



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
ENVIROMENTAL & LAND DIVISION
CIVIL CASE NO. 126 OF 2011

BEN JOSEPH MWANGI.....1ST PLAINTIFF

BISHOP JUSTUS WANJALA (Sued as

Representative & trading as

LIGHT HOUSE CHURCH.....2ND PLAINTIFF

VERSUS-

AGGREY ATSIAVULA MWANZI.....1ST DEFENDANT

SOFIA NAMBANGALA NDOLO.....2ND DEFENDANT

CITY COUNCIL OF NAIROBI.....3RD DEFENDANT

[BOTH TRADING AS “KAYOLE HEKIMA ACADEMY EDUCATIONAL CENTRE]

RULING

By a Notice of Motion dated 12th April, 2013, the 3rd Defendant herein, City Council of Nairobi has sought for these prayers:-

- i. That 3rd Defendant be granted leave to amend its Statement of Defence in terms of the draft amended statement of Defence annexed thereto .
- ii. That the 3rd Defendant witness Statement by Aduma J Owuor filed on 10th June, 2011 be marked withdrawn.
- iii. That the Draft amended Defence annexed hereto be treated as the 3rd Defendant/Applicant Defence and that the same be deemed as having been duly filed and served.
- iv. Costs of the application be in the cause.

The application was premised under **Section 1A, of the Civil Procedure Act, Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules**. It was also supported by the grounds on the face of the application notably that:-

- i. The 3rd Defendant/Applicant's Statement of Defence and the witness Statement filed by **Aduma J Ojwang** did not capture the true status of the proprietorship of the disputed property as per the records held and kept by the 3rd Defendant.
- ii. That subsequently new information has been submitted to them by relevant office of the 3rd Defendants/Applicant Legal affairs Department verifying the true ownership of the disputed property as per the 3rd Defendant's records.
- iii. That the new information has materially changed the 3rd Defendant/Applicant's Defence thus necessitating this application for leave to amend 3rd Defendant's Defence.
- iv. That the intended amendments shall not in any way result in addition to any new cause of action to this matter but merely meant to assist the Court to further the overriding objective of the Civil Procedure Act.

The application was also supported by the annexed affidavit of **Victor Omwebu (Advocate)**. The application was opposed by the 1st Defendant **Ben Joseph Mwangi** who filed his Replying Affidavit. He questioned the conduct of Mr **Victor Omwebu Advocate** who swore an affidavit in support of the 3rd Defendant's application. 1st Defendant averred that, the amendments sought are calculated to delay the case with ill-intentions and he therefore opposed the amendment sought.

The parties herein canvassed the application in Court orally. I have considered the oral submissions by all the counsels herein, the pleadings, the cited authorities and the law and I make these findings:-

The 3rd Defendant/Applicant states that the sought amendment is meant to capture the true status of the proprietorship of the disputed property and is supposed to determine the real question in controversy between the parties herein.

The application is premised under **Order 8 Rule 3 of the Civil Procedure Rules** which states;

"The Court may at any stage of the proceedings on such terms as to cost or otherwise as may be just and in such manner as it may direct, allow any party to amend her pleadings".

The Court therefore has discretion to allow such an application for amendment or not. Courts have variously decided on this issue of amendments of pleadings.

In the case of **Eastern Bakery Vs Castelino (1958) EA 46**; the Court held that :-

"Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side".

Equally in the case of **Kenyatta National Hospital Vs Kenya Commercial Bank Ltd and another (2003) EA 528** it was held that:-

"The principles under which the Court allows amendments are that amendment is intended to determine true, substantive merits of the case. That amendment should be timerously applied for; that power to amend can be exercised by the Court at any stage of the proceedings".

The applicant stated that, the amendment herein was necessitated by discovering of new information and it is not meant to delay the case nor cause prejudice to the 1st Defendant but to assist the Court to determine the issues in question.

The 1st Defendant claimed that the amendments are meant to cause delay to the case and prejudice his case. However, 1st Defendant did not demonstrate how the sought amendment would delay or prejudice his case.

The rationale for allowing amendment is that they do not cause any prejudice to the party who is

taken to have knowledge of such cause at the time the original pleading is filed and also leave to allow amendments is discretionary power which is widely provided that if the Court decides to allow an amendment, it should do so upon a term as are just; see; **Supreme Court Practice 1988 at 351 and Michelle Vs Harms Engineering Company (1967) 12 QB 703 at 718.**

3rd Defendant/Applicant herein has demonstrates that the amendment sought are only meant to assist the Court to determine the matters in issue and to further the overriding objective of **Section 1A of the Civil Procedure** which is to “*facilitate the just, expeditious, proportionate and affordable resolution of civil Disputes*”.

Having carefully considered the Notice of Motion dated 12/4/2013 by the 3rd Defendant herein, the Court finds that it is merited. The Court overrules, the 1st Defendant opposition to the application for amendment as the Courts have variously held that, “Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and in this respect there can be no injustice if the other side can be compensated by costs”. To quote from **Kuloba Vs Odoul (2001) KLR 647.**

The 1st Defendant herein, can adequately be compensated by costs and no injustice will be occasioned to him.

For the above reasons, the Court allows the 3rd Defendant Notice of Motion dated 12th April, 2013 with costs to the 1st Defendant. The 1st Defendant is also granted leave to amend his Defence accordingly if need be and so are the Plaintiffs herein.

It is so ordered.

Dated, Signed and delivered this 26TH day of July, 2013.

L. N. GACHERU

JUDGE

In the Presence of:-

.....for the Applicants

.....for the Defendants

Anne Court Clerk

L. N. GACHERU

JUDGE

