



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 160 OF 2011

HIRAM BERE KINUTHIA.....1ST PLAINTIFF

ELIZABETH WANJIRU NGIGI.....2ND PLAINTIFF

ROBER MATATHIA.....3RD PLAINTIFF

VERSUS

EDICK OMONDI.....1ST DEFENDANT

ANNE ANYANGA.....2ND DEFENDANT

THE REGISTRAR OF TITLES.....3RD DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....4TH DEFENDANT

RULING

The 1st Plaintiff has filed a notice of motion application under Order 8 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules seeking leave to re-amend his Plaint. The 1st Plaintiff also seeks leave to join the Commissioner of Lands as the 5th Defendant in this case.

The application is supported by an affidavit sworn by the Plaintiff's advocate, **Mr. George Gitonga Muragara** on 2nd July 2013. Counsel for the 1st Plaintiff states that the amendment was necessitated by matters which arose during pre-trial briefing and exchange of documents. Counsel avers that one of the issues that arose was how title known as LR 25763 (originally LR 28/6) was issued to the 1st and 2nd Defendants by the proposed 5th Defendant allegedly on behalf of the former president. It is the 1st Plaintiff's case that this is an issue for determination by the court and therefore, that it is in the interest of justice that the 5th Defendant be joined to these proceedings.

The 1st and 2nd Defendants have opposed the application as set out in the grounds of opposition dated 24th July 2013 where they argue that the amendments sought are contradictory, illegal and should not be allowed pursuant to the doctrine of laches. The 1st and 2nd Defendants have contended that the matters sought to be introduced are inconsistent and contradicts the original averments in the Plaint and therefore, that the application is misconceived and cannot breathe life to the original suit which is incurable by any amendment.

According to the 1st and 2nd Defendants, the 1st Plaintiff failed to explain why he did not exploit the opportunity of voluntary amendment since the matters sought to be incorporated in his pleadings were within his knowledge at all material times. The 1st and 2nd Defendant contends that the jurisdiction of the court to grant leave to amend is discretionary and cannot be invoked by a party intending to perpetuate illegal acts and /or frustrate, prejudice and/or injure the rights and interests of another party.

It is the 1st and 2nd Defendants case that the application seeking leave to amend is an attempt by the 1st Plaintiff to pursue his ulterior motive against the Defendants and amounts to an abuse of the court process. Lastly, it was contended that the application before the court seeks to delay the hearing of the suit to the prejudice of the 1st and 2nd Defendants who cannot enjoy their rights in the suit property.

The 3rd and 4th Defendants also opposed the application through grounds of opposition dated 13th August 2013 where they contend that the intended amendment is time barred in that it introduces new causes of action based on misrepresentation, fraud and breach of trust contrary to section 136(1) of the repealed Government Lands Act as read together with section 43 of the Limitation of Actions Act. It is the 3rd and 4th Defendants contention that the intended amendments are an afterthought and further, that the office of the intended 5th Defendant who is sought to be enjoined has been abolished by operation of law and no longer exists. Lastly, the 3rd and 4th Defendants have contended that the intended amendments are highly prejudicial to them and further, that the application is bad in law, incompetent and an abuse of the court process.

Parties were directed to file submissions and the Plaintiff filed submissions dated 1st August 2013 and argues that under section 100 of the Civil Procedure Act, the court has a freehand to allow amendments to pleadings and proceedings so as to bring out the real issue in controversy. It was further submitted that under Order 8 Rule 3(1) of the Civil Procedure Rules, the court has discretion to allow amendments to pleadings at any stage of the proceedings before judgement is pronounced.

Counsel for the 1st Plaintiff made reference to Order 8 Rule 3(2) and 5(1) and submitted that amendments may be allowed even after the limitation period and even where the effect of the amendment would be to add or substitute a new cause of action provided that the new cause of action arises out of the same facts as a cause of action in respect of which relief has already been claimed by the Plaintiffs. It is the 1st Plaintiff's submission that the Respondents will have the opportunity to reply, cross examine the Plaintiffs or even call their own witnesses to testify on the same. Counsel argued that it would be fair and just if the 1st Plaintiff is allowed to bring forward his entire claim against the Defendants and reference was made to Article 50(1) of the Constitution which requires disputes between parties to be determined in a fair manner.

In further submission, Counsel for the 1st Plaintiff averred that the amendments sought by the Plaintiff would not prejudice the Defendants in any way and further, that any prejudice suffered by the introduction of the amendments can be compensated by an order for costs. It is the 1st Plaintiff's submission that the proposed amendments are not inconsistent with the claim before the court since they arise from the same chain of transaction that forms the basis of the claim.

The 1st Plaintiff relied on the case of **Daniel Migwi Njai -vs- High View Farm Ltd & anor CA No. 139 of 1989** where the court stated that amendments can be allowed at any stage of the proceedings on such terms as to costs or otherwise for purpose of determining the real question in controversy between the

parties. Further reliance was placed on the case of **Edawrd G. Kihia -vs- Thomas Caroll Nakuru HCCC No. 217 of 2005** where the court stated that the power to amend pleadings is discretionary, exercised with the sole aim of determining the real question or issue in controversy before the court.

While submitting that even delay cannot defeat an application for amendment, Counsel for the 1st Plaintiff submitted that there has been no inordinate or inexcusable delay in seeking the court's leave since amendments can be allowed at any stage of the proceedings and before judgement. Counsel contended that the question of inordinate delay does not arise since leave to amend has been sought before the trial concludes and before judgement.

It was also submitted that under Order 1 Rule 3 of the Civil Procedure Rules, the claim against the intended 5th Defendant arises out of the same acts as the claim against the other Defendants. Lastly, the 1st Plaintiff submitted that under Order 1 Rule 10(2), the court can order the name of a party whose presence before the court is necessary to enable the court completely adjudicate and settle all the questions involved in the suit to be added at any stage of the proceedings,

In further submissions dated 19th August 2013, the 1st Plaintiff argued that the proposed amendments do not introduce a new cause of action as claimed by the Defendants. It is the 1st Plaintiff's submission that the claims of misrepresentation and breach of trust are consistent with the claim for fraud and are therefore not new. Counsel submitted that the issue of limitation does not arise since fraud was pleaded in the original Plaintiff.

Counsel for the 1st Plaintiff averred that amendments may be introduced even after the expiry of the limitation period. It was contended that the Defendants will be given and will have an opportunity to ventilate the issue of limitation during the hearing and therefore, that the Defendants would not suffer any prejudice were the amendments to be allowed. Counsel sought to distinguish the case of **Kuloba -vs- Oduol** cited by the 1st and 2nd Defendants by stating that in that case, the proposed amendments sought to introduce a new claim based on re-publication of defamatory material which claim had not been pleaded in the original Plaintiff. Further, Counsel submitted that in the **Kuloba -vs- Oduol**, the court recognized that amendments can be allowed even outside the period of limitation in certain circumstances.

While responding to the 1st and 2nd Defendants averments that the draft re-amended Plaintiff was not attached to the application, the 1st Plaintiff submitted that the re-amendments sought to be introduced are set out in colour blue. Counsel for the 1st Plaintiff contended that the draft re-amended Plaintiff was not evidence that should be introduced through an affidavit. It is the 1st Plaintiff's submission that under Article 159(2)(d) of the Constitution and section 72 of the Interpretation and General provisions Act, the court should not give undue regard to technicalities and should uphold substance rather than form.

While submitting that the Commissioner of Lands is the right party to be sued in these proceedings, Counsel for the 1st Plaintiff relied on section 107(1) of the Land Registration Act NO. 3 OF 2012 and argued that the Plaintiffs cause of action arose as against the Commissioner of Lands during the existence of the Government Lands Act (now repealed). Further, it was argued that under section 108 of the Act, any administrative acts made under an Act of Parliament which was repealed by the Land Registration Act should be construed with alterations, modifications and exceptions to bring it in conformity with the Act. It was therefore argued that the Chief Lands Registrar is accountable for the acts and omissions of the Commissioner of Lands and therefore, that despite the abolition of the office of the Commissioner of Lands who is the intended 5th Defendant, the successor to that office takes responsibility for the acts and omissions of the intended 5th Defendant.

In respect to the supporting affidavit being sworn by Counsel and not the party, it was argued for the 1st Plaintiff that under Order 19 Rule 3(1) of the Civil Procedure Rules, affidavits are to be confined to such facts as the deponent is able of his own knowledge to prove. Counsel argued that the facts deponed in the supporting affidavit relates to matters that have occurred and come within his knowledge while acting for

the 1st Plaintiff. Counsel relied on the case of **Pattni -vs- Ali and others (2005)1EA 339** for the proposition that there is no prohibition against an advocate who of his own knowledge can prove some facts to state them in an affidavit on behalf of his client. Reliance was also placed on the case of **Kitui Council -vs- Mwakini Ranching(D.A) Co. Ltd CA no. 221 of 1997.**

While seeking to distinguish the case of **Trust Bank -vs- Kiprono Kittony & others** cited by the 1st and 2nd Defendants, Counsel for the 1st Plaintiff submitted that in that case, the advocate sought to depone to the prejudice likely to be suffered by his client when the client was available to do so and further, that the objection was overruled and the affidavit found to have been competent. Lastly, it was submitted that nothing prevents the 1st plaintiff from seeking compensation and mesne profits simultaneously.

The 1st and 2nd Defendants argued in submissions dated 14th August 2013 that the application is fatally defective for reasons that the supporting affidavit was sworn by the 1st Plaintiff's advocate. Counsel for the 1st and 2nd Defendants argued that the facts relating to the amendment are contested and as such, it is the 1st Plaintiff who ought to swear the affidavit and not his Counsel and reliance was placed on the case of **Trust Bank Ltd -vs- Kiprono Kittony and 2 others, HCCC No. 223 of 2002.**

It was submitted for the 1st and 2nd Defendants that the application and the supporting affidavit have not provided reasons or grounds for the amendment and therefore that the application is baseless, unfounded and is an abuse of the court process. Counsel relied on the case of **Muchanga Investments Ltd -vs- Safaris Unlimited(Africa) Ltd & 2 others (2009)eKLR.**

While submitting that the re-amended draft Plaintiff was not attached to the affidavit contrary to the enabling provisions of the law, the 1st and 2nd Defendants argued that the draft re-amended Plaintiff is not part of the application and that the same ought to be disregarded by the court. Counsel made reference to sections 9 and 10 of the Oaths and Statutory Declaration Act and argued that the said provisions outline how an exhibit should look like and its format.

In further submission, the 1st and 2nd Defendants contended that the proposed amendments do not pass the test of limitation under the Limitation of Actions Act. Counsel argued that the amendment was an effort to defeat the principles of *ex dolo malo non oritur actio* (no court will lend its aid to a man who founds his cause of action upon an immoral or illegal act) and *ex turpi causa non uritur actio* (no action may be founded on illegal or immoral conduct) and therefore amounts to an abuse of the court process. It was also contended that the 1st plaintiff had not shown any authority to plead on behalf of the other Plaintiff.

While submitting the facts and/or basis of the amendments proposed were at all material times within the knowledge of the 1st Plaintiff, Counsel for the 1st and 2nd Defendants averred that the applicant's contention that the amendments would enable determination of the real issues was a facade which must be frowned upon in order to maintain the dignity of the court. Reliance was placed on the case of **James Ochieng' Oduol t/a Ochieng Oduol & Co. Advocates -vs- Richard Kuloba** for the proposition that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances.

It is the 1st and 2nd Defendants submission that the application is a recipe for delay and further, that injustice and prejudice will be visited on them since they have in good faith, refrained from utilizing the property. Reliance was placed on the case of **Central Kenya Ltd -vs- Trust Bank Ltd (2000) EA 365**

The 3rd and 4th Defendants filed submissions dated 13th August 2013. It is their case that in the Plaintiff and amended Plaintiff filed on 12th April 2011 and 30th August 2011, the Plaintiffs only pleaded particulars of fraud but did not plead any misrepresentation or breach of trust. Counsel for the 3rd and 4th Defendants argued that the intended amendments seek to plead further particulars of fraud and introduce misrepresentation and breach of trust as part of their cause of action.

It was submitted for the 3rd and 4th Defendants that misrepresentation and breach of trust constitute new causes of action pursuant to section 136(1) of the repealed Government Lands Act and section 43 of the Limitation of Actions Act. Further, it was argued that the same time bar applies to the Plaintiffs alternative claim for the value of the land, mesne profits and general damages and therefore, that the amendments cannot be allowed for being time barred.

In respect to the intended amendments being an afterthought, the 3rd and 4th Defendants submitted that there is no explanation as to why the Plaintiffs did not know the additional particulars of fraud at the time of filing the suit. Further, it was contended that the new particulars of misrepresentation and breach of trust are based on facts that the Plaintiff ought to have been aware of at the time of filing suit. It is the 3rd and 4th Defendants' submission that the plaintiffs are guilty of delay in seeking the intended amendments which militates against the court's exercise of discretion in their favour.

In further submission, Counsel for the 3rd and 4th Defendants contended that the office of the Commissioner of Lands who is the intended 5th Defendant was abolished by the Land Act and therefore, that the intended joinder ought not be allowed. Counsel argued that the order sought to enjoin the Commissioner of Lands is an order in vain which contradicts the well known doctrine that courts of law do not act in vain.

While submitting that the application is bad in law, incompetent and an abuse of the court process, the 3rd and 4th Defendants averred that the affidavit in support of the motion is sworn by the Plaintiffs' advocate yet the intended amendments are matters of fact known only to the Plaintiffs. Lastly, it was submitted that that the draft re-amended Plaint has not been exhibited and is therefore a strange document which does not assist the court to determine the nature of the intended amendment.

Determination

The main issue for determination is whether this court should exercise its discretion in the 1st Plaintiff's favour and grant him leave to re-amend his Plaint.

The Defendants have opposed the 1st Plaintiff's application for among other reasons that the proposed amendments seek to introduce a new cause of action. The court has a wide discretion to grant leave to amend pleadings at any stage of the proceedings under Order 8 Rule 3 of the Civil Procedure Rules. Pursuant to Rule 3 (5) an amendment may be allowed notwithstanding that the effect would be to add or substitute a new cause of action provided such cause of action arises out of the same facts or substantially similar facts as the cause of action in respect to which relief has already been claimed in the suit. Order 8 rule 3 (5) provides as follows:-

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 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.

The Defendants have not demonstrated that the proposed amendments do not arise from the same facts or substantially similar facts that gave rise to the suit. Their objection solely on grounds that the proposed amendments seek to introduce a new cause of action ought to fail as the matters giving rise to the amendment in my view can be said to have arisen out of the same facts and circumstances out of which the cause of action arose.

The court of appeal stated in the case of **Central Kenya Ltd -vs- Trust Bank Ltd & 5 others [2000]eKLR**

"that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue

delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

Thus, the overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. The court under order 8 Rule 3(1) has unfettered discretion to allow amendment of pleadings 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.

Save for stating that the application for amendment is highly prejudicial, the 3rd and 4th Defendants have not indicated what prejudice they are likely to suffer if the amendment is allowed. The 1st and 2nd Defendants have indicated that the application will delay the hearing of the suit. It has not been stated that such delay will cause an injury that cannot be compensated for in costs. The court in the case of **Central Kenya Limited -v- Trust Bank Limited** stated that mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation. In my view, no prejudice which cannot be compensated by an award of costs will be visited upon the Defendants if the application for amendment is allowed. The Defendants at any rate shall have the opportunity to respond to the amendment if they so wish. In the case of *Eastern Bakery vs. Castelino* (1958) EA 461 the former court of Appeal for East Africa held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side. My view is that amendments made before the hearing of a suit should be readily allowed if no prejudice is caused to the other party and if they are designed to help place before the court all the relevant matters for determination of the real issue in dispute between the parties.

In respect to the 1st Plaintiff's intention to join the Commissioner of Lands as a 5th Defendant through the proposed amendments, it has been contended by the 3rd and 4th Defendants that the office of the Commissioner of Lands has since been abolished. In my view, since the 1st Plaintiff has demonstrated that the Commissioner of Lands is a party whose presence before the court may be necessary for the court to effectually and completely adjudicate upon and settle all questions involved in the suit, I would in exercise of my discretion and pursuant to order 1 Rule 10 allow the addition of the Commissioner of Lands as the 5th Defendant having regard to the transitional provisions of the land Registration Act NO.3 of 2012 sections 107 and 108. Once a Chief Land Registrar is appointed and Gazetted, he will step into the shoes and carry out the functions which were hitherto performed by the office of the Commissioner of Lands. When such time does occur the name of the Commissioner of Lands shall be struck off and substituted with that of the Chief Land Registrar as the successor thereof again pursuant to the provisions of order 1 Rule 10 which allows for the deletion and/or addition of parties in a suit. In my view allowing the amendment will be in furtherance of the overriding objective under section 1A and 1B of the Civil Procedure Act which enjoins the court to facilitate just, expeditious, timely and affordable resolution of the civil disputes. It is in the interest of justice and expedient to allow the application for amendment at this stage to include the addition of the proposed 5th Defendant to obviate the need for the plaintiff to seek to amend the plaint once the Chief Land Registrar is appointed.

The 1st plaintiff's Notice of motion dated 2nd July 2013 is accordingly allowed as prayed on the following terms:-

i. That the re-amended plaint be filed and served within fourteen

(14) days from the date of this ruling.

(ii) That the 5th Defendant be served with summons and the re-amended plaint within fourteen (14) days from the date of the ruling.

iii. That the Defendants have leave of fourteen (14) days from the date of service of the re-amended plaint upon them to file their amended statements of defence if need be,

iv. The 1st Plaintiff shall pay the costs of the application to the 1st, 2nd, 3rd and 4th Defendants.

Ruling date, signed and delivered at Nairobi this.....20thday of....May.....2014.

J.M. MUTUNGI

JUDGE

In Presence of:-

.....For the plaintiffs

.....For the Defendants