



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL SUIT 59 OF 2009

JOSHUA MUEMA NYAMAI.....APPLICANT

VERSUS

ANNE KATUNGE LEWA.....RESPONDENT

RULING

1. The Application before the Court is the Notice of Motion dated **20/10/2011** (“Application”). It has been brought by the plaintiff herein, **Joshua Muema Nyamai** (“Applicant”). It seeks three prayers:
 - a. **THAT** the Honourable Court be pleased to grant the Plaintiff leave to amend the Plaint dated 16/03/2009;
 - b. **THAT** the draft Amended Plaint annexed [to the Application] be deemed as duly filed upon payment of the requisite court fees.
 - c. **THAT** costs be in the cause.
2. The Application is made on the grounds enumerated on its body and is supported by the Affidavit of the Applicant. He depones that he believes that it is necessary to amend the Plaint so that the matters in controversy between the parties can be more fairly resolved. In particular, he believes that it is important that he clarifies his cause of action to be one of trusteeship.
3. The Application is opposed. The Respondent, **Anne Katunge Lewa** (“Respondent”) filed a Replying Affidavit on **03/05/2011**. She believes that the Application is an abuse of the process of the Court. It is her opinion that the suggested amendments, if allowed, would totally change the nature of the case: whereas the plaint, as originally filed contained a cause of action rooted in sub-division of matrimonial property, the suggested changes will transform the cause of action to be one of trust.
4. The parties appeared before *Justice Kihara Kariuki* on **10/03/2011** when they agreed to canvass the Application by way of written submissions. On **28/06/2011**, the parties appeared before **Justice Kihara Kariuki** again and confirmed that they had filed their written submissions. Ruling was slated for **12/10/2011** but by then, *Justice Kihara Kariuki* had left the station. The matter was placed before me for a mention on **25/11/2011**. Both parties, through their counsel, requested for a ruling based on the record as it stood.
5. I have considered all the documents filed herein including the written submissions by both attorneys. The Application is brought under **Order 8, Rule 3(1)**. That section provides:

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.

6. The general rule applicable is that started by **Sir Kenneth O'Connor** in *Eastern Bakery v Castellino* [1958] EA 461 AT 462:

...[A]mendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

7. The rationale for this liberal attitude towards amendments was given in *Patel v Joshi* [1952] 19 EACA 42 at p. 49:

Amendments are allowed as a concession to human liability or error, not to enable a litigant to play fast and loose with his opponent and the court.

8. We therefore start from the position that amendments, whether to complaints or defences or other pleadings, are freely permitted unless some factor exists to disentitle a party from the proposed amendment. Over the years, the courts have suggested factors which would disentitle a party from the sought amendment. These include:

- a. A party cannot, through an amendment, substitute one distinct cause of action for another;
- b. A party cannot change the subject matter of the suit or substantially change the character of the suit;
- c. A party will also not be permitted to amend where such an amendment will prejudice the rights of the other party existing at the time of the proposed amendment. For example, a party will not be permitted to amend its pleadings if the effect would be to deny the opposite side a defence of limitation which might already have accrued.
- d. A party will not be permitted to amend where such an amendment is sought in bad faith or where it is a device to abuse the process of the court.

9. These principles are derived from a number of our cases including *Eastern Bakery Case* (supra); *Central Kenya Ltd v. Trust Bank Ltd & Others* (Civil Appeal No. NAI 222 of 1998); *Ladopharma Co. Ltd & Others v National Bank of Kenya Ltd* (Milimani HCCC No. 1031 of 2001) and *Kassam v Bank of Baroda (Kenya Ltd* [2002] 1KLR 294 among others. Some of these cases were cited by the counsel for the Applicant, and I am grateful for their assistance. The singular principle to be distilled from these cases and principles is that an amendment will be allowed if it does not cause injustice to the other side.

10. I will now apply these principles to the instant Application. The Respondent complains that:

- a. The amendments, if allowed, would introduce an entirely new cause of action;
- b. The effect of the suggested amendments is to change the character of the suit;
- c. The amendments are brought in bad faith because they have been brought in response to a ruling of this Court refusing to issue interlocutory injunction at the instance of the Applicant.

11. I am not persuaded that the Applicant is introducing an entirely new cause of action here. It is true that the Complaint as originally filed did not seek a declaration of trust and an accounting based thereon. The original claim was based on a claim for distribution of matrimonial property. However, the facts pleaded by the Plaintiff disclose the cause of action of trust. Indeed, the division of property sought by the Applicant in the original Complaint is a special species of trust. The partition and division sought therein is really analogous to the more precisely defined trust cause of action included in the suggested amended

Plaint.

12. For the same reason, I am also not persuaded that the suggested amendments have radically changed the nature of the suit as to embarrass or prejudice the Respondent. As the Applicant's correctly point out, the length or quantity of the amendments is not, in itself, a bar to leave to amend. See *Central Kenya Ltd Case* (supra) where the Court of Appeal stated:

...[M]ere length of proposed amendments is not a ground for declining leave. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties.

13. I am also not persuaded that the Applicant have sought the amendments in bad faith. It is true that the application has come after the Applicant's prayer for injunctive relief was dismissed by *Justice Lenaola*. However, that in itself does not disentitle the Applicant from seeking to amend his pleadings in as long as his amendments do not prejudice the Respondent. Since I have held that the suggested amendments do not denature the original cause of action in a sufficiently radical way to warrant a conclusion that the Applicant is seeking to re-do his suit in the guise of an amendment, I do not find the claim of bad faith well founded. It is true that the Applicant sought to leave after the matter had been fixed for hearing but before the hearing date had arrived. Indeed, he came before the Court on a Certificate of Urgency so as to ensure that the amendments are on record before the hearing date. I find no bad faith on his part. All I find is a delay, and perhaps, inconvenience to the Respondent for which I will compensate them with costs.

14. Accordingly, I will allow the Application and make the following orders:

- a. **That** the Applicant (Plaintiff herein) is hereby granted leave to amend his Plaintiff filed on **16/03/2009**;
- b. **That** the Amended Plaintiff annexed to the Notice of Motion Application dated **20/04/2011** will be deemed as duly filed upon payment of requisite Court fees as long as the Court fees are paid within seven days hereof;
- c. **That** the Respondent (Defendant) shall be at liberty to file an amended defence within **14 days** of today's date;
- d. **That** he Applicant (Plaintiff) will bear the Respondent's (Defendant's) costs of this Application.

DATED and DELIVERED at MACHAKOS this 27TH day of FEBRUARY, 2012

J.M. NGUGI
JUDGE