



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 1403 OF 2007**

**TULIP PROPERTIES LTD.....PLAINTIFF**

**VERSUS**

**MOHAMMED KORIOW**

**SIMON KIPRONO LABOSO**

.....**1<sup>ST</sup> DEFENDANTS**

**MACDONALD LIJOODI MARAKA**

**NOOR MOHAMMED HASSAN**

**DAVID MWENJE .....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF TITLES.....4<sup>TH</sup> DEFENDANT**

**RULING**

The 1<sup>st</sup> Defendants have filed a Notice of Motion dated 10<sup>th</sup> May 2013 under section 3A, of the Civil Procedure Act and Order 51 Rules 1 and 3, Order 8 Rule 3(1), (2), (5), Rule 5(1) and Rule 8 of the Civil Procedure Rules. They are seeking leave to amend their defence dated 8<sup>th</sup> November, 2004 by introducing a counterclaim. The said Defendants are also seeking leave to enjoin the parties named in the counter-claim into these proceedings.

The application is supported by the affidavit of Simon Kiprono Laboso sworn on 10<sup>th</sup> May, 2013 wherein the grounds outlined in the application are detailed. The 1<sup>st</sup> Defendants' case is that the crux of this suit comprises an ownership and/or proprietorship dispute over Land Reference 14277 Nairobi, where both the Plaintiff and the 1<sup>st</sup> Defendants have title documents. The 1<sup>st</sup> Defendants have contended that a determination cannot be made without them pleading their counterclaim and tendering evidence in support of the same. The said Defendants have stated that they have set out a case against the Plaintiff in the draft counterclaim, which has been annexed to the application, and have challenged the Plaintiff's acquisition of the grant I. R. 46540 and the subsequent transfer of the same, alleging that the same was acquired irregularly and is therefore null and void. Further, the 1<sup>st</sup> Defendants have contended in the draft counterclaim that their title having been issued by the relevant authorities, after following all the procedures required in law is absolute, sacrosanct and indefeasible.

According to the 1<sup>st</sup> Defendants, the guiding principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings provided they will not result in prejudice or injustice which cannot be compensated for in costs. The Defendants have alleged that the proposed amendments will not occasion any prejudice to the adverse parties which cannot be compensated for in costs and further, that since the matter is still before the court, all the parties will have an opportunity to adduce evidence and make submissions. It is the 1<sup>st</sup> Defendants' case that the court has discretion to allow amendments even though made outside the limitation period if the court thinks it is just to do so, provided the new or substituted cause of action arises from the same or substantially the same facts as the earlier cause of action. Lastly, the 1<sup>st</sup> Defendants have stated that the court has extensive power of allowing amendment to pleadings as may be necessary for the purposes of determining the real question in controversy between the parties.

The Plaintiff has opposed the application as set out in the grounds of opposition dated 22<sup>nd</sup> May 2013, wherein it is argued that the suit is part-heard since the Plaintiff has closed its case and the limitation period for amending pleadings has elapsed. The Plaintiff objected to the amendment stating that it sought to introduce a different claim and is therefore a fresh suit and further, that the intended amendment sought orders against retired President Daniel Toroitich Moi who is not a party to the suit. The application was also opposed on grounds that the order sought against retired President Daniel Toroitich Arap Moi are similar to orders sought in the 1<sup>st</sup> Defendant's Petition No. 277 of 2012 in the Constitutional and Human Rights Division. Lastly, it was contended that the intended amendment was an abuse of the court process intended to delay the hearing of this suit, where it is now the 1<sup>st</sup> Defendants' turn to present their evidence and prove their case.

The parties to filed written submissions and Counsel for the 1<sup>st</sup> Defendants' argued in submissions dated 4<sup>th</sup> June, 2013 that substantive justice will be served after all the claims have been ventilated in the public glare, in an open and impartial court. It was further argued that the court's overriding objective is to facilitate the delivery of justice in a manner that is just and proportionate, and that will result to affordable resolution of the dispute between the parties. The 1<sup>st</sup> Defendant's counsel relied on the cases of **Kiplangat Arap Biator -vs- Esther Tala Chepyegon (2006) eKLR**, **Rosemary Muthoni Msafiri -vs- Elizabeth Msafiri Mombasa HCCC No. 365 of 2009** and **Amalo Co. Ltd -vs- Investments & Mortgages Bank Limited (2005) eKLR** where the court gave leave to the applicants to amend their defences to include a counterclaim. Reliance was also placed on the treatise **Bullen and Leake** as well as the cases of **Barclays Bank DCO -vs- Shamshudin (1973) EA 451** and **Boesco Ltd -vs- Alfa Lava Company Ltd (1994) 4 All ER 464**

The 1<sup>st</sup> Defendants' advocate referred the court to the case of **Timothy Ndalo Otiende -vs- Joshua A Osewe Kisumu HCCA No.73 of 1996** for the proposition that the main question in an application for leave to amend is whether or not prejudice would have been caused to the other party, since such an application can be allowed even where the period of limitation has expired provided the court thinks it is just to do so. Counsel also relied on the case of **Monica Wamuhu Macharia -vs- Attorney General & Another CA No. 282 of 1998** where the court stated that amendments can be made at any stage of the proceedings so long as the step is made before judgment.

Reliance was also placed on the cases of **John Akello Omboto t/a Ringa Petrol Station -vs- Caltex Oil(K) Ltd, Kisumu HCCC No. 200 of 1990** and **Anthony Francis Wareham t/a Wareham & Others -vs- Kenya Post Office Savings Bank CA No. 5 & 48 of 2002** for the proposition that the court's power of ordering amendment is exercised for the purposes of determining the real questions in the controversy between the parties. Counsel for the 1<sup>st</sup> Defendants referred the court to the case of **Microsoft Corporation -vs- Mitsumi Computer Garage & anor Nairobi HCCC No. 810 of 2001** where the court made a finding that rules of procedure are intended to facilitate the administration of justice in a fairly orderly and predictable manner.

It was further submitted for the 1<sup>st</sup> Defendants that the intended amendments seeks not only to introduce a new party but to plead the matters so that the real question in controversy between the parties may be

determined and to avoid a multiplicity of suits. It was argued that there is no new or inconsistent cause of action being introduced and Counsel relied on the cases of **Melita -vs- Shah (1965)EA 321** and **Kyalo -vs- Bayusuf Brothers Ltd (1983)KLR 229**.

The 1<sup>st</sup> Defendants through their advocates stated that no prejudice will be occasioned to the other parties which cannot be compensated for in costs. Counsel submitted that the Plaintiff has not demonstrated what prejudice it will suffer if the proposed amendment is allowed, since there is no affidavit on oath where the prejudice to be suffered has been particularized and stated in clear and unequivocal terms. Reliance was placed on the Court of Appeal decision in the case of **Central Kenya Ltd -vs- Trust Bank Ltd & others (2000)2 EA 365** wherein it was held that all amendments should be freely allowed and at any stage of the proceedings, provided the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs.

It was also argued for the 1<sup>st</sup> Defendants that the proposed amendment is being sought before judgment, and the law allows an amendment at any stage of the proceedings provided no prejudice is caused to the other party which cannot be compensated for in costs and the court was referred to the case of **Beaco -vs- Alfa Laval Company Ltd(1994)4 All ER 464**. in this regard. Lastly, the 1<sup>st</sup> Defendants stated that there is no abuse of the court process as the intended amendments have nothing to do with Petition No. 277 of 2012 in the Constitutional and Human Rights Division which the Plaintiff has not demonstrated that it is party to and further, that the said Defendants are not engaged in parallel proceedings since the issue of proprietorship will be determined in this suit.

The Plaintiff's counsel filed submissions dated 22<sup>nd</sup> May 2013 wherein he argued that the limitation period for amending pleadings has lapsed. Further, that the suit is part heard and that what is now pending is the defence case. Counsel stated that the defence sought to be amended is dated 8<sup>th</sup> November 2004 and relied on the findings in the cases of **Mehta -vs- Shah (1965) EA 321** and **Kyalo -vs- Bayusuf Ltd (1983) KLR 229** for the proposition that a person seeking to amend his pleadings should apply without undue delay and further, that applications for amendments should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process.

It was submitted for the Plaintiff that the application has been brought over 8 years and after the close of the Plaintiff's case, and that the only reason tendered by the 1<sup>st</sup> Defendants is that they had failed to include the counterclaim. The Plaintiff referred the court to the case of **General Manager E.A.R. & H.A. -vs- Thierstein (1968) EA 354** where it was stated that amendments can be allowed after the close of the Defendant's case when it is necessitated solely by a drafting error and there is no element of surprise to the other party. Reliance was also placed on the case of **Joseph Ochieng' & 2 others t/a Aquiline Agencies -vs- First National Bank of Chicago(1995) eKLR** in which the court cited with approval the case of **Ketterman -vs- Hansel Properties Ltd (1988)1 All ER 35** where it was held that to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful Defendant an opportunity to renew the fight from an entirely different defence.

The Plaintiff's counsel stated that the intended amendments introduce a different claim/cause of action as the 1<sup>st</sup> Defendants intend to challenge the process of acquisition of its title, which would fundamentally change the nature of the original claim and ought to be brought by way of a fresh suit. Counsel relied on the case of **Central Kenya Ltd -vs- Trust Bank Ltd (2000) 2 EA 365** for the submission that amendments of pleadings that introduce a new or inconsistent cause of action will not be allowed. The Plaintiff also referred the court to the case of **Mehta -vs- Shah (1965) EA 321** where it was held that leave to amend will be refused where the character of the suit is changed or where it would be prejudicial to the rights of the parties existing at the date of the proposed amendment.

Lastly, the Plaintiff submitted that the application is an abuse of the court process since the orders sought are similar to the orders sought in the applicant's Petition No. 277 of 2012 in the Constitutional and Human Rights Division, and relied on the case of **Nishith Yogendra Patel -vs- Pascale Mireille Baksh & Another (2009) eKLR** where it was stated that pursuing the same remedies in parallel courts which are competent to deal with the application amounted to an abuse of the court process.

I have read and carefully considered the pleadings and submissions by the 1<sup>st</sup> Defendant and Plaintiff. The main issue for determination is whether this court should exercise its discretion in the 1<sup>st</sup> Defendant's favour and grant them leave to amend their Defence to introduce a Counterclaim and join a new party to this suit. The provisions of Order 8 Rule 3 of the Civil Procedure Rules grant the court wide discretion to grant leave to amend pleadings at any stage of the proceedings notwithstanding that the effect may be to add a new party, or change the capacity in which a party is suing or to add or substitute a new cause of action provided such action arises out of the same facts. I am also guided in this respect by all the judicial authorities cited by the parties, and particularly by the decision of the Court of Appeal in **Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365** that the overriding consideration in circumstances as arise in this case is 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 amendment sought by the 1<sup>st</sup> Defendants seeks certain relief from the Plaintiff herein and other Defendants in the proposed counterclaim. It is my view that the 1<sup>st</sup> Defendant should be allowed their day in court in this respect, even though their action to amend their pleading is coming late in the day. This is because the prejudice solely caused by delay can be adequately addressed by way of costs. The real prejudice that is likely to be caused by the proposed amendment however not only arises from the delay in bringing the application, but also from the fact that the suit herein is part heard and the Plaintiff closed its case on 19<sup>th</sup> October 2010 after calling two witnesses who testified in court.

The counterclaim also seeks to join a new party, the 2<sup>nd</sup> Defendant in the Counterclaim, who has not had the benefit of participating in the trial and cross-examining witnesses called so far and will be prejudiced in this respect. There is also the aspect of abuse of process of court to be considered as the 1<sup>st</sup> Defendant have also sued the Defendants in the proposed counterclaim in Nairobi High Court Petition No. 277 of 2012 (now Nairobi High Court ELC Case 73 of 2013) – **Mohammed Koriow Nur and 3 Others vs Retired President Daniel arap Moi and 3 Others.**

The court is in this regard granted the discretion under Order 8 Rule 3(1) to grant amendments of pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. In the circumstances of the present application this court is faced with two actions that it can undertake. The first is to disallow the amendment sought by the 1<sup>st</sup> Defendant in light of the prejudice alluded to that will be caused to the Plaintiff herein and the proposed 2<sup>nd</sup> Defendant in the counterclaim. The alternative course of action available to the court is to allow the amendment, and mitigate the prejudice that it may cause by allowing the Plaintiff herein to reopen its case to recall its witnesses and bring any further evidence which will be subjected to further cross-examination.

It is my considered opinion that as the overriding principles of section 1A and 1B of the Civil Procedure Act require just, expeditious, proportionate and affordable resolution of civil disputes, it would be more prudent to allow the Defendant's application to amend their pleadings in order to forestall further delays and expedite the hearing of the suit herein. I have also perused the file for Nairobi High Court Petition No. 277 of 2012 (now Nairobi High Court ELC 73 of 2012), and do note that it is indeed the case that the 1<sup>st</sup> Defendants are seeking relief therein with regard to the property that is the subject matter of the suit herein, and against the same parties herein. This Petition was filed on 28<sup>th</sup> June 2012, during the pendency of the suit filed herein, and will have to be stayed pursuant to the provisions of section 6 of the Civil Procedure Act. The 1<sup>st</sup> Defendant will however have to be subjected to the payment of the costs that their delay in applying for the amendments of their pleadings has caused.

It is therefore accordingly ordered as follows:

1. The 1<sup>st</sup> Defendants in the Original Suit herein are granted leave to amend their Defence to the extent that it introduces a Counterclaim in the terms of the draft annexed to their Notice of Motion dated 10<sup>th</sup> May 2013, and to also thereby join the 2<sup>nd</sup> Defendant in the said Counterclaim as a party in this suit.

2. The said Defence and Counterclaim, together with the List and Bundle of Documents and Witness Statements to be relied upon by the 1<sup>st</sup> Defendant in the Original Suit herein, to be served upon the parties in the Original Suit and the Defendants in the Counterclaim within 15 days of the date of this ruling. In default the orders as to the amendment of the Defence and joinder of the 2<sup>nd</sup> Defendant in the Counterclaim hereinabove shall cease to have effect, and the Original Suit shall proceed to hearing from where it stopped.
3. The Plaintiff and 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in the Original Suit and the Defendants in the Counterclaim are granted leave to file their Reply to the Defence and Defence to the Counterclaim, List and Bundle of Documents, and Witness Statements to be relied upon within 30 days of service by the 1<sup>st</sup> Defendant in the Original Suit herein as ordered hereinabove.
4. Upon compliance with order 3 hereinabove the trial of this suit shall start *de novo*.
5. The 1<sup>st</sup> Defendants in the Original Suit herein shall meet the costs of the Notice of Motion dated 10<sup>th</sup> May 2013, and the costs incurred by the Plaintiff in the Original Suit relating to the trial proceedings held on 19<sup>th</sup> October 2010.
6. That the hearing and all proceedings in Nairobi High Court Petition No. 277 of 2012 now Nairobi High Court ELC 73 of 2012 be and are hereby stayed pending the hearing and determination of the suits filed herein.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_5<sup>th</sup>\_\_\_\_ day of\_\_\_\_August\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**