REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 25 of 2005

JEPKOECH TAPKILI METTO:…..…..PLAINTIFF

VERSUS

HELLEN TUM:……..... …..1ST DEFENANT

DAVID LELEI:…….....….…..2ND DEFENANT

BARNABA LELEI:…….....…….3RD DEFENDANT

NICHOLAS K. KUGUN….....…..…4TH DEFENDANT

DAVID K. MONGONY:….....…….5TH DEFENDANT

RULING

The 1st Defendant brings this application under order VIA Rule 3 of the Civil Procedure Rules and section 100 of the Civil Procedure Act Chapter 21 Laws of Kenya. She prays that she be granted leave to amend her statement of defence to include a counter-claim as in the draft amended defence attached to the application and for the costs of the application. The application is brought on the grounds that the applicant is in effective occupation of the suit land with permission from the registered proprietor. That the prayer to use and work on the land which fact existed at the time the defence was filed and is implied in paragraph 10 of the defence must now be made expressly and the omission to plead the counterclaim is excusable and no party will suffer prejudice if the amendment is made. The applicant swore a supporting affidavit stating that the counter-claim was inadvertently omitted under a mistaken belief that marriage under Nandi customs would cover the same but the court issued restraining orders against her from using the land to cultivate he land. She further states that the intended amendment does not introduce frivolous issues to confuse the trial. The application is opposed and a Replying affidavit is filed stating that the application is defective bad in law and an abuse of the process of the court. The deponent says that she is the registered owner of the suit land and the proposed amendment would involve a complete change of the action and is a new ground of defence or counterclaim. She adds that what is intended to be included now was known to the Defendant when the defence was drawn but was not included in that defence as it was also not sought within reasonable time. The application is said to be made in bad faith and would cause the Plaintiff prejudice as she has closed her case.

The court's power to order amendment is not disputed. Such power is discretionary and must be exercised rightly and with regard to the principles upon which amendments are to be allowed and these are as set out in Order VIA Rule (1) of the Civil Procedure Rules which provides:-

"For the purpose of determining the real question in controversy between the parties or correcting any defect or error in any pleadings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and or such terms as to costs or otherwise as are just."

It has been held variously that amendments be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs – see the case of **BEOCO LIMITED VIALFA LAVAL CO. LTD (1994) 4 ALL ER 464.**

The first Defendant wishes to amend her defence to include a claim for quiet possession and the right to use and work on the land as a lawful wife of the Plaintiff and a prayer that the suit is incurably defective as the same is not a divorce cause. As admitted by the Applicant the prayers sought to be included in the counterclaim existed at the time of filing the defence and are implied in the said defence at paragraph 10 thereof and all the 1st Defendant now wishes to do is to buttress her defence. It then is evidently clear that what is now sought to be introduced by way of the amendment is not new and the applicant was all along aware of them but failed to plead them in the defence. The 1st Defendant was at all times material represented by counsel. The amendment appears to have been prompted by the Plaintiff obtaining an injunction to restrain the 1st Defendant from interfering with the suit land and not to use it. To allow that amendment in the circumstances of this case would appear to aid a negligent pleader, to borrow the words of their Lordships in **Nairobi Civil Appeal No. 02/2002 OCHIENG ODUOL –VS- RICHARD KULOBA.** The plaint was filed on 30th March 2005 and Defence was field on 15th April 2005. The Plaintiff who says she is now 84 years old and in poor health gave evidence on 23/6/2005 and 13/7/2005 and she says she did so with difficulties due to the said poor health and advanced age and she says putting her through the same procedure again would cause her prejudice and difficulties. It is now over four years since the Plaintiff closed her case and the application under consideration was also brought after similar time. That in my consideration is not bringing an application for amendment of pleadings within reasonable time as held in the case of **KYALO V BAYUSUF BROTHERS LTD Mombasa Civil Appeal No.38/1981.**

Taking into consideration the application and submissions by both counsel here appearing for their respective clients and considering all the authorities quoted by such counsel in support of their different positions and bearing in mind the relevant law, I do not exercise my judicial discretion in favour of the 1st Defendant/Applicant and accordingly I hereby dismiss the application by chamber summons dated 1st April, 2009 with costs.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 2ND DAY OF DECEMBER, 2009

P.M.MWILU

JUDGE

IN THE PRESENCE OF

Mr. Mbugua for Applicants

No appearance for the Respondent

Court Clerk – Paul Ekitela