



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Misc Civil Appli 11 of 2005

REPUBLIC
APPLICANT

-VERSUS

CHAIRMAN

KAPSABET LAND DISPUTES TRIBUNAL
RESPONDENT

DAVID RIANDA **EX**
PARTE

AND

RICHARD GICHOHI MUYA **INTERESTED**
PARTY

RULING

This is an application by way of Chamber Summons brought under Order VIA Rule 3 and 5 of the Civil Procedure Rules and section 100 and 3A of the Civil Procedure Act (Cap.21).

The application is dated 15th April 2005 and has been brought by Messrs. C. O. Moitui and Company Advocates on behalf of the applicant, David Rianda. It seeks for three orders -

- i) Leave be and is hereby granted to the applicant (David Rianda) to amend his Notice of Motion filed on 4th March 2005.**
- ii) The proposed amended Notice of Motion annexed herewith be deemed to be duly filed and served.**
- iii) Costs be provided for.**

The application has grounds on its face and is supported by the affidavit of Charles O. Moitui Advocate sworn on 18th April 2005. The grounds of the application are firstly, that the applicant inadvertently omitted to cite section 8 and 9 of the Law Reform Act (Cap.26 Laws of Kenya) on the heading of the application. Secondly, that there were typing errors on the face of the application. Thirdly, that in the interest of justice, technicalities need not deter this honourable court from determining the real issues and controversy between the parties.

According to the supporting affidavit, it is deponed that the intended amendment does not cause any prejudice to the respondent. The application is opposed. A replying affidavit was sworn and filed by the interested party Richard Gichohi Muya. It is deponed in the replying affidavits that the application is defective and incompetent. Also it is deponed that the application is vexatious, frivolous and an abuse of the process of the court.

At the hearing of the application Mr. Moitui for the applicant submitted that the Land Disputes Tribunal was served, though they never attended court. He submitted that the applicant was seeking for an amendment of the application, part of the proposed amendments was to join the Attorney General as a party. He abandoned prayer (ii) of the application under the provisions of Order 24 Rule 2(2) of the Civil Procedure Rules. He submitted that this court had powers to grant leave to the applicant to amend his Notice of Motion. The applicant had inadvertently omitted to cite section 8 and 9 of the Law Reform Act (Cap.26) and therefore the application was fatally defective. The subject matter in the proceedings was land which was a sensitive subject. Therefore, in the interest of justice, the amendment should be allowed, and the matter should be determined on merit and not on technicalities.

He sought to rely on the case of **Eastern Bakery –vs- Castellino [1958] EA 461**, in which the Court of Appeal for East Africa held that an amendment of proceedings before the hearing should be freely allowed. He also sought to rely on the case of **Republic –vs- Rift Valley Province Disputes Appeals Committee - Eldoret High Court Miscellaneous Civil Application No. 24 of 2002**. In that Miscellaneous Application the applicant had omitted to cite section 8 and 9 of the Law Reform Act (Cap.26). The High Court held that amendment of proceedings can be made at any time. This application was a similar application. If this application was granted no party would suffer any prejudice.

The interested party, Richard Gichohi Muya made submissions in opposition to the application. He stated that he was relying on his affidavits in opposition to the application. He asked the court to peruse the contents of the replying affidavit.

I have considered the application, the supporting affidavit, the replying affidavit, as well as the submissions in court. The Notice of Motion sought to be amended did not cite section 8 and 9 of the Law Reform Act. That failure to cite section 8 and 9 of the Law Reform Act (Cap.26) makes the Notice of Motion fatally defective. It has however, not yet been heard. The applicant has now applied to this court for amendment of the application before it is heard.

This application was brought under Order VIA rule 3 of the Civil Procedure Rules. Order VIA rule 3(1) provides as follows: -

“3(1) Subject to Order I, rules 9 and 10, Order XXIII, rule 3, 4, 5 and 7 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

From the above provisions of the law it is clear that the court may allow an amendment of pleadings at any stage of the proceedings. In our present case, the amendment is sought before the Notice of Motion came for hearing. In the case of **Eastern Bakery –vs- Castellino [1958] EA 461**, which was cited by the applicant, the Court of Appeal for East Africa held that amendments to proceedings sought before hearing should be freely allowed if they can be made without injustice on either side.

In our present case, I find no injustice that can be cause to either side by the amendment. This amendment has been sought before the hearing of the Notice of Motion application. The respondent has filed a replying affidavit in opposition to the application. However, it only raises issues of the defects which are being addressed by the proposed amendments, especially the failure to cite section 8 and 9 of the Law Reform Act (Cap.26). He deponed in the replying affidavit that the application is vexatious, frivolous and

an abuse of the process of the court. I see nothing in this application that supports those contentions of the application being vexatious, frivolous or an abuse of the process of the court.

In my view, it is in the interest of justice that parties should be allowed to canvass their causes in court for their matters to be determined on the merits of each case. I find no ground on which to decline the application for amendments.

For the above reasons, I find that this application has merits. I allow the application and order as follows:

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i) Leave be and is hereby granted to the applicant (David Rianda) to amend his Notice of Motion filed in court on 4th March 2005.

ii) The amended Notice of Motion to be filed within 14 days from the date hereof.

iii) The said amended Notice of Motion to be served on all persons affected by it in accordance with the provisions of Order LIII Rule 2 of the Civil Procedure Rules.

iv) The costs of the application will however be to the interested party.

Dated and delivered at Eldoret this 18th day of July 2005.

George Dulu

Ag. Judge

In the Presence of: Mr. Moitui for ex-parte applicant

Richard Gichohi Muya – interested party in person