

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. NO. 545 OF 2010

PAUL NG'ANG'A NDUNGU..... PLAINTIFF

VERSUS

STEPHEN WAINAINA WANG'OMBE.....1ST DEFENDANT

REGISTRAR OF TITLES.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 5th November 2013 in which the Plaintiff/Applicant seeks for an order allowing him to amend his plaint as per the amended draft annexed.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff, Paul Nganga Ndungu, sworn on 5th November 2013, in which he averred that he seeks for enjoin the Attorney General of Kenya into this suit as he is the Chief Legal Advisor and legal representative of the Republic of Kenya. He added that he has a good case against the defendants jointly and severally and that the defendants would not suffer any prejudice if this Application is allowed.

The Application is contested. The Intended 3rd Defendant filed his Grounds of Opposition dated 15th September 2014 in which he stated that the Plaintiff did not give the intended 3rd Defendant the mandatory statutory notice of intention to use in compliance with **section 13A of the Government Proceedings Act, Cap 40**. On that ground, the intended 3rd Defendant sought the dismissal of this Application.

In response thereto, the Plaintiff/Applicant filed his Further Supporting Affidavit sworn on 19th September 2014 in which he stated that it is not true that he failed to comply with **section 13A of the Government Proceedings Act** stating that he in fact did serve the Attorney General with the relevant notice as required. He annexed a copy of the notice dated 24th August 2010 duly served upon the Attorney General.

Both the Plaintiff and the 1st Defendant filed written submissions. The Plaintiff submitted that any party to pleadings was free to amend his pleadings at any time before the pleadings are closed. He stated that the Defendants have not stated any prejudice they would suffer if the Application is allowed. In his submissions, the 1st Defendant stated that the sole reason for filing this Application was to delay the hearing. He stated that **Order 8 Rule 7 (2) of the Civil Procedure Rules, 2010**, provides that the all amendments shall be shown by striking out in red in all deleted words but in such a manner as to leave them legible and by underlining in red ink all added words but this has been disregarded by the Plaintiff. He contended that rules of procedure ought to be strictly followed as it was observed in **Co-operative Insurance Company of Kenya Limited vs. Paem Agencies Company Limited**. He further stated that the Plaintiff ought to sue the Chief Land Registrar as the suit property has been registered under the

Registered Land Act, now repealed. He also stated that by amending the plaint, the Plaintiff has brought a new cause of action, party and facts.

The issue arising from this Application for my determination is whether or not to allow the Plaintiff to amend its plaint herein by adding the intended 3rd Defendant, the Attorney General, as a party in this suit. Save for stating that the application for amendment is highly prejudicial, the 1st Defendant has not indicated what prejudice he is likely to suffer if the amendment is allowed. The 1st Defendant has also indicated that the Application will delay the hearing of the suit. However, he has not stated that such delay will cause an injury that cannot be compensated for in costs. The court in the case of **Central Kenya Limited –v- Trust Bank Limited (supra)** stated that mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation. In my view, no prejudice which cannot be compensated by an award of costs will be visited upon the Defendants if the application for amendment is allowed. The Defendants at any rate shall have the opportunity to respond to the amendment if they so wish. Just as the plaintiff has stated in his submissions that the suit has not been set down for hearing I am of the view that amendments to any pleadings before setting down the suit for hearing should be freely allowed as the parties will have time to prepare their cases adequately. This view was held in the Court of Appeal case of **Eastern Bakery vs. Castelino (1958) EA 461** where it was held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side.

Arising from the foregoing, I hereby allow this Application. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF JANUARY 2016.

MARY M. GITUMBI

JUDGE