

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

HCC 209 OF 2009

KARIM ISMAEL SURANI.....PLAINTIFF

VERSUS

ROSEMARY ADHIAMBO ODINGO.....DEFENDANT

RULING

On 19/4/2012 the Plaintiff/Applicant – **KARIM ISMAEL SURNI** – filed a notice of Motion seeking, inter alia, to be granted leave to amend the plaint as per the amended plaint attached to the application. The draft amended plaint is supposed to be deemed duly filed once leave is granted. Also asked for is provision for costs.

The grounds advanced stipulate that new issues have emerged since the filing of the suit and it is necessary to plead them. It is also alleged that crucial facts which need to be pleaded were left out. No prejudice, it was intimated, would be occasioned to the defendant – **ROSEMARY ADHIAMBO ODINGA** – because of the proposed amendments.

The application is brought under Order 8 rules 3 and 5 of Civil Procedure Rules and Sections 63(e) and 100 of Civil Procedure Act (Cap 21).

The plaintiff/Applicant stated further in support of the application that the defendant acquired title to the suit property – **L.R. KISUMU MUNICIPALITY/BLOCK 7/148** – fraudulently and the plaintiff/Applicant therefore need to plead fraud. He also needs to plead his assessed losses and the defendant is said not to have a good title to the suit property.

The defendant, through counsel, filed grounds of opposition on 26/6/2013. The application is said to be frivolous, vexatious and unmeritorious. It is alleged that no new facts or issues have emerged as alleged by the plaintiff and that what is stated in the draft amended plaint is a mere restatement of what is in the original plaint. The application is said to be calculated to defeat the ends of justice.

The Court heard both sides inter partes on 3/7/2013. Wedo for plaintiff/Applicant proceeded along the contents of the application while Ashitiva for the respondent also gave a response that reiterated the grounds of opposition. The plaintiff was further said not to be truthful, and possible delay on his part was alleged.

I have considered everything that was laid before me. It seems to me that much as the defendant is opposing the application, there is no defence filed yet. What is on record so far is only a memo of appearance.

In law, the plaintiff is entitled to amend the pleading once if the pleadings are not closed. If we treat the pleadings as closed in this case by virtue of lapse of time or other good reason, the defendant herself would be at a disadvantage. And there being no defence filed as yet, it is difficult to see what prejudice the defendant will suffer if amendment is allowed.

Generally, court's are unwilling to disallow amendments because a litigant should be allowed to ventilate all issues relevant to the case.

It is not possible to agree with the defendant concerning allegations of possible delay and untruths.

The defendant herself has not filed defence. She has not therefore played her part.

It is necessary therefore to allow the application herein and the same is allowed with costs in the cause.

A.K. KANIARU – JUDGE

21/1/2014