed i.e. prayer for temporary injunction. In conclusion the application succeeds in part to the extent that leave to amend is granted. Costs of the application to abide the outcome of the main suit.

Dated & signed at Mombasa this 28th day of June 2017

A. OMOLLO

JUDGE

Delivered at Mombasa this 29th day of June 2017

C. YANO

JUDGE