



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 311 of 2001

ERASTUS CHOMBA WAHOME.....1ST PLAINTIFF

GRACE WANGARI CHOMBA.....2ND PLAINTIFF

MARY WANGARI CHOMBA.....3RD PLAINTIFF

VERSUS

DAVID KARIUKI GITHIGA.....1ST DEFENDANT

JEREMIAH KINUTHIA MAHUGU.....2ND DEFENDANT

MICHAEL KURIA.....3RD DEFENDANT

THOMAS WANDERI.....4TH DEFENDANT

W. OLWENY t/a OLWENY & ASSOCIATES.....5TH DEFENDANT

RULING

The plaintiffs made an application under the provisions of **Order VIA rules 3(1), (5) and (8) of the Civil Procedure Rules** seeking the order of this court to be granted leave to amend their pleadings. The grounds in support of the application as stated on the face of the application are that the plaintiffs contend that they had suffered loss and damage arising from a hitherto undisclosed incident between the parties to this suit. They pleaded with this court to allow them to amend their pleadings to enable the ends of justice to be met. The application is supported by the annexed affidavit of Erastus Chomba Wahome, the 1st plaintiff. The application is opposed. The defendants filed grounds in opposition to the said application. They have stated that the application was fatally defective, unmerited and filed in breach of the provisions of the **Civil Procedure Act** and **The Limitation of Actions Act**. They stated that the suit was part-heard and therefore the application for amendment was belated. The defendants urged this court to dismiss the application with costs.

At the hearing of the application, Mr Kagucia Jnr learned counsel for the plaintiff submitted that this court should allow the application for amendment even if it has the effect of introducing a new cause of action. He submitted that the issues raised in the amendment flowed from the facts in issue in this case. He submitted that the plaintiffs' properties were damaged during the subsistence of an injunction which had restrained the defendants from interfering with the plaintiffs' possession of the suit land pending the hearing and determination of this suit. He submitted that the defendants would not be prejudiced and would adequately be compensated by an award of costs. He urged this court to allow the application.

Mr. Owang' learned counsel for the defendants opposed the application. He submitted that the affidavit sworn in support of the application was incompetent. He further submitted that the plaintiffs were aware of the issues they intend to introduce in the amended plaint when this suit was filed in the year 2002. He submitted that there were no reasons which were advanced by the plaintiffs which would enable this court grant them leave to amend their plaint. He further submitted that the issue sought to be introduced by amendment was a new cause of action which was barred by the provisions of the **Limitation of Actions Act**. He urged this court to dismiss the application to amend the plaint with costs.

I have considered the rival submissions made before me by the counsels for the parties to this application. I have also read the pleadings which were filed by the parties in support of the respective position taken in this application. The issue for determination by this court is whether the plaintiffs have established a case to enable this court grant them leave to amend their plaint. **Order VIA rule 3(5) of the Civil Procedure Rules** allows this court to grant leave to a party to amend his pleadings even though the said amendment would introduce a new cause of action provided the facts being pleaded in the amendment are substantially the same facts that were pleaded when the suit was first filed. This court may grant leave to a party to amend his pleadings at any stage of the proceedings provided the said amendments would assist in determining the real issues in controversy. In this case, the plaintiffs wish to amend their plaint so as to introduce a claim for special damages which they alleged was occasioned by the defendants when they destroyed their properties during their unlawful eviction from the suit land.

This court notes that this suit is partly heard. The evidence of one witness has already been taken. However looking at the said amendments it is my view that the facts pleaded in the proposed amendments arose substantially out of the same facts that were pleaded by the plaintiffs when this suit was originally filed. The issues raised in the amendment would enable this court to determine all the issues in controversy. The defendants have complained that if the said amendment is allowed it would amount to the plaintiffs introducing a new cause of action which is barred by the provisions of the **Limitation of Actions Act**.

I have noted their complaint. This court however has discretion to allow any party to amend his pleadings at any time before the suit is heard and determined provided the said amendments would not prejudice the opposing party and embarrass him in the prosecution of his case. As was held in **Kuloba -vs- Odoul [2001] 1EA 101** at page 110 by Visram J.,

“Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment which is permissible under Order VIA rule 3 of the rules as it is a claim emanating from the same facts. As to the question of prejudice, I am not satisfied that the defendant will be exposed by the amendment in any manner that cannot be compensated by costs.”

I agree with the reasoning of the learned judge in the above case. Applying the same reasoning to this case, I will allow the application for amendment.

The plaintiffs are granted leave to amend their plaint within fourteen days of today's date. The defendants equally have a corresponding leave to file an amended defence, if any, within fourteen days after service. The defendants shall be paid the costs of this application which I have assessed at Kshs 3,500/= and which shall be paid within fourteen days of today's date.

DATED at NAKURU this 24th day of March 2006.

L. KIMARU

JUDGE