

5. Parties have exchanged written submissions which this court has had the chance of analyzing.

6. The general power of the court to amend pleadings is drawn from section 100 of the Civil Procedure Act. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, which right is not absolute for it is dependent upon the discretion of the court. This discretion should be exercised judicially. Section 100 of the Civil Procedure Act and order 8 rule 3 of the Civil Procedure Rule, provides a broad criteria which should guide the court in the exercise of jurisdiction that:-

“The amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and It is just to do so.”

Rule 18 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter “the Mutunga Rules”) should be the starting point for purposes of the instant application.

7. The Rule allows parties to amend their pleadings and in particular the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings. Rule 18 of the Mutunga Rules stipulates as follows:

“A party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.”

8. The brief question I need to grapple with is whether I should exercise my discretion in favour of the Petitioner, it being appreciated that the permission is not to be automatically granted. The general rule when it comes to amendments of pleadings is that amendments ought to be freely allowed so long as they do not occasion any prejudice to the party facing them. The test whether or not to allow amendments is now relatively clear.

9. In the case of **Ann Muthoni Karanu vs La Nyavu Gardens Limited NBI ELC 181 of 2014[2015] eKLR**, I stated as follows with regard to amendment of pleadings:

“...The test for amendment of pleadings was perfectly put in Cobbold vs. Greenwich LBC 9th August, 1999 (unreported decision): referred to in the notes to the White Book (Civil Procedure 2003 Edn) Vol. 1. At paragraph 17.35. Peter Gibson LJ is stated to have said: “The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed”

10. Also referred to and applied in the case of **Maguire –v- Molin [2002] 4 All ER 325, 326**, the above truly ought to be the appropriate and composite test for amendments of pleadings. I shall say no more on the test save to add that locally the same test was adopted and approved in the case of **Central Kenya Ltd –v- Trust Bank Ltd [2002] 2 EA 365**.

11. The Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits.

12. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was affected and (iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.

13. Notwithstanding the Court of Appeal's prolific holding and approach, it is apparent that the test is as was stated in **Cobbold (supra)** and the overriding consideration was whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.

14. Perhaps, I may also add that going by the Cobbold test as expounded in **Central Kenya Ltd –v- Trust Bank Ltd (ibid)** the powers to order or allow amendments or joinder of parties is discretionary and very wide.” [emphasis in the original] <http://www.kenyalaw.org> - Page 2/4 Case law has then broken down these broad requirements and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings.

15. These principles were set out by the Court of Appeal in **Central Kenya Ltd. Vs. Appeal No. 222 of 1998** as shown below:-

“(i) Amendments that are necessary for determining the real question in controversy;

(ii) To avoid multiplicity of suits provided there has been no undue delay;

(iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action;

(iv) That no vested interest or accrued legal rights is affected; and

(v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.”

16. It is clear from decided cases that the discretion of a trial court to allow amendments of a plaint is wide and unfettered except that it should be exercised judicially upon the foregoing defined principles.

17. In this particular case, the circumstances of the petitioners changed in that there was the destruction and/or demolition of structures which had been constructed by the petitioner. The said demolition was done after the petition had been filed and an appeal preferred. The appeal allowed the petition to be heard afresh. The destruction and/or eviction caused some loss on the petitioners' property and therefore those actions are the ones being brought up in the amendment.

18. I therefore find that there is good reason for the amendment as prayed by the petitioner. I also agree with the petitioners' sentiment that amendments should be generally freely allowed even on oral application when there is no prejudice to the other side.

19. Bullen and Leake & Jacobs precedents of pleadings 12th edition stated as follows on amendment of pleadings:-

***“..... power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is ought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical, that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which would more conveniently be made the subject of a fresh action*”**

20. A court of law properly guided by principles of law should be able to allow an amendment for purposes of determining real question or issue in controversy which is what adjudication of cases and effectual dispensation of substantive justice to parties under Article 159 of the Constitution is all about.

21. With all the above in mind, I find and hold that the proposed amendments to the petition is necessary for determining the real questions in controversy, they don't introduce an inconsistent cause of action

which would change the action into one of a substantially different character, which can only be more conveniently made the subject of a fresh action. I also find no prejudice or injustice to the respondent which cannot be properly compensated in costs.

22. For the reasons above, the petitioners' application dated 19th May, 2016 is allowed. Leave is granted as prayed.

SIGNED, DATED and DELIVERED at KAKAMEGA this 8TH day of DECEMBER,2016.

C. KARIUKI.

JUDGE.

In the presence of:-

Nyikalifor the Petitioners.

Ochiengfor the Respondents.

AnundaCourt Assistant.