



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

CIVIL SUIT NO. 77 OF 2008

ALMAR HOLDINGS LIMITEDPLAINTIFF

VERSUS

ATTORNEY GENERAL1ST DEFENDANT

**MALINDI DISTRICT HEALTH
MANAGEMENT BOARD**

.....2ND DEFENDANT

MALINDI DISTRICT HOSPITAL

3RD DEFENDANT

RULING

The Chamber summons dated 27th July 2010 is made pursuant to the provisions of Order VI Rule 3 (1), Rule 5 (1) and Rule 8, Order 1 Rule 10 (2) of the Civil Procedure Rules and section 3A Civil Procedure Act, seeking that this court do grant leave to the defendants to amend its defence and counterclaim.

(2) That the defendant be granted leave to enjoin Katana Ndzai and Ali Omar Said Alamudi as 1st and 2nd defendants in the counterclaim.

(3) The draft amended defence and counterclaim annexed to the affidavit in support and marked 'A' be deemed as duly filed and served.

(4) The costs of this application be in the cause.

The application is based on the following grounds:

(1) The defendants have found new evidence which they desire to adduce in court and wish to include a counterclaim.

(2) The said evidence can only be properly adduced in this court if the defendant files an amended defence and counterclaim.

(3) The defendants wish to include other new parties to the suit as they are necessary for the determination of this suit.

(4) The plaintiff will not be prejudiced by the orders sought.

In support of the application, is an affidavit sworn by Joseph Kariuki Wanjohi, a Health Inspector at Malindi District Hospital (2nd defendant) in which he states that the hospital has furnished him with further documents in the matter, which show that there was fraud and improper conduct in the acquisition of the land in question by the plaintiff company and the defendants in the counterclaim.

The 2nd defendant wished to amend the defence and include a counterclaim so that the issue of fraud can be canvassed at the hearing. It is in the light of this new evidence that applicant desires to join KATANA NDZAI and ALI OMAR SAID ALAMUDI as defendants to the counterclaim.

The application is opposed and in a replying affidavit sworn by GUISEPPE PASSAGLIA, (the plaintiff's director) he depones that the court already visited the suit premises with the necessary parties including the 2nd and 3rd defendants' representatives and the plaintiff's witness, a professional surveyor has testified on aspects relating to the survey.

It is contested that what is referred to as new material on fraud are simply allegations structured in offended semantics. Further, that the proposed amended pleadings are based on material found within the plaintiff's list of documents, so it is not new material because plaintiff's list of document was served on the defendant before the trial begun in 2009.

The plaintiff mentions some interaction he had with OMAR ALAMUDI regarding the inspection of the suit property. Defendant attempts at amendment are described by respondent as "trying to pull a fast one on the court because even the "further documents" being referred to have not been included in any further list of defendant's documents"

Paragraph 24, 2-31 are really out of place as they tend to argue the material suit rather than the application.

The other aspect of the respondent's objection is that there has been great delay in filing this application and that plaintiff would then have a to recall the surveyor, amend its pleadings and file a fresh list of documents and this will be costly, time consuming and prejudicial to plaintiff. The application is seen as a mischievous intention to delay progress in this case. The plaintiff filed a supplementary affidavit attaching other exhibits.

In response, the 2nd defendant's representative, Joseph Kariuki, filed a supplementary affidavit stating that as a matter of fact, the new material was handed over to him by the District Works Officer from the Ministry of Works which would demonstrate the status of the Malindi District Hospital's land and he annexed the relevant site plan. He listed several other old letters dating back to 1999 which had been held by the hospital and he points out, this is public utility land which has generated a lot of public interest so the amendment ought to be allowed so that the real issues in controversy such as conspiracy to defraud the hospital of its land, can be presented before this court and be finally determined.

It was agreed that this matter be disposed of by way of written submissions, however, only the respondent's counsel Mr. Bryant filed the written submissions, Mr. Njoroge (the State Counsel) failed to file written submissions despite period given to him to file the submissions.

I have perused the proposed amended defence and counterclaim, the defendant's contention is that for its challenge to the plaintiff's case to have any meaningful basis, then the amendment ought to be allowed, so that the issue of fraud can be pleaded, as this is the only way it can then be able to adduce evidence of fraud during the hearing, and a counterclaim introducing the two named persons is also desirable.

The settled rule with regard to amendment of pleadings is stated in A. I. R. COMMENTARIES ON THE INDIAN CIVIL PROCEDURE CODE by CHITTALEY and RAO, VOL.2, 6TH Edition at page 2245.

“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 the amendment can be allowed without injustice to the other side.”

The respondent opposes this on grounds that:

(1) The court already visited the suit premises accompanied by all the relevant parties. Is there anything that would bar a revisit with all the parties including the proposed ones? I detect no difficulty at all. The site is about five minutes drive from the court – the visit lasted less than one hour, and police readily provided security so there would be no prejudice occasioned by a revisit, in terms of distance, time and facilitation.

It is true that the plaintiff’s first witness testified – however I note that plaintiff is not saying that the amendment will be patching up on the cross-examination carried out with regard to PW1’s evidence. This may be a professional witness but that does not mean he cannot be recalled to testify

(3) Plaintiff also claims that an amendment cannot be allowed when a matter has reached a late stage – true – but in the present case the life has only just begun – only the surveyor has testified, that cannot be termed as a late stage by any stretch of the word. In any event an amendment is allowed at any stage, if a party can demonstrate good reasons.

(4) Respondent also complains that amendment will mean recalling the surveyor, amending the pleadings, filing a fresh list of documents – and this will be costly in terms of time and money. I think those are aspects which can easily be compensated by directing the applicant to meet the costs including costs of recalling the witnesses.

I notice that even in the respondent’s own affidavits, he has made reference twice, to interacting and dealing with OMAR ALUMADI (paragraph 42 of Guisepppe’s affidavit) in relation to this suit property – which then confirms the defendant’s asserting that OMAR ALUMADI was involved in dealings with this property and ought to be joined as a party. From the proposed amended pleadings, it is clear to me that applicants want to amend their pleading so as to fully lay out their claim against the plaintiff and the intended defendants in the counterclaim.

In the Court of Appeal decision **CENTRAL KENYA LTD V TRUST BANK LTD, TRUST FINANCE AND OTHERS, (Civil Appeal No. 222 of 1998 (unreported)** – in a bench comprising Justices J. E. Gicheru, S. E. O. Bosire and E. Owuor, the Honourable Judges of Appeal stated:

“It is also trite law, that as far as possible, a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action ...otherwise, the court will not later permit him to reopen the same subject of litigation...because they have from negligence, inadvertent or accidentally omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obitate this. Hence the guiding principle in applications for leave to amend is that all amendment should be freely allowed at any stage of the proceedings, provided that the amendment or joinders will not result in prejudice or injustice to the other party, which cannot properly be compensated.”

I have already addressed my mind to the three aspects of prejudice, injustice and compensation by costs.

Is there any new cause of action raised by the pleadings – that is what the plaintiff’s say although he does not state what he considers to constitute the new cause of action. My own assessment of the proposed amendments is that they simply bring out in clearer perspective the issues in controversy which is the acquisition of the suit land, its ownership and legality thereof – that, to my mind is not a new cause of action, in fact the proposed amendments are not inconsistent with the cause of action existing in this

matter.

I am persuaded that the ends of justice will be met for all parties involved in this matter, and the issues in controversy will be properly addressed before this court, if the amendment is allowed so as to introduce the fraud alleged in the statement of defence, and for the two persons to be joined as defendants in the counterclaim. My finding is that the application is merited and I allow it. The draft amended defence and counterclaim and amendments here are deemed as duly filed and served.

The applicants shall bear the costs of this application.

Delivered and dated this **28th** day of **March 2011** at Malindi.

H. A. OMONDI

JUDGE

Mr. Bryant for respondent

Mr. Naulikha for Applicant