



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

CIVIL SUIT NO.55 OF 2009

**CATHOLIC DIOCESE OF
KERICHO.....PLAINTIFF/APPLICANT**

VERSUS

JAMES TAPKEI

MAURICE OGWANG

ANDREW ROTICH

DAVID TUTTO (*All sued on their own behalf and on behalf of the Management Committee and the Parents*)

***Teachers Association, Sacred Hearts Catholic Primary School.....*DEFENDANTS/RESPONDENTS**

R U L I N G

(Application to amend plaint to enjoin another party; application made after matter is partly heard; whether such application may be allowed; amendment can be allowed at any time of the proceedings; no prejudice which cannot be compensated by an award of costs; application allowed.)

The application before me is that dated 9th June, 2015 brought under the provisions of **Section 3A** of the **Civil Procedure Act**; **Order 1 Rule 10** and **Order 8 Rules 3, 5, and 7** of the **Civil Procedure Rules**. It is an application seeking leave to amend the plaint. The application is opposed and before I go to the main issues raised, I think it is necessary to give a little background leading to this application.

This suit was commenced by way of plaint filed on 24th June 2009. The suit as originally filed (for there have been other amendments along the way) was filed by the Catholic Diocese of Nakuru as 1st plaintiff and the Catholic Diocese of Kericho as 2nd plaintiff. The named defendants were four, James Tapkei, Maurice Ogwang, Andrew Rotich and David Rutto all sued on their own behalf and on behalf of the Management Committee and the Parents Teachers Association, Sacred Heart Catholic Primary School. It was pleaded that the 1st plaintiff is the registered owner and the 2nd plaintiff is the beneficial owner of the land parcel L.R No. 631/277 which they hold and use for the benefit of the members of the Catholic Church within the Diocese of Kericho. It was pleaded that in the year 2005 or thereabouts, the defendants fraudulently registered the Sacred Heart Catholic Primary School (the School) using the name of Sacred Heart Catholic Church without the consent of the Bishop of the Catholic Diocese of Kericho. It is alleged that they then took possession of some of the plaintiffs' buildings and established the School. It was

pleaded that the defendants are now running and operating the School on the plaintiffs' land without their consent. In the suit, the plaintiffs sought judgment against the defendants *inter alia* for a declaration that the plaintiffs are the lawful owners of the suit property and an order of eviction to remove the School from the suit land.

The defendants entered appearance and filed defence . They *inter alia* denied that the plaintiffs are the registered and beneficial owners of the suit property and asked that the suit be dismissed.

Through an application dated 22nd June 2011, the plaintiffs sought to amend the plaint which application was allowed on 5th October 2011 and an amended plaint filed on 17th October 2011. The gist of the amendment was to remove the Catholic Diocese of Nakuru as 1st plaintiff, thus leaving the Catholic Diocese of Kericho as the sole plaintiff. The amendment also introduced into the case, a second property, that is Kericho Municipality Block 5/220. The case of the plaintiff still remained that the defendants have encroached into the original land parcel L.R No. 631/277 and the newly introduced land parcel Kericho Municipality Block 5/220. An amended defence was filed which basically maintained the original defence.

The parties complied with pretrials and the suit was set down for hearing on 27th February 2014, before my predecessor, Waithaka J. Only one witness testified but he did not complete his evidence in chief as he was stood down. I took over the matter from Waithaka J, owing to her transfer to another station, and I directed that the matter do start afresh. On the day of the hearing, Mr. Kiplenge for the plaintiff, stated from the bar that the plaintiff will confine itself to the claim over the land parcel Kericho Municipality Block 5/220. Counsels made their opening statements and the hearing of the suit commenced. The plaintiff's first witness testified on 5th May 2015 and was cross-examined on the same day and on 7th May 2015. The matter was then adjourned to 25th May 2015 but counsel for the plaintiff was not ready on that day and the matter was adjourned to 28th May 2015 for the evidence of the plaintiff's second witness. It is on this day that Mr. Kiplenge signaled that before he proceeds, he would wish to amend the plaint and I directed that an application be filed.

In the application, I have seen that what the plaintiff wants to do is to enjoin more defendants to the suit. The plaintiff intends to add five persons, who collectively are the officials of Sacred Heart Community Welfare Group. It is said that this Welfare Group has a title to the suit property which is fraudulent and therefore it is necessary to sue them as well in the matter.

The defendants opposed the application through the Replying Affidavit of James Tapkei. He has *inter alia* stated that the matter started in the year 2006 but at no time has the Welfare Group been sued. He has also gone at lengths to attempt to demonstrate that the plaintiff does not deserve title to the suit property. He has averred that the plaintiff intends to introduce another party to the proceedings when the matter has already taken off and that the new party will be condemned unheard since a witness has already testified. He has deposed that the new party will be highly prejudiced.

Both counsels filed written submissions. Mr. Kiplenge, learned counsel for the plaintiff, *inter alia* submitted that the amendment sought is being done in the interests of justice so that the real issues in controversy are brought out. He submitted that the Civil Procedure Rules do not limit the number of times a party can amend his pleadings and that amendment can be done at any time before judgment. He relied on a number of authorities to support his cause.

Mr. Nyaingiri, learned counsel for the defendants, on his part submitted *inter alia* that it has taken the plaintiff 6 years to realize that the defendants are not registered owners of the suit land. He submitted that this came out during the hearing of the matter. He submitted that the amendments raise totally new issues that have nothing to do with the defendants. He was of the view that the amendments are not necessary and that they would take away the defendant's right to a fair trial. He also made submissions which in my view attempt to justify the case of the defendants.

I have considered the matter. The application is for amendment of plaint. The general power to amend is contained in **Section 100** of the **Civil Procedure Act, CAP 21**, which is drawn as follows :-

Section 100. General power to amend

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

It will be observed from Section 100 above that an amendment may be allowed at any time. The essence of allowing an amendment is so that the real questions or issues in controversy are permitted into the proceedings so that the same may be litigated. The provision in Section 100 is elaborated in Order 8 of the Civil Procedure Rules of 2010. For our purposes, I think Order 8 Rule 3 is illuminative. It provides as follows :-

3. Amendment of pleading with leave [Order 8, rule 3.]

(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.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

I also think that for the circumstances surrounding this application, the provisions of Order 1 Rule 10 are important. The same is drawn as follows :-

10. Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or

defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall

A look at Order 8 Rule 3 (1) will demonstrate that an amendment can be allowed at any stage of the proceedings and Order 1 Rule 10 does allow the addition of parties to a suit. It will therefore be appreciated that a party can be allowed to amend his pleadings even where a matter has commenced, even where the amendment seeks to introduce a new party. Amendments are of course subject to the discretion of the court and it is not a foregone conclusion that all applications for amendment must be allowed. The mandate of the court is weigh the merits of the application and exercise its discretion in a manner that does justice to the parties. There is no question that at times amendments may prejudice the other party to the suit, but this does not mean that in such case an amendment cannot be allowed. It may be allowed unless the prejudice to the party will cause a significant injustice which cannot be compensated by way of costs. Every application for amendment has to be determined upon the special circumstances of each case.

In our case, the matter has partly proceeded and I appreciate that there may be some prejudice to the defendants. However, I think this prejudice is far outweighed by the need to allow the plaintiff to plead her case as she so wishes. The case of the plaintiff in this suit is for recovery of certain property which it believes belongs to her and ought to be registered in her name. It is averred that the property being claimed is now registered in the name of the proposed new defendants. If I deny the plaintiff the opportunity to amend, clearly, I will be shutting her out from claiming the property that she wants to assert title to. That to me will occasion the plaintiff a great injustice. I do not see any injustice being visited upon the existing and new defendants which cannot be compensated by an award of costs. On the concern that the matter is partly heard, the case, if necessary, can be started afresh so that the new defendants can participate in the proceedings. The essence is to ensure that all parties are given an opportunity to be heard and to present their case in full as they so wish.

Given my above discourse, I do allow the application to amend. I direct the plaintiff to file the amended plaint within 14 days and serve it in the usual manner. Upon service, the new defendants have 21 days to file their defence and the existing defendants a similar period in the event that they feel the need to amend their defence. The plaintiff will however shoulder the costs of this application.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 29TH DAY OF JANUARY, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of:

1. Mr. Brian Langat holding brief for Mr. Kiplenge for the plaintiff/applicant.

2. Mr. T.M.O Nyaingiri for the defendants/respondents.