



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 53 OF 2013**

**JACKSON ODUORI OKWARO.....PLAINTIFF/APPLICANT**

**= VERSUS =**

**ALI MALALA WAMUKOYA.....DEFENDANT/RESPONDENT**

**RULING**

1. The application for determination before me is a motion on notice dated 12/11/2018 and filed in court on 13/11/2018. It is brought under Order 8 Rule 3 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act (cap 21). The Applicant – **JACKSON ODUOR OKWARO** – is the Plaintiff in the suit while the Respondent – **ALI MALALA WAMUKOYA** – is the Defendant. The application came with three prayers, which are as follows:

- (1) That leave be and is hereby granted to the Applicant to amend his plaint.
- (2) That the annexed amended plaint be deemed as being duly filed and properly on record pending payment of the requisite court fee.
- (3) That costs be in the cause.

2. The grounds on which the application is anchored state, *inter alia*, that the pleadings have closed and leave of court is therefore necessary and that the amendment is necessary so as to bring out issues with clarity for determination on merits. In the supporting affidavit that came with the application, it was deposed, *inter alia*, that the proposed amendment is not prejudicial to the administration of justice and that it is in the interests of both parties that the amendment be undertaken.

3. The Respondent responded *vide* grounds of opposition dated 20/11/2018 and filed on 21/11/2018. It was averred that the Respondent stands to be prejudiced as the case is part-heard and the Plaintiff has closed his case. It was also said that there are related suits here in Busia which are still pending. According to the Respondent, there is no new issue in controversy to necessitate amendment.

4. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 15/1/2019. According to the Applicant, the amendment sought is not aimed at changing the cause of action. It was stated that it is necessary to include specific prayers in the plaint to enable the court to determine the real issues in question. The Applicant submitted that there was a mix-up in the prayers sought and it is necessary to rectify the situation. It was further submitted that no party will suffer prejudice if amendment is allowed.

5. The submissions of the Respondent were filed on 16/1/2019. It was reiterated that the Respondent will be prejudiced. It was emphasised that there are related suits pending and that there is no new issue in controversy to warrant amendment. The application was said to be an abuse of the court process.

6. I have had a look at the suit as filed. I am cognizant of the stage at which the amendment is sought. And I have considered the application, the response made, and the rival submissions. I do not agree that the Respondent will be prejudiced. His defence is only starting. The Applicant is not seeking to change the cause of action. A look at the draft amended plaint shows that the amendment sought serve to make things clearer and more specific. The draft amended plaint is more detailed and its focus as a cause of action is more clearly founded on the tort of fraud.

7. The law is clear. The court has a wide discretion to allow amendment in order to determine the real question in dispute and/or do substantial justice. The amendment can be sought at any stage but within reasonable time provided the other side can be compensated with costs.

8. The circumstances under which amendment can be allowed are many and varied. Each case usually depends on its own facts. But its necessary to point out that amendment cannot be allowed to change the character of the suit. The amendment should flow the existing or the original suit. And this is precisely what I see here.

9. In all cases, amendment should be sought in good faith and the court will not allow amendment if it finds that the Applicant is hell-bent on abusing the court process. And it may amount to abuse of the court process if the proposed amendment is immaterial, useless or merely technical. I do not find this to be the position regarding the amendment sought in this case.

10. I take the position that any injury or prejudice that the Defendant may suffer can be compensated by way of costs. I also take the position that the amendments shown in the draft amended plaint are meant to serve the interests of justice.

11. Without much ado therefore, I make a finding that the application herein is meritorious. I hereby allow the application in terms of prayers 2 and 3. The Applicant however will pay costs of the application.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of July, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff/Applicant: Absent

Defendants/Respondent: Absent

Counsel for the Plaintiff/Applicant: Absent

Counsel for the Defendant/Respondent: Present

Court Assistant: Nelson Odame