



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MALINDI**

**Civil Case 40 of 2005**

**PAOLO MARRIA PALMITESSA.....PLAINTIFF**

**VERSUS**

**LUIGI FORMICA.....DEFENDANT**

**RULING**

The applicant has moves the court under Order 6A rules 1 and 3(5) of the Civil Procedure Rules for leave to amend the plaint. The application is supported by the applicant's affidavit. The amendment sought is for purposes of substituting a new cause of action against the defendant.

The grounds upon which the application is brought are that the defendant is in the process of putting up a house which is likely to interfere with the plaintiff's quiet enjoyment of his adjacent property. That if the construction is completed the plaintiff's right to privacy will be compromised.

The defendant who is now acting in person opposed the application arguing that he has no intention of going on with the building to the extent that would be annoying to the plaintiff. I have given consideration to the application and the arguments.

Both Section 100 of the Civil Procedure Act and Order 6A rule 3 of the Civil Procedure Rule donate very wide powers to the court to allow amendment to the pleadings. Order 6A rule 3, however lays down the parameter of the exercise of that discretion. These limitations were succinctly considered in both **Eastern Bakery V Castelino Case** (1958) EA 461 and the case of **Joseph Ochieng and 2 others V First National Bank of Chicago**, Civil Appeal No. 149 of 1991.

Briefly stated these principles give the court the discretion at any stage of the proceedings, including appeal to grant leave to amend pleadings. But that discretion must be exercised rationally. The main consideration in the exercise of this discretion is whether the other party stands to suffer injustice if the amendment is allowed. Where amendment sought is for the substitution of a new cause of action, the condition is that the new cause of action must arise out of the some facts as the cause of action to be amended.

The court will also allow an application for amendment of pleadings for the purposes of determining the real question in controversy between the parties.

The case of **Joseph Ochieng** (supra) also held that the exact nature and the extent of the proposed amendment ought to be formulated and submitted to both the opposing party and the court. The court cannot, therefore, allow a party to amend his pleadings without the draft amendment being annexed to the application. It is only in complying with this that injustice to the other party shall be avoided and both the Court and that other party shall have notice of the full extent and nature of the proposed amendment. The applicant herein has merely stated that he wishes to substitute the claim as framed in the plaint and that the cause of action in the present plaint will not avail to him the relief he wishes to seek by amendment. That is not acceptable. It is not sufficient.

The application is therefore incompetent and is struck out with costs.

Dated and delivered at Malindi this 26<sup>th</sup> day of February, 2006.

**W.OUKO**

**JUDGE**