



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**ELC CASE NO 50 OF 2018**

**ROSE MWONGELI WAMBUA.....APPELLANT**

**VERSUS**

**JOHN KILUNGU MBONDO.....RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 1<sup>st</sup> of August 2021, brought under Order 8 Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, the applicant herein sought for the following orders:-

**a. That the Honourable court be pleased to allow the Applicant amend the Plaintiff.**

**b. That the cost of the application be provided for.**

2. The application is premised on the grounds on the face of the application namely: -

**a. That the amendment is necessary for the determination of the real issues.**

**b. That the amendment is necessitated by the actions of the respondent.**

3. The application is further supported by the affidavit of Rose Mwongeli Wambua sworn on the 1<sup>st</sup> day of August 2019. The applicant averred that the issues sought to be included in the proposed amended plaintiff came to her knowledge in the course of these proceeding. She further averred that the amendment would bring out the real issues and that no prejudice would be occasioned to the Defendant.

4. The application is opposed vide the Respondent's replying affidavit sworn on the 13<sup>th</sup> of August 2021. The Respondent averred that the application is an afterthought, frivolous, vexatious and an abuse of the court process. He asserts that he had already filed an application to have the suit struck out as the plaintiff had filed a similar suit namely Makueni ELC No. 502 of 2017 which was dismissed for non-attendance, which orders were yet to be set aside or reviewed. He contends that what was pleaded in paragraph 3a and 3b of the amended plaintiff has always been in the knowledge of the Plaintiff and therefore not a discovery of a new matter. He further argued that the present application has been made to circumvent or scuttle the Respondent's application to strike out the Plaintiff's suit. He contends that the amendment sought does not change the contents in the plaintiff in ELC No. 202 of 2017 or the substance of the plaintiff.

5. The parties were directed to canvass the application by way of written submission. Both parties filed their written submissions on the 11<sup>th</sup> of November 2021 which I have considered.

### **ANALYSIS AND DETERMINATION**

6. I have considered the application, the supporting and replying affidavit and the written submissions by the parties herein and I find that the only issue for determination is whether the applicant is entitled to the orders sought.

7. The law as regards grant of leave to amend pleadings is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The main principle is that an amendment should not be allowed if it causes injustice to the other side.

8. The Court of Appeal set out the principles under which courts may grant leave to amend pleadings in the case of **Ochieng and Others –vs- First National Bank of Chicago Civil Appeal No. 147 of 1991** where it held that:-

**a. The power of the court to allow amendment is intended to determine the true substantive merits of the case.**

**b. The amendments should be timeously applied for.**

**c. Power to amend can be exercised by the court at any stage of the proceedings.**

**d. That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate to other side**

**e. The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to reply on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of the current period of limitation.**

9. In the instant case, the Respondent contends that the amendment is an afterthought, frivolous, vexatious and an abuse of the court process. The Respondent submitted that the amendment sought in paragraph 3a and 3b of the draft amended plaint are issues which have always been in the knowledge of the Plaintiff and therefore does not amount to discovery of a new matter. He argues that the amendment sought does not change the substance of the plaint as earlier claimed in Makueni ELC No. 202 of 2017 which was dismissed for non-attendance. It was further argued that the delay in prosecuting the present application had not been explained.

10. The Applicant does not dispute the fact ELC No. 202 of 2017 was dismissed for non-attendance. The plaintiff proceeded to file the instant suit. The Respondent has not demonstrated or indicated what particular prejudice if any that he will suffer if the amendment is allowed or he will not be adequately compensated if the amendment is allowed at this stage. In the present suit pre-trial directions have not been taken.

11. The court has inherent power under section 3A of the Civil Procedure Act to permit a party to amend his or her pleadings at any time before judgment. The overriding consideration in an application for leave for amendment is whether the amendment sought is necessary for determining the real question in controversy and whether the amendment will prejudice the opposite party. In the instant case, I find that the application is merited and that the defendant will not be prejudiced in any way.

12. The upshot of the foregoing is that the Notice of Motion Application dated 1<sup>st</sup> of August 2021 is allowed as prayed in the following terms:-

**a. That the amended plaint be filed and served within 14 days from the date hereof.**

**b. That the Respondent is hereby granted leave to file an amended defence within 1 days after service**

c. That the Applicant shall meet the cost of this application.

**RULING DELIVERED, READ, DATED AND SIGNED VIRTUALLY THIS 15<sup>TH</sup> DAY OF DECEMBER, 2021**

.....

**HON. T. MURIGI**

**JUDGE**

**IN THE PRESENCE OF:**

Kemboi – court Assistant

Sila for the Defendant



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