



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL CASE NO. 77 OF 2008**

**BERNDETA ATSIENO WESONGA .....PLAINTIFF/ APPLICANT**

**VERSUS**

- 1. JOSEPH MALALA SAKWA**
- 2. HUMPHREY NYONGESA MAPESA**
- 3. JUDITH ULUMA KIMANYALA**
- 4. DORICE ACHOLA ODERO**
- 5. LINUS OGUDO OGWENO**
- 6. AMBROSE AMBWERE OPESO**
- 7. JAMES AMERE BUNYALI**
- 8. NEREA AWINO ODOCK**
- 9. NELSON MAKOKHA WAMBIA**
- 10. RANUEL NAMATSI** **DEFENDANTS/**
- 11. AGNES KHIGHT OBIERO** **RESPONDENTS**
- 12. CASMIR AUGUSTUS OBIERO**
- 13. ANTONY NG'ONO OBIERO**
- 14. MABEL AKISO MALANDA**
- 15. FRED SUMBA**
- 16. RAJAB SEBWA MAKOKKHA INJAMU**
- 17. JOSEPHAT WASHIKA MALONA a.k.a.**  
**SALIM WASIKA MALOBA**

## 18. GEORGE MUSUNDI ONYANGO

### RULING

1. Before me is a Notice of Motion dated 14/12/2012 brought under **Sections 2A, 18 and 63 ( c)** of the Civil Procedure Act (Cap. 21) Laws of Kenya, **Section 68** of the Land Registration Act (No. 3 of 2012) and **Orders 8 rule 3, 50 rules 12 and 3** of the Civil Procedure Rules.
2. In this Motion, Bernandeta Atsieno Wesonga has sought several Orders, including a prayer where she seeks leave of the court to amend her plaint in terms of the draft amended plaint which is annexed to the application. She also seeks orders of inhibition and injunction.
3. The application is supported by grounds appearing on the face of the motion and an affidavit sworn by the applicant on 14/12/2012.
4. The application is opposed by the 5<sup>th</sup> respondent who has filed grounds of opposition.
5. On 8/10/2014 parties agreed that the application be heard in respect of prayer “b” only which relates to leave to amend the plaint.
6. Mr. Masheti moved the application and submitted that after the suit was filed, it was discovered that the suit property had been sub-divided into several parcels of land which had also been transferred to some people and therefore wished to amend the plaint and bring on board the rest of the people to be affected so that the suit is fairly and conclusively decided. He prayed that the application be allowed.
7. Mr. Kimuli opposed the application as relates to the 5<sup>th</sup> respondent, one Linus Ogudo Ogweno. Counsel submitted that the prayer in the Motion has only sought to amend the Plaint but does not contain a Prayer seeking to enjoin a party to the suit. Counsel further argued that the principles of amending pleadings and those of enjoining parties to a suit are different and justification for it has to be made to the satisfaction of the court.
8. Counsel further submitted, that according to the grounds supporting the Motion, the applicant seeks to enjoin 9-18<sup>th</sup> intended defendants and the 5<sup>th</sup> defendant is not one of those intended defendants. Mr. Kimuli argued that the 5<sup>th</sup> defendant’s name was struck out of the suit on 14/10/2009 after the 5<sup>th</sup> defendant’s name had been introduced midway after the suit had been filed. Counsel submitted that since the draft amended plaint does not show that the 5<sup>th</sup> defendant is being brought into the suit and it has not been shown that the 5<sup>th</sup> defendant is a necessary party, the application should not be allowed; and that the court should confirm the order of 14/10/2009 striking out the 5<sup>th</sup> defendant’s name.
9. I have considered the applicant’s application, the supporting affidavit, grounds in opposition and submission by respective counsel.
10. The applicant has sought to re-amend her plaint and bring on board ten other defendants into the suit. Her reason for doing so is that the suit property has been sub-divided into numerous parcels which have changed hands into the intended defendant person’s names. She therefore wishes that the intended defendants be included in the suit so that they can be heard before the court makes a final determination.
11. The 5<sup>th</sup> defendant has opposed this application saying that the applicant has not sought to enjoin parties but seeks to amend the Plaint. I do not think this makes a difference. An amendment can be sought to add a party or generally amend pleadings in whatever manner the court deems fit so long as this is intended to bring forth the real question in controversy between the parties in the suit. In this case, the intended defendants are necessary parties to this suit.

12. I think the 5th respondent's sound argument is on the fact that the draft amended plaint does not include the 5<sup>th</sup> respondent as a party intended to be brought into the suit. Counsel for the 5<sup>th</sup> respondent has submitted that his client's name was struck off the suit on 14/10/2009. The applicant's counsel agrees. However, on the record, the 5<sup>th</sup> defendant's name LINUS OGUDO OGWENO was struck out of the suit on 9/10/2009 by Chitembwe J., and not on 14/10/2009. That being the case, Linus Ogudo Ogweno is not a party in these proceedings.

13. Looking at the Draft amended Plaint, Linus Ogudo Ogweno, though named as 5<sup>th</sup> defendant, is not one of those parties intended to be brought on board. His name though appearing in the pleadings was struck out and is therefore of no use in this suit. Service on him is also unnecessary and a mistake.

14. As said earlier, my duty is to consider whether the applicant has satisfied the requirements to enable the court grant her leave to amend her pleadings. And on that, I am satisfied that the leave sought is justified since the amendments are intended to bring forth all issues for purposes of a just determination of this suit.

15. If the suit property has been sub-divided and portions therefrom transferred into the intended defendants' names, it is only fair that those people be brought on board so that they are heard before any orders are made against them.

16. I also think the overriding objective is to ensure that the court achieves fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (City Chemist (NBI) *Mohamed Kasabuli suing for an on behalf of the Estate of Halima Wamukoya Kasabuli –vs- Orient Commercial Bank Ltd. – Civil Application No. Nai. 302 of 2008 (UR 199/2008)*).

17. By allowing this application, the court will facilitate a fast resolution of this case than delay the case for reasons that otherwise hinder the course of justice.

18. For the above reasons, the application dated 14/12/2012 is allowed. The applicant do file her re-amended plaint excluding Linus Ogudo Ogweno's name, within 14 days from the date of this ruling.

19. Costs of the application to Linus Ogudo Ogweno, in any event.

*Dated and delivered at Kakamega this 23<sup>rd</sup> day of January, 2015*

**E. C. MWITA**

**J U D G E**