



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE 103 OF 1998

LAWRENCE KINYUA MWAIPLAINTIFF

VERSUS

NYARINGU FARMERS CO.LTD 1ST DEFENDANT

FLORENCE WAIRIMU 2ND DEFENDANT

OLWENYI & CO.LAND SURVEYORS 3RD DEFENDANT

RULING

This application for amendment of the plaint was undefended. It seeks to join Olwenyi & Company Land Surveyor as a third defendant. It also seeks to include certain amendments as reflected in the draft amended plaint annexed to the application.

The grounds upon which the application is based is that the proposed third defendant surveyed the farm in dispute and would therefore throw some light on the dispute.

The intended third respondent despite service of this application and the hearing date did not attend or respond to the application.

It appears from the record that interlocutory judgment was entered against the 1st defendant/respondent. The 2nd respondent did not file a reply to this application but was represented by counsel when this application came up for hearing. Learned counsel argued that the amendment cannot be allowed due to limitation period.

The intended 3rd respondent, although served, did not respond to the application or appear at the hearing. To begin with it is noted that the power of the court to amend pleadings are derived, first and foremost from Section 100 of the Civil Procedure Act and secondly from Order 6A of the Rules made under the aforesaid Act. The effect of these provisions is that amendment to pleadings can be made at any stage of the proceeding on such terms as the court may determine.

Specifically the court will allow amendment if it is sought for the purpose of determining the real question in controversy between the parties, or to correct a defect or error in any proceedings.

An amendment may be allowed even where its effect is to add or bring a new cause of action so long as the new cause of action arises out of the same or substantially the same facts as those in the earlier action.

However, an application for amendment will not be allowed where the applicant is acting *mala fide* or where the proposed amendment is likely to cause injustice to the respondent or where it will amount to an abuse of the court process.

Finally, an amendment will be allowed even outside the period of limitation in cases where they flow from the same set of facts or substantially the same facts within the claim originally pleaded.

These are the principles upon which a court will consider an application for amendment as provided for under Section 80 and Order 6A aforesaid as well as pronounced in the following judicial decisions;

Eastern Bakery V Castelino, (1958) EA 461 Joseph Ochieng and 2 Others V First National Bank of Chicago, Civil Appeal No.149 of 1991 and Kuloba V Oduol(2001) KLR 647.

Apart from these procedural requirements, amendments must also conform to the mode of effecting them as provided for under Order 6A rule 8.

Turning to the application before me, the first prayer is to include in the suit Olwenyi & Company Land Surveyors as 3rd defendants. This amendment is sought because it is Olwenyi & Company Land Surveyors who surveyed the suit land.

A person may be joined as a defendant against whom any right relief is alleged to exist. In other words the plaintiff must have a claim against a defendant.

The applicant has no claim against the proposed 3rd defendant. If all the proposed 3rd defendant did in relation to the suit land was to carry out a survey, then the proposed 3rd defendant can only be a witness and no more.

Secondly, and without going into the details of the amendments sought, save to observe that they do not depart significantly from the original plaint, arise out of the same facts as those pleaded earlier. I also hold that no injustice will be caused by the said amendments, and further that limitation period does not apply.

However, the applicant has not complied with Order 6A Rule 7(2) of the Civil Procedure Rules in that all the words are either underlined or struck out. The applicant was expected to strike out all deleted words and to underline all added words.

He has even included the date of amendment before the application is allowed. But as was held in the case of Gladys Wanjiru Ngacha V Teresa Chepsaat and 4 others, Civil Appeal No.119 of 2001, this omission is not fatal at this stage when all that is sought is leave to amend.

The court in the above authority delivered itself thus;

“We consider that it is certainly best practice to so mark up the proposed amendment. However, the Rules do not stipulate that it must be done at this stage and, that being so, we do not consider that the failure to do so was a valid ground for the learned Judge to dismiss the application to amend”

Having come to these conclusions, this application for amendment will be allowed, except that the proposed 3rd defendant will not be joined as no cause of action is shown against him. The applicant is expected to comply with Order 6A Rule 7(2) and (3).

I make no orders as to cost.

DATED AND DELIVERED AT MERU THIS 8TH DAY OF JUNE 2007

W. OUKO

JUDGE