



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 2018 of 1990

FRANCIS NDUNG’U NJUGUNA.....PLAINTIFF

VERSUS

NJAU KABIRII.....1ST DEFENDANT

PAULINA GACHAMBI KARIUKI.....2ND DEFENDANT

R U L I N G

1. The application before me is the Chamber Summons dated 14/09/2007 filed on behalf of the Plaintiff/Applicant for
ORDERS:-

1. ***THAT*** the Plaintiff be granted leave to amend his plaint as per the draft amended plaint annexed hereto.
2. ***THAT*** the draft amended plaint annexed hereto be deemed duly filed and served upon determination of this application.
3. ***THAT*** costs be in the cause.

2. The application is premised on the grounds that (i) some very vital information was left out by the Plaintiff while drafting his plaint; (ii) the inclusion of the missing information will enable the court to make an informed decision in the matter and (iii) the amendment will not prejudice the Defendant but help in meeting the ends of justice.

3. The application is also supported by the affidavit of **Francis Ndungu Njuguna**, the Plaintiff herein. The deponent says that the proposed amendments have been necessitated by two factors:- (a) that there is 3.80 acres which the Plaintiff had initially bought from the Defendant and which parcel of land was not in dispute as at the time of filing plaint but which is now disputed and (b) the entry into the case of a third party, one Paulina Gachambi Kariuki as an interested party has introduced a new dimension to the case and (c) that because of the law, it is advisable for the plaint to be amended to include a prayer for refund of the purchase price should the main prayer fail.

4. The application is opposed by the 3rd party Pauline Gachambi Kariuki on the grounds that the proposed amendment is coming too late in the day and that the claim is time barred. The 3rd Party also says that the proposed amendment is highly prejudicial to her since the person the Plaintiff alleged to have bought the 3.80 acres of land is now deceased. The 3rd party also claims that if the amendment as proposed is allowed, it will deny the said Third Party her defence of time limitation.

5. The application is also opposed by the Defendant on the grounds:
1. **THAT** the suit against Njau Kibiriri abated over one year after his death without substitution. The amendment sought offends order XXIII of the Civil Procedure Rules.
 2. **THAT** the prayers sought in 6(a), 7, 8, 11d, e and f are time barred and offend the Limitation of Actions Act.
6. The Defendant did not make any other submissions nor did he appear both on 29/07/2009 and 29/08/2009 when the matter came up for hearing and mention respectively.
7. The Plaintiff/Applicant made spirited submissions and argued that the proposed amendments are absolutely necessary and will not prejudice the Defendant/Interested Party in any way. The Plaintiff, through the firm of Gachoka Mwangi & Co. Advocates submitted that Order VIA Rules 3 and 8 of the Civil Procedure Rules provide that amendment to pleadings ought to be generally accepted unless such amendment would cause an outright injustice to the other party in the suit. Counsel for the Plaintiff argued that if the amendment is allowed, the Interested Party will also have a chance to amend her pleadings (if any) and that any costs incurred therefrom can be paid by the Plaintiff. Counsel for the Plaintiff argued that no injustice would be suffered by the Respondents. Further, counsel argued that over the years, courts have leaned towards allowing amendment of pleadings unless there is a very good reason for refusing to do so. In the case of **Eastern Bakery –vs- Castelino [1958] E.A. 461** referred to by counsel for the Plaintiff/Applicant, the Court of Appeal for Eastern Africa, held inter alia that —
- “amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs.”*
8. Counsel for the Plaintiff further submitted that contrary to the misapprehension held by the 3rd party, the Plaintiff is not seeking to introduce a new claim by the proposed amendments and that there is no injustice that is likely to be caused to the 3rd Party. Further, counsel for the Plaintiff submitted that the 3rd Party cannot take shelter under the allegation that she was not a party to the transactions that gave rise to this suit. Counsel submitted that since the Defendant who has since died was substituted within the time allowed for such substitution, the party now appearing in place of the said deceased Defendant cannot tell the court that he was not there at that time.
9. I have now carefully considered the application as filed, the submissions made and the law. The issue that arises for determination from what I have considered above is whether the Plaintiff/Applicant has satisfied this court that he is entitled to the order sought. In other words are the proposed amendments such that if allowed will not cause any injustice to the Interested Party or the Defendant? The measure of what would amount to injustice according to the **Eastern Bakery case** (above) is a party’s ability or inability to pay costs. In the instant case, the Plaintiff/Applicant says that he is willing to reimburse costs to the other party.
10. I have also perused the record and note that there are a number of other applications on the file. There is a Notice of Motion application dated 4/11/2008 filed by M/s Mwicigi Kinuthia & Co. Advocates, seeking —
- (a) *That direction be given for hearing of this case.*
 - (b) *That this case [ELC No. 49 of 2007] be consolidated with HCCC No. 2018 of 1990 – Francis Njuguna – vs- Njau Kibiririi which concerns the same premises LR Githunguri/Kimathi/173 and be heard together.*
 - (c) *That costs be in the cause.*
11. I have also perused the draft amended. On the basis of all these considerations, I am satisfied that the Plaintiffs

Chamber Summons application dated 14/09/2007 has merit. I have not noted any circumstances that would cause injustice to either the Defendant or the Interested Party. It is clear to me that there are issues that need to be clarified through the proposed amendments so that the court is enabled to decide this case based on all facts before it. Accordingly, leave be and is hereby granted to the Plaintiff/Applicant to amend his plaint as per the draft amended plaint annexed to the application. The Plaintiff shall file and serve the amended plaint within 7 (seven) days from the date of this ruling. The Defendant and Interested Party shall be at liberty to file and serve their amended pleadings (if any) in accordance with the rules.

12. As I conclude this ruling, I must tell all the parties herein that no more time should be lost in having this suit set down for hearing once the amended pleadings are closed. Litigation must surely come to an end and so that the ending process can start. Costs of this application shall be paid to the Defendants and the Interested Party.

It is so ordered.

Delivered and Dated at Nairobi this 28th day of January, 2010.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Paul Muite for Gachika Mwangi (present) for the Plaintiff/Applicant

No appearance for (M/s S.W. Ndegwa) (absent) for the Defendant/Respondent

M/s Kamunye & Co. (absent) for Interested Party

Mr. Shikumo– court clerk