



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 298 OF 2014**

**SILVANO OTIENO KOLA.....PLAINTIFF**

**VERSUS**

**DANIEL OTIENO AGOLA.....1<sup>ST</sup> DEFENDANT**

**TUNZA CO-OPERATIVE SOCIETY LTD.....2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

The Plaintiff Sylvano Otieno Kola has come to this court with application dated 20<sup>th</sup> September 2021 seeking orders that this Honourable Court be pleased to grant leave to the Plaintiff/applicant to amend his originating summons dated 16<sup>th</sup> September 2014 in terms of the annexed draft amended originating summons. That the draft amended originating summons annexed hereto be deemed as duly file upon payment of the requisite filing fees. Costs of this application be provided for.

The application is based on grounds that It is necessary and in the interest of justice for the amendment to be allowed. A number of circumstances have arisen thereby necessitating the amendment. The amendment will crystallize the real issues in controversy between the parties and ease the court's determination of the suit. The plaintiff/Applicant will not be prejudiced by the intended amendment.

In the supporting affidavit, the plaintiff states that he is the beneficial owner of Land Parcel Nos. Kisumu/Kanyakwar "B"/384 and Kisumu/Kanyakwar "B"/385. That despite him being the beneficial owner of the said Land Parcel No. Kisumu/Kanyakwar "B"/384 he has not gone for issuance of the title document.

That on 18<sup>th</sup> April 2014 he received a phone call from the DCIO Kisumu that he was required to appear before him in relation to the sale of Land Parcel Nos. Kisumu/Kanyakwar "B"/384 and Kisumu/Kanyakwar "B"/385. That at the meeting with the DCIO he learnt that someone had fraudulently acquired titles to the parcels in his name and intended to sell the same in his name while he has neither entered into a sale agreement with anybody nor intended to sell the properties herein. That he went to the Land Registrar and lodged a complaint as to why his titles were issued to a bogus person. That the Land Registrar after examining the documents wrote a letter summoning the 1<sup>st</sup> Defendant/Respondent to return the titles for cancellation. That despite the summons the 1<sup>st</sup> Respondent has refused/ignored and defiantly refused to return the title for cancellation as demanded by the Land Registrar.

That the plaintiff later obtained a green card indicating that land parcel No. Kisumu/Kanyakwar "B"/385 had been transferred from his name to the 1<sup>st</sup> and then 2<sup>nd</sup> Defendant/Respondent's names.

That the plaintiff has never been party to any transfer of the said land to anyone leave alone the 1<sup>st</sup> and 2<sup>nd</sup> Respondent.

That in view of the above the plaintiff verily believes in all honesty that the Defendants/Respondents have no basis whatsoever to continue to hold any other title deed and the same should be cancelled forthwith.

That it is necessary to declare his title over land parcel no. Kisumu/Kanyakwar "B"/385 as the lawful title and to declare the plaintiff the legal owner of both parcels, having been in occupation for well over twelve (12) years now. That the plaintiff's possession thereof has been peaceful and continuous.

The 1<sup>st</sup> Respondent filed a replying affidavit stating that the plaintiff's claim in the originating summons in the case No. 298 of 2014 claiming that he is the beneficiary of the said land Kisumu/Kanyakwar "B"/384 and Kisumu/Kanyakwar "B"/385 is not true as alleged. The Plaintiff filed a notice of motion dated 20<sup>th</sup> September 2021 seeking to amend his originating summons which was drawn and dated on 16<sup>th</sup> September 2014 out of time.

That the plaintiff was given more time to renew his originating summons dated 16<sup>th</sup> September 2104 which is already elapsed according to the law of Kenya and to amend his originating summons or to consolidate the files but he keeps on mentioning the file.

That the sister file No. 62 of 2014 which were to consolidate with file no. 298 of 2014 was dismissed. That the 2<sup>nd</sup> Defendant failed to prosecute his case or to produce forensic evidence before the honorable court.

I have considered the rival submissions and do find that an amendment can be made at any stage of proceedings before Judgment is delivered. In this case, the hearing has not even started. Moreover, the respondent has not demonstrated that he will suffer any prejudice if the amendment is granted.

Order 8 Rules 3 and 5(1) of the Civil Procedure Rules stipulates as follows: -

**“(3) (1) 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.”**

**“3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”**

**General power to amend**

**“5(1) 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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”**

In *Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991* (unreported) as cited with approval in *St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR the Court of Appeal set out the principles governing the amendment of pleadings as follows: -

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.**
- b) The amendments should be timeously applied for;**
- c) Power to amend can be exercised by the court at any stage of the proceedings.**
- d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.**
- e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.**

In *Harrison C. Kariuki v Blueshield Insurance Company Ltd* [2006] eKLR the court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd* [2000] EALR 365 and held that: -

**“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sough be permitted in order that the real question in controversy between the parties be determined.”**

I do find the application merited and that the amendment is necessary to enable the court to determine the real issues in controversy and do grant an order that leave be and is hereby granted to the plaintiff to amend the Originating Summons dated 16/9/2014 in terms of the draft amended Originating summons. The Amended Originating Summons to be filed within 10 days. The Defendants to file a reply within 10 days. Costs in the cause. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 23<sup>rd</sup> DAY OF FEBRUARY, 2022.**

**ANTONY OMBWAYO**

**JUDGE**

*This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020.*

