



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

LAND & ENVIRONMENTAL DIVISION

ELC NO. 37 OF 2012

PAUL OPIYO.....PLAINTIFF

VERSUS

CHRISPINUS OJIAMBO1ST DEFENDANT

SYLVESTER JUMA OPADO.....2ND DEFENDANT

RONEX KUNDU OPADO3RD DEFENDANT

JOSEPH MBIYE OCHUBE.....4TH DEFENDANT

JOSHUA AUMA OCHUBE.....5TH DEFENDANT

THE LAND REGISTRAR, BUSIA COUNTY.....6TH DEFENDANT

THE HON. ATTORNEY GENERAL.....7TH DEFENDANT

R U L I N G

1. The application before me is a Notice of Motion expressed to be brought under Order 1 Rule 3 and Order 8 Rule 3 of Civil Procedure Rules and all other provisions of law. The application is dated 2/9/2016 and the Applicant, who is Plaintiff in the suit, filed it on 5/9/2016. The Applicant is **PAUL OPIYO** and the application is filed against the Respondents **CHRISPINUS OJIAMBO (1st Respondent)**, **SYLVESTER JUMA OPADO (2nd Respondent)**, **RONES KUNDU OPADO (3rd Respondent)**, **JOSEPH MBIYE OCHUBE (4th Respondent)**, **JOSHUA AUMA OCHUBE (5th Respondent)**, **The Land Registrar, Busia County (6th Respondent)** and the **Hon. Attorney General (7th Respondent)**. Of these parties, the 6th and 7th Respondents are intended to be enjoined in the suit. The 1st Respondent was a party at the time of filing but the capacity in which he was sued had not been stated.

2. In the application various orders are sought as follows:

Prayer 1: That the Plaintiff/Applicant be granted leave to amend the plaint.

Prayer 2: That the Plaintiff/Applicant be granted leave to join the Land Registrar, Busia County and the Hon: Attorney General as 6th and 7th Defendant respectively in this matter.

Prayer 3: That the annexed amended plaint be deemed to be duly filed.

Prayer 4: That costs be in the cause.

Prayer 5: That this honourable court be pleased to issue any other or further orders as it may deem fit and just to grant.

3. The parties are tussling over land **Parcel No. BUNYALA/BULEMIA/253** ("disputed land" hereafter) and the Applicant claims he solely owns the land but the land register erroneously shows one Ojiambo Odongo as a co-owner. The said Ojiambo Odongo is deceased and the 1st Respondent is his legal representative. The Land Registrar and the attorney General are said to be necessary parties for purposes of executing the orders the court may give. The Land Registrar in particular was singled out as a necessary party required to explain how the

alleged error in the Land Register occurred.

4. The application was opposed vide a replying affidavit dated 17/10/2016 filed in court on the same date. In the replying affidavit, it was stated, *interalia*, that the Applicant had filed an application for injunction earlier. That application was dismissed. Parties were also said to have met at a venue in presence of their counsels where an agreement on settlement was reached. The Applicant is said to have reneged on that agreement later and while doing so, he also abandoned his counsel then on record. The amendment proposed was said to serve no useful purpose given that what the Applicant seeks to change took place during first registration. Continuation of this case itself was said to be an exercise in futility as parties have already reached an agreement that the disputed land be subdivided. The Respondents are said to have already acted on that.

5. The application was canvassed by way of written submissions. The Applicants submissions were filed on 13/11/2017. The approach taken and reasons given are not different from what was stated in the application. It was pointed out that the Applicant is pleading for justice and this can only be achieved if the prayers sought in the application are granted.

6. The Respondents submissions were filed on 7/11/2017. It was submitted, *interalia*, that the application lacks merit and should be dismissed. The Respondent sought to rely on his response to the application filed earlier.

7. I have considered the application, the response made, the rival submissions, and the suit as generally filed. The paramount consideration behind all amendments is that courts should try the merits of the cases before them and should therefore allow all amendments that may be necessary for determining the real issues in controversy. The law however enjoins that such amendments should not cause prejudice or injustice to the other side. But it is not every whiff of injustice or inconvenience that will impede amendments. The courts should always consider whether any alleged injustice or inconvenience can be compensated by way of costs.

8. Grant or refusal is in the discretion of the court. But like all other discretions, that discretion has to be exercised judiciously and upon settled principles. Ultimately however, it's important to realise that courts exist to do justice and amendments should always be allowed in the larger interests of justice.

9. In this matter, it has been alleged that parties had reached a settlement. In fact, one of the annexures to the Respondent's replying affidavit is a letter dated 8/5/2014 referring to the various terms of the alleged settlement. It is important to realise that the alleged terms of settlement do not make reference to withdrawal of this case from the court. No compromise of the case at all is also mentioned.

10. Bearing this in mind, and noting that the Applicant later on reneged even on the terms expressly agreed on, this case then becomes one that is for trial and determination. Amendment then remains one of the things that can happen to the case.

11. I have also considered the reasons given in the Respondents response to the application. In my view, these are reasons that may be useful for final determination of the case. They are not reasons that can be used to deny or refuse amendment.

12. In light of the foregoing, the application herein is found to have merits and prayers 1, 2, and 3 are granted. On the issue of costs (prayer 4) however, the Applicant should bear the costs of the application. And this is ordered because what the Applicant seeks to achieve in amendments is something which he should have done while filing the case if he had exercised due diligence.

Dated, signed and delivered at Busia this 21st day of February, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendants:

Counsel of Plaintiff:.....

Counsel of Defendants: