



REPUBLIC OF KENYA

IN THE HIGH COURT AT KERICHO

E.L.C NO. 94 OF 2015

THOMAS KIPRUTO MARITIM PLAINTIFF/APPLICANT

-VERSUS-

SAMWEL CHELUGET DEFENDANT

RULING

Introduction

1. What is before me is the Plaintiff's Notice of Motion Application dated 2nd February 2018 seeking the following orders;

1. **THAT** the plaintiff/applicant be granted leave to amend the plaint as set out in the draft Amended plaint annexed.
2. **THAT** the cost of this application be provided for.

2. The application is supported by the Plaintiff's affidavit sworn on 2nd February, 2018.

The main reason for seeking to amend the plaint is that the Defendant has during the pendency of this suit obtained a titled deed of the suit land in his name and therefore the initial claim for trespass against him is not tenable. The Plaintiff therefore wishes to amend the plaint to plead fraud against the Defendant.

3. The application is opposed by the Defendant through his replying affidavit sworn on the 20th June, 2018. In the said affidavit he explains how he came to be registered as the owner of the suit land while the case was pending in court. The long and short of it is that his son Erick Kipyegon who was the original owner of the suit land disappeared in India and has not been seen or heard of since 1999. This prompted the Defendant to move the court to have him presumed dead in accordance with the provisions of section 118A of the Evidence Act and Law of Succession Act. The court thereafter issued a declaratory order presuming the defendant's son dead. Upon obtaining the said order, the Plaintiff proceeded to apply for a Grant of Letters of Administration after which he had the suit property transferred to him through the process of transmission.

Issues for Determination

4. The main issue for determination is whether the Plaintiff ought to be granted leave to amend his plaint.

Analysis and Determination

5. Order 8, Rule 3 of the Civil Procedure Rules provides as follows:

Amendment of pleadings with leave

(1) Subject to Order 1, Rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

[Order 8, rule 5.] General power to amend.

5. (1) 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”

6. In the case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, Lenaola, Mumbi and Majanja JJ while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

7. What can be gleaned from the above case is that the Court has a wide discretion to amend pleadings at any stage of the proceedings so as to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.

8. I have carefully considered the application, affidavits and submissions of both counsel. Even though I appreciate the Defendant’s frustration considering the long and winding route that this matter has taken, I find the application meritorious and I grant it and make the following orders:

- a) The Plaintiff is granted leave to amend his plaint in terms of the annexed draft amended Plaintiff attached to the application dated 2.2.2018.
- b) The said Plaintiff shall be deemed and served upon payment of the requisite court fees.
- c) The Defendant shall file and serve his amended Defence within 21 days.
- d) The costs of this application shall be borne by the Plaintiff.

Dated, signed and delivered at Kericho this 30th day of August, 2018.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Odhiambo for the Defendant
2. Miss Sitati for the Plaintiff
3. Court assistant - Rotich