



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC NO.40 OF 2011

1. PASCALIA A. OPIYO
2. JOSEPH ODIWO OPIYO
3. PETER WESONGA.....PLAINTIFFS

VERSUS

1. WALTER OMBENG OKELLO
2. PETER OMULLO OGODO
3. DISTRICT LAND AND SETTLEMENT
4. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. This ruling follows filing of submissions to determine the application filed here on 25/5/2012. The application is dated 30/4/2012 and is brought as a Motion on notice under Sections 1A, 1B and 3A of Civil Procedure Act and Order 8 rule 3(1) of the Civil Procedure Rules. There are three prayers namely:

- (1) That leave be granted to plaintiffs to amend the plaint.**
- (2) That the amended plaint annexed to the application be deemed duly filed upon payment of the requisite fees.**
- (3) That costs of the application be provided for.**

2. The parties are **PASKALIA A. OPIYO, JOSEPH ODIWA OPIYO** and **PETER WASONGO** as plaintiffs. The defendants are **WALTER OMBENG OKELLO** (1st defendant), **DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER, BONDO** (2nd defendant), **PETER OMOLLO OGODO** (3rd defendant) and **ATTORNEY GENERAL** (4th defendant). The grounds advanced stipulate, inter alia, that amendment is crucial for just determination of the suit; that no prejudice will be suffered by defendants and the application is made in good faith; and that the application serves the interests of justice.

3. From the supporting affidavit accompanying the application, it emerges that consent to sue was omitted in the sit. The amendment is meant to plead and include it.
4. The 1st and 2nd defendants opposed the application vide grounds of opposition dated 23/6/2012 and filed here on 28/6/2012. The application is termed as an abuse of court process and designed to delay the trial. The two defendants talked of existence of a similar suit – **BONDO SRMC CC NO.50/2010** seeking eviction of the plaintiffs. The amendment, it was alleged, does not cure the initial defect of failure by the plaintiffs to file objection proceedings before the relevant adjudication body. It was also averred that there is no connection between the two land parcels mentioned by the plaintiffs viz: **NYANGOMA/UYAWI/4050** and **NYANGOMA/UYAWI/5217**.
5. The 3rd and 4th defendants also responded by way of filing grounds of opposition. The application was said to be frivolous and vexatious as land parcel No. **NYANGOMA/UYAWI/4050** has never been interfered with. The land parcels mentioned by the plaintiffs – **NYANGOMA/UYAWI/5217** and **NYANGOMA/UYAWI/4050** – are said not to be related. The 3rd and 4th defendants however did not file submissions.
6. The plaintiff's submissions stated, inter alia, that the application is meant to enable the court reach a just decision. The plaintiffs were said to be acting in good faith. What is meant to be included is consent to sue or institute the suit. The consent appears to have been inadvertently left out. The intended amendment, it was submitted further, will not prejudice the defendants.
7. The plaintiffs went on to state that it is the discretion of the court to allow the amendment. The decided authority of **BRITISH INDIA GENERAL INSURANCE COMPANY LIMITED VS PARMAR & CO. (1966) EA 172** was availed to show that amendments will ordinarily be allowed provided no injustice is done to the other side. This same position emerges in **PETER OKAO OBOGA & Another VS JULIUS ORENGE KEROSE (2005) eKLR** where **D. Musinga J**, quoting from **MWAKOA VS KENYA COMMERCIAL BANK LIMITED (1987) eKLR 513**, observed “.....that leave to amend should not normally be declined unless it would occasion injustice to the other side....”
8. The 1st and 2nd defendants submissions reiterate that the application and the entire suit are non-starters as they were filed without the requisite consent of the Lands Adjudication office. The plaintiff's were also faulted for not filing objection proceedings at the appropriate time at that office.
9. I have considered the material laid before me. It seems to me that the tussle concerning the intended amendment revolves around whether consent to institute the suit was obtained from adjudication office, with defendants saying it was not. The plaintiffs however say it was but it was inadvertently left out in the suit. I have looked at the application. An annexure that looks like a consent is availed. The date appearing on it precedes the filing of this suit. This seems to give credence to the plaintiff's averments.
10. I also consider that if the plaintiffs are not allowed to amend, there is the very real possibility that the suit herein can be dismissed or struck out as such consent would be lacking. The defendants obviously would like a scenario like that. The court would be interested however to see the suit determined on merits. A word of caution though; the annexed consent is not precisely clear whether it is for this suit here or for the suit at Bondo. But that is for the defendants to raise at another time. It is not raised in their submissions.
11. In an application like this, the court should look at the nature, extent and purpose of the proposed amendment. It should ensure that the defendants side does not suffer prejudice as a result of the amendment. But it should ensure too that denial of leave to amend does not cause injustice to the plaintiffs. It is necessary to ensure that the plaintiffs are not punished for seeking to cure defects in their pleadings. They should in fact be commended for vigilance.
12. I agree with the plaintiffs concerning the applicable law as stipulated in the decided authorities availed. I don't see any injustice that the defendants will suffer. And if there is any, I think costs would adequately compensate. In this regard, I bear in mind the holding in **SHAH VS APERIT INVESTMENTS S.A & Another: (2002) IKLR 130**. The court held, inter alia, that amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated with costs.
13. I therefore allow the application herein but costs will go to the defendants.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

Before A.K. Kaniaru – Judge

Diang'a G – Court clerk

Parties – Absent

Interpretation; English/Kiswahili

Onyango P.D for Mwamu for Plaintiff

Nyanga (absent) for defendant

COURT: Ruling on application dated 30/4/2012 read and delivered in open **COURT**.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

29/1/2015