

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 523 of 2009

KENYA CHRISTIAN INDUSTRIAL TRAINING INSTITUTE.....PLAINTIFF

V E R S U S

ABDULAHI MOHAMMED HUSSEIN.....DEFENDANT

R U L I N G

On 14th October 2009 the Plaintiff filed the suit seeking a permanent injunction to restrain the Defendant by himself, his agents and/or servants from encroaching, trespassing, constructing and in any other way interfering with the “Defendant’s” property in LR No.209/12484, general damages for trespass and costs. The Plaintiff pleaded it was the registered owner of this property which was adjacent to the Defendant’s property in LR. No. 209/12681. Both properties are situated on Fifth Street of Eastleigh Section II Nairobi. The Plaintiff claimed that the properties are separated by a natural drainage system measuring approximately 2.5 metres wide. It is alleged that some time in August 2009 the Defendant commenced construction of a building on his parcel of land by digging a foundation which has cut across this natural drainage and encroached into the Plaintiff’s perimeter wall. The Defendant has in the course of the construction erected massive support structures against the Plaintiff’s perimeter wall which in addition to the encroachment on the foundation have considerably weakened the wall which is set to give way and may collapse. The Defendant, it was further alleged, has cut off five (5) telephone lines leading to the Plaintiff’s property severely disrupting the communication system which is core in the running of the Plaintiff’s communication system. The construction on the drainage system has obstructed the natural flow of waste down the system which is causing a pile up upstream that will invariably cause flooding on the Plaintiff’s property and the surrounding environment. The intervention by National Environment Management Board Authority (NEMA) to stop the intrusion has not borne fruit. The Plaintiff complained that these acts and omissions had made it difficult for it to have peaceful and quiet enjoyment of its property and the rights of user of the draining system. Hence the suit.

Filed together with the suit was a chamber application under **Order 39 rules 1, 2, 3 and 9** of the **Civil Procedure Rules** and **Section 3A** of the **Civil Procedure Act** for a temporary injunction restraining the Defendant by himself, his agents and/or servants from encroaching, trespassing, constructing and in any other way interfering with the “Defendant’s property” in LR. No. 209/12484 pending the hearing and determination of the suit.

When the application came for hearing, M/s Lunani for the Plaintiff made an oral application to amend line 3 of the prayer to read “Plaintiff’s property” instead of “Defendant’s property” which error she submitted was a typographical one, and therefore excusable and not prejudicial to the Defendant. She informed court she was applying under **order 6A rule 8** of the **Civil Procedure Rules**. She sought to rely on Black’s Law Dictionary, Eighth Edition by Bryan A. Garner and the decisions in **ECHARIA –VS- ECHARIA Civil Appeal No. 247 of 1997** at Nairobi, **CENTRAL BANK OF KENYA –VS- KAMAL Z. SHAH & ANOTHER, HC. (MILIMANI) Misc. Civ. Appli. No. 427 of 2000**, **TRINITY PHARMA LIMITED & OTHERS –VS- GIRO COMMERCIAL BANK LIMITED H.C. (MILIMANI) CC. No. 422 of 2003** and **KEN VINCENT KAUNDA –VS- WILFRED DAVID KIBORO & ANOTHER, HCCC NO. 933 of 2003** at Nairobi.

Mr. Osundwa for the Defendant opposed the application saying the sought amendment was being prayed for late in the day and that the Defendant would be prejudiced by the amendment. He sought a formal application to be made. Counsel proceeded that what was sought to be amended was not a pleading but summons. He submitted that summons are not amendable and relied on the decisions in **MISHECK GAUKU M. AMBUTU & OTHERS –VS- KENYA RAILWAYS CORPORATION, HC (ELC) No 605 of 2008 at Nairobi, and BOARD of GOVERNORS, NAIROBI SCHOOL –VS- GETAH [1992] 2 EA 56.**

M/s Lunani's application was under **Order 6A rule 8** and was on basis that what was sought to be amended was "pleading". **Rule 8** only provides for the procedure in applying for amendment of pleadings. This may be done formally by summons or by an oral application. The chamber summons sought to be amended is not a "pleading" as it is not a manner prescribed for instituting suits. (**See BOARD OF GOVERNORS, NAIROBI SCHOOL –VS- GETAH (Supra). Order 6A rule 8**, in so far as it relates to pleadings, cannot apply to the circumstances at hand.

The decisions cited by Ms Lunani are in regard to amendment of pleadings. The only exception is **CENTRAL BANK OF KENYA –VS- KAMAL Z. SHAH (Supra)** where the court relied on **Order 6A rule 5(1)** to allow amendment to a motion. Counsel has not relied on the rule.

I will not grant the application but, since hearing of the main suit has not commenced, allow 7 days leave to the Plaintiff to make the appropriate formal application to amend its pleadings (see prayer (a) of the plaint) and application as is appropriate to enable the determination of the real questions in controversy between the parties. This is being done to give effect to **sections 1A and 1B** of the **Civil Procedure Act**. The Defendant shall have 14 days upon service to respond to the application. I ask that the Plaintiff pays costs of this application as it has been indulged.

DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF APRIL, 2010

A. O. MUCHELULE

J U D G E