



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 104 of 1994

M'IMATHIU RUGIRI PLAINTIFF

VERSUS

M'MUTUNGI M'MUCHEKE DEFENDANT

RULING

The plaintiff filed this case on 2nd March 1994 by way of originating summons. Amongst the prayers that he sought were for the court to determine if the defendant had refused to obtain consent of Land Control Board, that is, consent to a transaction of sale over parcel number *Nyaki/Kithoka/162*. The plaintiff further sought determination of whether he was entitled to a declaration that he had obtained title over that land by way of adverse possession. The defendant is now deceased but by consent of the parties recorded on 5th July 2006, the parties

consented to Evangeline Karoki M'Mutungi to substitute the deceased defendant. The plaintiff now seeks an order to amend his pleadings. He seeks to refine the prayers for adverse possession. He has come to court by way of Chamber Summons dated 27th April 2009. That application is brought under Order VIA Rule 4 of the Civil Procedure Rules. Looking at the amendment sought in the originating summons, it becomes clear that what the plaintiff seeks to do is to put into focus the prayers. The reasons given by the plaintiff why he had not made the application earlier was because he all along had been acting in person and it was not until he appointed counsel to appear for him that he was advised that amendment was necessary. That deposition is correct because the plaintiff appointed the firm of R. Kimathi Kiara and Co. Advocates on 26th February 2007. That in my view was reasonable explanation for the delay in seeking the amendment. The Court of Appeal in the case **James Ochieng' Oduol T/A Ochieng' Oduol & Co. Advocates Vs. Richard Kuloba** Civil Appeal No. 2 of 2002 after quoting the provisions of Order VIA Rule 5 (1) had this to say:-

“It was common ground that the power of the court to order amendment is discretionary. The discretion though wide is circumscribed by the rule itself and by the general principles on amendments. The power may be exercised to substitute a party, to correct the names of parties or to allow the capacity of suit. (See Rule 3). The relevant Rule merely sets out the general power donated to the court to order an amendment to the pleadings. The power of the court being discretionary, it then means that the general principles stated in Mbogo & Another Vs. Shah [1968] EA 93 apply.”

Order VIA Rule 5 (1) provides as follows:-

“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the applicator of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

In that case, the same Court of Appeal further stated thus:-

“It is quite clear from decided cases that a trial court has power to allow amendments of a plaint disclosing no cause of action (See Motokov Vs. Auto Garage Ltd and Another [1971] E.A. 353). In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation (Barclays Bank D.CO. Vs. Shamsudin [1973] E.A. 451) However, such amendments can only be allowed where peculiar circumstances are present.”

The Rules regarding amendment were considered in the case **Amos Kabiru Kimemia Vs. Industrial & Commercial Development Corporation** Civil Suit No. 1779 of 2001. The Court in this case stated:-

“The settled rule with regard to amendments of pleadings has been concisely stated in Vol. II of the 6th edition at page 2245 of the Air Commentaries on the Indian Civil Procedure Code by Chittaley and Rao in which the learned authors state:-

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

Bearing in mind that what the plaintiff seeks by his application to amend is to put into focus his claim and since I found that the defendant will suffer no prejudice, I find that the application is merited. I therefore grant the following orders:-

1. *The plaintiff is granted leave to amend, file and serve his originating summons as per the draft annexed to the Chamber Summons dated 27th April 2007 within 14 days from this date hereof.*
2. *The defendant, if need be, is granted leave to file further affidavit in answer to those amendments and to serve the same within 14 days after service of the amended originating summons.*
3. *The costs for the Chamber Summons dated 27th April 2007 are granted to the defendant in any event.*

Dated and delivered at Meru this 4th day of June 2010.

MARY KASANGO

JUDGE