



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MERU

Civil Case 114 of 1998

SEBASTIAN NJAGI MARIA PLAINTIFF

VERSUS

MRS. NAU MUNGANIA MUNYINYI DEFENDANT

RULING

This suit was filed way back on 8th October 1998. The hearing commenced before Tuiyot, J on 13th March, 2001. He heard only one witness before Sitati, J took over after nearly three years' break on 24th August 2004. Sitati, J heard five (5) witnesses before finally I took over and heard one witness. Parties closed their respective cases and counsel for the defendant filed written submissions, while counsel for the plaintiff, instead filed an application on 27th September 2007, a week after the period for filing written submissions and four (4) days before both counsel were expected to highlight those submissions in court.

In the application which is the subject matter of this ruling the plaintiff seeks to amend the plaint. The application is opposed on the grounds that it comes too late in the day when all that is left is the judgment. That the amendment would be prejudicial to the defendant and finally that it introduces a new cause of action. I have duly considered these arguments.

With respect, I agree with submissions by counsel for the defendant that the application has been brought too late in the day. The matter has been pending for nearly twenty (20) years and counsel ought to have discovered the need for amendment earlier instead of waiting until this last stage. Parties must strive to put forward all the facts they intend to rely on when filing their pleadings.

However, the law recognizes that this is only an ideal proposition. Section 100 of the Civil Procedure Act and order 6A Rule 3 of the Civil Procedure Rules donate to the court the discretion to allow an amendment at any stage of the proceedings for the purpose of determining the real question or issue in the dispute.

The court's general power to amend pleadings was sacinctly considered in the case of **Joseph Ochieng and 2 others V. First National Bank of Chicago** Civil Appeal No. 149 of 1991. Quoting from **Bullen and Leake and Jacob's Precedents and Pleadings**, 12th Edn, their Lordships delivered themselves thus:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case: amendments should be timerously applied for: power to so amend can be exercised by the court at any stage of proceedings (including appeal stage): that as a general rule- however late the amendment is sought to be made it should be

allowed if made in good faith provided costs can compensate the other side: that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court: that adjournments should be given to the other side if necessary if an amendment is to be allowed: that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed: that the proposed amendment must not be immaterial or useless or merely technical: that where the plaintiff's claim as originally framed is unsupportable, an amendment which would leave the claim equally insupportable will not be allowed: that if the proposed amendments introduce a new case or a new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action: that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment."

The amendments sought in the instant application relate to:

- (i) The capacity of the defendant who is sued on behalf of her late husband's estate
- (ii) The fact that the plaintiff and defendant entered into a sale agreement in respect of MUTHAMBI/ERIGA/267 (instead of MUTHAMBI/ERIGA/298)
- (iii) The fact that the plaintiff had two parcels of land at the time of the transaction, namely, MUTHAMBI/ERIGA/267 and 290 (should be 298).
- (iv) The fact that the plaintiff transferred to the defendant's husband MUTHAMBI/ERIGA/298 measuring 9 acres instead of 267 measuring 4 acres by mistake.
- (v) The fact that the Land Control Board consented to the transaction but the defendant declined to facilitate the transfer.
- (vi) An averment that there are no previous or pending suits between the parties over the same matter.

Although these amendments are sought this late, they are necessary and, I believe, made in good faith. The proposed amendments are not introducing a new cause of action but rather clarifying the plaintiff's existing case. For instance, it is important to state the capacity in which the defendant is sued. Similarly, the correction to reflect the actual parcel the plaintiff intended to sell is equally necessary. However, I find the other amendments either technical such as the last proposed amendment or immaterial.

It is also my view that the proposed amendments are not in any way prejudicial to the defendant. They may have caused inconvenience to her and even delayed the conclusion of this matter, but that can be compensated by an award of damages.

For these reasons, I will allow the application and order that leave is hereby granted to the plaintiff to amend the plaint as shown in the filed draft. The same to be filed and served within 7 days from today's date. The defendant has leave to amend his amended defence, if need be, within 7 days' of serve and a further leave to recall any witness. The plaintiff also has leave to file along with the amended plaint written submissions. Costs to the defendant.

Dated and delivered at Meru this 18th Day of April 2008.

W. OUKO

JUDGE