



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 57 OF 2020 (OS)

IN THE MATTER OF AN APPLICATION FOR RECTIFICATION OF A BOUNDARY

AND

IN THE MATTER OF LR. NUMBER KALAMA/KATANGA/629

IN THE MATTER OF SECTION 80 OF THE LAND REGISTRATION ACT (2012)

AND SECTIONS 3A OF THE CIVIL PROCEDURE ACT, CAP 21 (REVISED 2018)

AND ORDER 37 RULES 8 AND 14 OF THE CIVIL PROCEDURE RULES (REVISED 2020)

BETWEEN

STEPHEN KIMEU NGUKU.....APPLICANT

VERSUS

KIOKO MAUNDU.....1ST RESPONDENT

JOHNSTONE MULI MAUNDU.....2ND RESPONDENT

MESHACK MUTUNGA MAUNDU.....3RD RESPONDENT

MUASYA MAUNDU.....4TH RESPONDENT

KYALO MAUNDU.....5TH RESPONDENT

AND

THE LAND REGISTRAR, MACHAKOS.....INTERESTED PARTY

RULING

What is before Court for determination is the Applicant's Notice of Motion application dated the 9th December, 2020 brought pursuant to Order 1 Rule 10 and Order 8 Rule 3, 4 & 5 of the Civil Procedure Rules. The Applicant seeks the following orders:

- 1. That the Applicant be granted leave to amend the originating summons as per the draft amended Originating Summons.***
- 2. That costs of this Application.***

The Application is premised on the grounds on the face of it and the supporting affidavit of STEPHEN KIMEU NGUKU where he deposes that on 21st July, 2020, he made an application to this court in the nature of an Originating Summons when he was acting in person. He explains that the court gave directions on the filing of submissions after which he sought Counsel of Messrs Masaviru & Ketoo Advocates. He claims upon reviewing his application on record, there is need to amend the said application since serious legal issues were omitted at the

time of presenting it. He now seeks leave to amend the Originating Summons to include new parties, prayers and set of evidence inadvertently left out. He reiterates that the instant motion has been filed timeously and will not occasion any injustice to the Respondents. Further, that the amendment if allowed will determine the issues in dispute with finality and fairly.

The application is opposed by the Respondents who filed a replying affidavit sworn by KIOKO MAUNDU where he deposes that the said application is fatally defective and a waste of the Court's time. He explains that the Applicant's Originating Summons sought to be amended is res judicata having been heard and determined by this Court via the Ruling dated 10th December, 2012 and the Judgement dated 16th November, 2018. He contends that the amendment sought to be included in the Amended Originating Notice of Motion prayer No. 3 was already heard and determined by this Court and a Ruling delivered dated the 16th November, 2018. He reiterates that this Court has no jurisdiction to deal with a boundary dispute. Further, that the instant application is untenable and only seeks to waste this Court's time.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated 9th December, 2020 including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether this Court should grant the Applicant leave to amend his Originating Summons as per the attached draft.

I will proceed to highlight the various legal provisions governing amendment of pleadings here below.

Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provides that:

“(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. (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.”

While Order 8 Rule 5 of the Civil Procedure Rules provides as follows:

“(1) For purposes 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

In the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR*, the Court of Appeal in dealing with issues of amendment held a follows:

“The law on amendment of pleading in terms of Section 100 of the Civil Procedure Act and Order VIA Rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

In the current scenario, I note the Applicant seeks leave to amend his Originating Summons as per the annexed draft. Upon perusal of the annexures in the respective affidavits I note the fulcrum of the dispute herein which revolves around land parcel number Kalama/Katanga/629 had been heard and determined in Machakos High Court Misc. Application No. 243 of 2006 vide Ruling dated the 10th December, 2012 and Machakos Misc. Application No. 9 of 2018 through an Order issued on 21st May, 2019. The Respondents have vehemently opposed the amendment sought and insist it is res judicata.

I wish to reproduce here below the order issued in Machakos Misc. Application No. 9 of 2018 on 21st May, 2019:

“1) That the Machakos Land Registrar together with the Machakos Land Surveyor to visit the parcel of land known as Kalama/Katanga/629 and fix the boundary of the said land pursuant to the Judgement of 5th April, 2006 in Miscellaneous Case No. 20 of 2006.

2) That the Land Registrar and the Surveyor to implement this order within 45 days and file their report.

3) That the matter be mentioned on 4th July, 2019.”

I note in the instant case, the Applicant seeks to amend the Originating Summons to include the following prayers:

“2. That the Honourable Court be pleased to revoke the amendments to the Registry Index Map 2nd Edition Ref REC/1/MKS/VOL 1/33, Diagram No. 21 Amended on 6th April, 2018. 3. That this Honourable Court be pleased to further direct the 2nd Interested Party to rectify the physical boundary of LR. NUMBER KALAMA/KATANGA/629 to agree with the boundary as initially set out in Registry Index Map No.1.”

Upon perusal of the proposed amendments including the Ruling and Judgement in the two aforementioned suits, I opine that the issues being raised had already been determined twice by courts of competent jurisdiction. Further, I note the proposed 2nd Interested Party sought to be included in the proposed amendment is the County Land Surveyor who had already been directed to fix the boundary of suit land. Insofar as it is trite that the basis of an amendment is to enable the court determine the real question in controversy between the parties, or of correcting any defect or error in any proceedings, however, from my highlights above, I find that Applicant is hell bent on abusing the Court process by seeking to relitigate on an issue which had already been determined twice by two courts’ of competent jurisdiction.

Based on the facts as presented while relying on the legal provisions certain above as well as associating myself with the quoted authority, I find that the Applicant has not met the threshold set for amending the Originating Summons and will decline to allow it.

It is against the foregoing that I find the Notice of Motion application dated the 9th December, 2020 unmerited and will disallow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

JUDGE