



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**Civil Case 97 of 2003**

**JOSEPH CHIBEYIA MAKAMU ..... PLAINTIFF**

**V E R S U S**

**JOHN A. KAROLI ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH M. AMALEMBA ..... 2<sup>ND</sup> DEFENDANT**

**THOMAS M. AMALEMBA ..... 3<sup>RD</sup> DEFENDANT**

**MUKAVANA AMALEMBA ..... 4<sup>TH</sup>**

**DEFENDANT**

**R U L I N G**

The defendants seek leave to amend their defence.

It is their contention that the defence currently on record, (and which was drawn and filed by the defendants in person), contains errors and omissions which are prejudicial to their case.

As far as the defendants are concerned, their desire to amend the defence is informed by a wish to put forward their full defence, so that the dispute between the parties can be determined effectually and with finality.

It is common ground that the plaintiff's claim against the defendants is premised on the fact that he is the sole registered proprietor of the suit property L. R. NO. ISUKHA/LUKOSE/1027. Notwithstanding that position, the defendants are said to have trespassed onto the said suit land, without the consent or authority of the plaintiff.

It is the plaintiff's further case that the Provincial Administration had asked the defendants to vacate the suit land, but the defendants had refused to move out of the land.

Therefore, the plaintiff has come before this court, seeking the eviction of the defendants from the suit land.

The record of the proceedings shows that the plaintiff testified on 18<sup>th</sup> June 2007, and closed his case. The court then fixed the defence case for hearing on 25<sup>th</sup> September 2007. However, on that date, the advocate for the defendants sought an adjournment, because his clients had failed to give him appropriate

instructions. The advocate therefore indicated a desire to cease acting for the defendants.

Indeed, on 23<sup>rd</sup> January 2008, M/S Akwala & co. Advocates filed an application for leave to cease acting for the defendants. That application was set down for hearing on 22<sup>nd</sup> April 2008, whilst the substantive suit was fixed for hearing on 13<sup>th</sup> May 2008.

Regrettably, however, the application was not listed for hearing on 22<sup>nd</sup> April 2008. The defendants' advocate then appears to have persuaded the registry staff to fix the application for hearing on 13<sup>th</sup> May 2008.

On that date (the 13<sup>th</sup> of May 2008) the advocate for the defendants notified the court that his clients had finally persuaded him to continue representing them. However, he sought an adjournment, so that he could seek further instructions.

As the case was already part-heard, both parties were in agreement that the proceedings had to be first typed, before the succeeding judge could continue with the further hearing.

Whilst awaiting the new hearing date (which was the 8<sup>th</sup> of July 2008), the defendants filed the present application.

When canvassing the application, the defendants' advocate indicated that his clients had further defences which they wished to raise. One such line of defence was to the effect that the plaintiff did not have a good title.

Another issue which the defendants said they wished to raise was that there had been adverse possession (presumably by the defendants). As a consequence, the defendants said that the plaintiff's title was extinguished by operation of the law.

All the said issues are said to be serious, and the defendants expressed the view that the court needs to give due consideration to them, before deciding the case.

If the defendants were granted leave to amend the defence, they feel that the plaintiff would not be prejudiced at all, because he would have an opportunity to respond to the issues raised.

In answer to the application, Mr. Mukavale, learned advocate for the plaintiff submitted that it should be dismissed because the defendants had failed to explain the reason for the long delay between 22<sup>nd</sup> January 2004 (when the defence was filed) and the 27<sup>th</sup> May 2008, when the defendants filed their application for leave to amend the defence.

The plaintiff pointed out that he had already closed his case, and that he would therefore be prejudiced if the defendants were allowed to amend their defence.

The court was also invited to consider the conduct of the defendants, in the course of the proceedings to date, when determining this application. The said conduct included the failure by the defendants to attend court on the date when the application came up for hearing.

As far as the plaintiff was concerned, the said absence of the defendants from court, implied that they had taken the court granted, as they must have assumed that the case would be adjourned.

If the plaintiff had seriously held the view that the defendants were taking the court for granted, the plaintiff ought to have raised objections to the defendants' request to first hear and determine the application for amendment. Instead, the plaintiff readily conceded that the defendants' application be heard first, even though the substantive suit was also scheduled for further hearing. Having made that concession, the plaintiff ought not to ask the court to hold the defendants' conduct against them.

In reply, the defendants' learned advocate, Mr. Akwala, submitted that if leave was granted to amend the defence, the plaintiff could be granted liberty to re-open his case, and that that would be done at the defendants' expense.

Pursuant to the provisions of Order 6A rule 3 of the Civil Procedure Rules the court may allow any party to amend his pleadings at any stage of the proceedings. Therefore, although the plaintiff had closed his case, that, by itself, could not be a bar to the defendants being accorded an opportunity to amend their defence.

To my mind, the plaintiff would only be prejudiced if he were not permitted to re-open his case, after the defence had been amended. But in this case the defendants, themselves, have indicated that they would have no objection to the plaintiff re-opening his case.

Having given due consideration to the application before me, I find that the defendants have made out a case warranting the grant of leave to amend the defence. Accordingly, leave is hereby granted to the defendants to amend their defence. The amended defence is to be filed and served within the next FIFTEEN (15) DAYS.

The costs of the application shall be borne by the defendants in any event.

Furthermore, after the defence is amended, the plaintiff is granted leave to re-open his case anew.

For the avoidance of any doubt, the plaintiff is at liberty to choose to re-start the case, as if he had not yet led any evidence on this matter.

In the event that the plaintiff chooses to re-open his case anew, the defendants will pay all the thrown away costs for 18<sup>th</sup> June 2006 and 25<sup>th</sup> September 2007.

The plaintiff shall, if he be so minded, have every right to file and serve his Reply to Defence within 7 days of service of the amended defence.

It is so ordered.

***Dated. Signed and Delivered at Kakamega, this 15<sup>th</sup> day of October 2008***

**FRED A. OCHIENG**

**J U D G E**