



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1082 of 2003**

**PROFESSOR JOSEPH KAMUYA MAITHA ..... PLAINTIFF**

**VERSUS**

**ELIZABETH KAMENE NDOLO AND THREE OTHERS .....DEFENDANT**

**RULING**

Before me is a Chamber summons dated 1<sup>st</sup> December, 2005 premised under Order VI (A) Rules 3 and 8 of the Civil Procedure Rules and Sections 3 and 3A of Civil Procedure Act and all other enabling provisions and procedures of the law.

It seeks leave to amend the plaint, amongst other consequent orders.

The application is supported by grounds set out on the face of the application and affidavit in support sworn by the Plaintiff on 1<sup>st</sup> December, 2005. It also annexed the proposed amended plaint.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants through their respective Advocates filed grounds of opposition.

This matter has not yet commenced hearing and after the present firm of Advocates came on record for the plaintiff this application is filed. It relies on the ground that all the causes of action available to the plaintiff are now put forth before the court.

As is evident from the annexed draft of amended plaint, the details of the claim are sought to be added. The plaintiff has also sought to delete the alternate prayer for compensation.

Mr. Kalonzo Jr. the Learned Counsel for the plaintiff introduced law relating to amendment by citing authorities.

He started with famous case of **Eastern Bakery vs. Casterlino (1958) E.A.C.A 461**. In short he submitted relying on that case, that the amendment to pleadings sought before the hearing should be freely allowed if they can be made without injustice to other side, and there is no injustice if the other side can be compensated by costs.

He also took the court to the respective paragraphs sought to be amended after stating that the plaint involves a land transaction and paragraph 6 of the Draft amended plaint pleads specific clauses of the agreements for sale relied upon by the plaintiff and the particulars of the land alleged to have been sold.

Paragraph 5 thereof only states the details of the will appointing the 1<sup>st</sup> Defendant as one of the

executors and grant of probate. He pleaded there was nothing prejudicial to those amendments.

Paragraph 9 of the amended plaint shows the details of variations which was already pleaded and particulars of the breach of deed of variation.

Paragraph 10 intends to plead the details of the judgment of the Court of Appeal in Civil Appeal No.128/95 between the 1<sup>st</sup> Defendant and a third party namely George Matata Ndolo (not a party in this case).

Paragraphs 11 (a) and 11 (b) are details of the subsequent registrations due to alleged improper subdivision.

Paragraph 10 (b) is the admission of the 1<sup>st</sup> Defendant on the agreement in H.C.C.C. 56/94.

Paragraphs 8, 12, 14, 16 and 17 are details of the subsequent sale, divisions and gift etc.

The payers now include the declarations from the court.

According to Mr. Kalonzo, all these facts are relevant to be brought before the court and in any event, all these facts were within the knowledge of the Defendants and thus they shall not be prejudiced.

Commenting on the grounds of opposition filed by 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants, Mr. Kalonzo submitted that what is sought to be included in the proposed amendments are the facts and particulars which are required under the law to be pleaded.

As regards issue of limitation, he contended that the same has not been specified and in any event no affidavit, to show which one is time barred and on what grounds, is filed.

As regards the response by Mr. Omindo, the learned counsel for the 2<sup>nd</sup> Defendant, to the effect that the matter is Res Judicata because the same is decided by the Court of Appeal in Civil Appeal No.128/95, cannot be accepted with respect, for simple reason that the plaintiff is relying on the said judgment to show that the 1000 acres were kept aside by the court on the basis that they were sold and did not form the part of the estate.

Mr. Simiyu contended that the original plaint was based on breach of contract and as per its contents the cause of action arose on 14<sup>th</sup> April, 1994. The suit having been filed on 22<sup>nd</sup> October, 2003, is time barred. It was stressed that the issue of the plaint being time barred is raised by the 3<sup>rd</sup> Defendant in the statement of Defence. The issue of fraud now being sought to be contended is a new cause of action and the Defendants will be burdened as there is a total shift in the cause of action and thus the Defendants shall be also prejudiced.

He relied on the famous case **of Kettman and others vs. Hansel Properties Ltd. (1988) 1 All E.R. 35.** He placed his reliance on holding (4) thereof on page 39.

However on page 62 of the said case it was observed ( d toe), and I quote:

**“Furthermore, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”**

This is not the case herein. In any event it is a well established doctrine of laws on amendment that it is within the discretion of the trial court to allow an amendment at any time of the proceedings. However, that discretion has to weigh the strain, prejudices and injustice which the proposed amendment may impose on the litigants against the claim of the plaintiff who claims to be aggrieved by various acts of the opposing party.

The said discretion is specified and donated under Order VI A Rule 3. The provisions of Rule 3(1), (2) and (5) stipulate inter alia that the court has general discretion to allow amendment at any stage of the proceedings on such terms as to costs or otherwise as may be just. That it can also allow the amendment notwithstanding that its effects will be to add or substitute 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 the relief has already been claimed.

Under Order VI A Rule 3(2) the court has been given discretion to allow an amendment sought under sub-rules (3), (4) or (5) of Rule 3, notwithstanding the period of limitation current at the time of filing the suit has expired.

The issue of limitation has been raised in the defence filed by 3<sup>rd</sup> Defendant which is an issue to be determined by the trial court. It shall be presumptuous on my part to look at the merits or otherwise of the same.

In the proposed amendment the plaintiff has raised an issue of fraud and thus gives a different dimension to the point of limitation. Without further evidence on record that issue is still alive to be determined by the trial court.

In the circumstances, should I close the door of litigation for the plaintiff at this stage? I do not think it shall be fair and just to the Plaintiff, in the present case.

He has come before the court opening all his claims and in this initial stage of the proceedings, it shall not be appropriate to stop him.

With this cautious approach in mind, I allow the application filed by the Plaintiff as prayed.

The Plaintiff shall file the amended plaint in terms of the annexed amended plaint within seven days. The same be served on the Defendants who shall file their respective amended statements of Defence within 14 days from the date of service.

The Plaintiff shall pay the costs of this application as well as the costs for consequent pleadings (inclusive of instructions) to be filed by the Defendants.

Dated and signed at Nairobi this 29<sup>th</sup> day of May, 2007.

**K.H. RAWAL**

**JUDGE**

**29.5.07**