



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 402 OF 2013**

**SURESH KUMAR SOFAT.....1<sup>ST</sup> PLAINTIFF**

**SADINA SOFAT.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**TRUSTEES OF KENYA ASSEMBLIES OF GOD.....1<sup>ST</sup> DEFENDANT**

**NAIROBI CITY COUNTY.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Coming up for determination is a Notice of Motion application dated 15<sup>th</sup> February 2021 filed by the 1<sup>st</sup> Defendant seeking leave to amend its defence dated 7<sup>th</sup> May 2013 to include in their pleadings and documents the fact that they have a genuine title deed NO. I.R.181940 (IR 181940/1), L.R.209/15383 and the Minutes and Correspondences with the Ministry of Lands and settlement as well as the various applications for searches relating to the said title. They also pray that the Draft Amended plaint be deemed as filed with requisites leave of the Court upon payment of the Fees.

2. This application supported by the affidavit sworn by Frederick M Kibuga dated 15<sup>th</sup> February 2021 is premised on the grounds that when the 1<sup>st</sup> Defendant filed its defence in 2013, the process of preparing the title by the Ministry of Lands was incomplete and they were unable to obtain search certificates over the title availed by the Plaintiffs since the file could not be traced. They have since been issued with a title to the suit property. They contend that the title held by the Plaintiffs LR.No.209/11281 was not genuine. They also added that the 1<sup>st</sup> Defendant had been in occupation of the suit property from 1996 to date.

3. The Plaintiffs have opposed the application vide the replying affidavit dated 7<sup>th</sup> May 2021 sworn by the 1<sup>st</sup> Plaintiff Suresh Kumar Sofat where it is stated that the application should be dismissed with costs on grounds that: It was made in bad faith, was an abuse of the court process since it was a late amendment and it would be prejudicial to the Plaintiffs having been brought 8 years after the case was instituted and 5 years after the alleged title was issued to them, noting that the said title was issued on 24<sup>th</sup> August 2016 and no reasons for the delay have been given.

4. The Plaintiffs added that the amendments sought were advancing a new ground of defence by accusing them of fraud and forgery by asserting that they held a fake title number LR No. 209/11281, hence the application should not be disallowed.

5. The Plaintiffs also stated that the question of validity of title could only be determined by enjoining the Registrar of Titles.

**Submissions**

6. The Applicant filed their list of authorities dated 27<sup>th</sup> May 2021, (they were to file their written submissions by 26<sup>th</sup> October 2021 but none are on the court's digital platform- CTS) in which they highlighted the following cases on leave to amend pleading; (i) **Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR** in which the court held that:

*“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... (ii) **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000]eKLR** where it was held: *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.*”*

7. In their written submissions dated 9<sup>th</sup> November 2021, the Plaintiff's argued that the application is unmerited and is an abuse of the court process since it was made inordinately late noting that amendment of pleadings should only be allowed if they are brought within a reasonable time. Reference was made to the case of **Evaline Rosa v Catherine Koriko & 3 Others (2016) eKLR** which reiterated the Court of Appeal decision in **Central Kenya Ltd v Trust Bank Ltd & 5 others [2000]eKLR** which outlined considerations to be made in allowing amendment of pleadings. This include- amendments should be done without undue delay and do not prejudice the other party. Also cited was the case of **Rubina Ahmed & 3 others v Guardian Bank (sued in its capacity as a successor in the title to First National Bank) [2019]** where it was held that:

“...the person applying for amendment must be acting in good faith. Amendment should not be allowed at a late stage of trial if on analysis, it is intended ...to advance a new ground for defence, if the amendment... seeks to repair an omission due to negligence or carelessness. Leave may be granted if the amendment can be made without injustice to the other side.”

8. Reference was also made to the case of **Evans Njenga Muritu v Continental Developers Limited & Another [2019] eKLR** where it was held that ... the amendment was sought close to 11 years later... there has certainly been an inordinate delay ... which leads me to the conclusion that the application amounted to an abuse of the court process. Other cases cited by the plaintiffs include; **Patel v Amin [1988] eKLR**, **Evans Omari Siano v Nation Media Group Limited [2011] eKLR**, **Kenya Wine Agencies v Yobesh Amoro [2018] eKLR** and **Aaron Tafari Ouko & Another vs. Solomon Boit (2021)eKLR**.

### **Analysis and determination**

9. The issue for determination is whether; *Leave to amend the defence as sought is merited*. Order 8, Rule 3 (1) Civil Procedure Rules, 2010 provides:

“ 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” .

10. Further, Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010 provides that:

“ 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” .

11. The Court of Appeal for East Africa in the *locus classicus* case of **Eastern Bakery vs. Castelino (1958) EA 461** held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side.

12. In the current application, the Applicant/1<sup>st</sup> Defendant wishes to amend its defence on grounds that it has a genuine title to the suit property which was not in their possession when they filed their defence in 2013. The Respondent/ Plaintiffs objected to this prayer on grounds that the amendment had been brought late in the day since the Applicant was issued with the said title in 2016. The Respondent also noted that the applicant was introducing a new ground of fraud in their defence contrary to set guidelines in allowing amendment of pleadings.

13. This court appreciates the case laws cited by both parties and takes cognisance of the grounds of objection raised by the respondents. The Applicant has not explicated why the amendments are being sought so late in the day noting that they've been in possession of the said title from 2016 when it was issued. The delay is certainly inordinate.

14. However, the 1<sup>st</sup> Defendant in the statement of defence dated 7<sup>th</sup> May 2013 at paragraph 18 had alluded to the fact that they had:

“... already forwarded the original deed plan to the lands office and requested for the certificate of title to the suit property. After several enquiries to the lands office in Nairobi, he was told that the correspondence file had not been traced...”

15. Paragraph 3 of the said statement of defence states:

“It is shocking how the Plaintiff's illegally processed an illegal title over their property”

16. What I discern is that the pursuit of their title was an issue captured by the 1st Defendant at the very initial stages of this suit. Further the issue of fraud is not a new ground.

17. This court borrows the words of A.B. Shah J.A in the case of **Joseph Ochieng & 2 Others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR** who while making reference to the case of **Ketteman vs Hansel Properties Limited (1988) 1 ALL ER 3S** stated:

“I also agree with what Lord Griffiths said in the Ketteman Case (supra) at page 62:

**"Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the**

**exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants ... Further, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial ..."**

18. This court in exercising its discretion finds that for fair and conclusive determination of the dispute, in the interest of justice and based on the parties prayers in the pleadings, the amendments ought to be allowed.

19. Having noted that there are now two tiles relating to the suit property, the court gives directions that the Chief Land Registrar as well as the Attorney General be enjoined in these proceedings as 3<sup>rd</sup> and 4<sup>th</sup> Defendants respectively.

20. The final orders are given as follows:

**i. The Notice of Motion application dated 15<sup>th</sup> February 2021 is allowed but costs thereof are awarded to the Plaintiffs/ Respondents.**

**ii. The Chief Land Registrar and the Attorney General are hereby enjoined in these proceedings as the 3<sup>rd</sup> & 4<sup>th</sup> Defendants respectively.**

**iii. The 1<sup>st</sup> Defendant is directed to file and serve its amended pleadings within 14 days failure to which the orders granted herein shall lapse.**

**iv. The Plaintiffs are to file and serve their response to the amended defence within 28 days from today and also serve their other pleadings upon the new parties within the same period.**

**v. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants are granted 42 days from today to file their respective pleadings.**

**vi. All parties are to file and serve their trial bundles within 60 days from today.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY, 2022 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Njeri Mucheru for the Plaintiff

Jaoko for the Defendants

Court Assistant: Eddel Barasa