



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
CIVIL SUIT NO. 5 OF 2001

JUDITH A. GUSERWA.....PLAINTIFF

VERSUS

JOACKIM M. OKESA.....DEFENDANT

RULING

On 13th October 2003 the Plaintiff took out Chamber Summons in this matter under Order 6A of the Civil Procedure Rules seeking orders to amend the plaint in the manner proposed in an annexed amended plaint.

The said proposed amendments were intended to introduce paragraph 12A reading:

“The Plaintiff states that the cohabitation was predicated upon the existence of a valid common law marriage since both parties had capacity in law to marry. In the event that the cohabitation does not amount in law to a marriage, the Plaintiff seeks a declaration that no marriage was ever contracted by the parties.”,

and an additional declaratory prayer (b) (b) reading:

“In the alternative a declaration that no marriage was contracted by the parties hereto.”

The said proposed amendments are based on the ground that the real issue for determination under the suit is whether this court can, by virtue of cohabitation, presume marriage between the parties herein.

In support of the application, the counsel for the Applicant/Plaintiff has argued that by virtue of the provisions of Order 6A of the Civil Procedure Rules, the said amendments are admissible in that they will assist in determining the real issues that should go to trial in this matter. He further argues that, therefore, there is no mala fide because the said amendment constitute inclusion of honest omissions that are not intended to mislead. He also argues that in any event, the court will be invited to make a finding whether there was a valid marriage in existence between the parties and hence the said amendment will not in any

way cause prejudice or injustice to the Respondent's/Defendant's case. The said amendments, he further argues, have not introduced any new cause of action and that by reason of interlocutory litigation that has previously been going on, there has not been any delay in presenting this application.

The said counsel further contends that the issues of admission to the existence of a valid Luhya customary law marriage by the Applicant are unknown to him. As regards execution of the supporting affidavit herein by the said advocate, the counsel argues that he is presently the advocate prosecuting this matter and thus the said affidavit is properly on record. He ends by quoting several authorities in support of this application and stating that amendment to pleadings can freely be allowed at any stage of the proceedings subject to the principles laid down in the said authorities. In the circumstances aforesaid, the said counsel concludes by saying that his present application cannot be construed as frivolous, vexatious or abuse of process.

The counsel for the Respondent is however of different view. He argues that the said application is fatally defective because the affidavit in support was sworn by an advocate who was then on record in what is clearly contentious matters and hence offends Rule 9 of the Advocates (Practice) Rules. The said advocate has thus entered willingly into the arena of litigation. He further argues that this court has no jurisdiction to entertain determination of matters relating to customary law and hence the said amendments should not be admitted. This, he continues, is because the Applicant has by a separate document, made an admission that she was wedded to the Applicant under Luhya customary law, and thus this matter lies squarely at the first instance within the purview of the subordinate court. He further contends that this application is delayed, the suit having been filed in the year 2001 under which a mandatory injunction confining the Respondent out of the matrimonial home was granted to his detriment. The said counsel therefore construes prejudice against the Respondent because the intended amendments are aimed at prolonging litigation that continues to preclude the Respondent from the benefit of residing and utilizing the said matrimonial home.

My clear reading of the plaint tells me that the main issue that comes for determination is whether there did really exist a marriage between the parties herein, and if so what type of marriage. This, to my mind, is the real question in controversy. Order 6A of the Civil Procedure Rules allows amendment of pleadings at any stage for purpose of determining real question in controversy where the court thinks just to do. The case law has reinforced this by laying out specific parameters that should be met before granting leave to amend. Said Sir Barclay Nihill(President) in *Jashbhai Patel Vs D.D. Joshi* [1951] EACA 42;

“An examination of the authorities goes to show that where, for instance, a plaintiff has made a mistake an amendment subject to an appropriate order as to costs, is normally allowed so that the real issues between the parties can be determined, unless some injury has been done to the defendant which could not be compensated by costs. But the mistake must be capable of a bonafide, honest explanation and in particular there must have been no intention to mislead the court”p.48

The above principle was adopted with modification in the case of *Central Kenya Ltd Vs Trust Bank Ltd* [2000] 2 EA 365 where the Court of Appeal held that mere delay was not sufficient ground for declining leave to amend and that the overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation costs. The said court, inter-alia, held that amendment of pleadings could be freely allowed at any stage of the proceedings if they were not likely to cause injustice and prejudice to the other party.

Firstly I find that the present application is not fatally defective as argued by the counsel for the Respondent. No doubt an advocate of this court has deponed to contentious issues for which he may be summoned as a witness. But the counsel prosecuting this application is not the said advocate who swore the said affidavit. The present Applicant is therefore valid on record. Secondly I find that the issue of jurisdiction of this court to try the main suit is not the subject matter of the present application and hence cannot be argued at this stage. Thirdly, I find that the alleged admission by the Applicant/Plaintiff to the existence of a valid Luhya customary law marriage is an issue clearly triable in the main suit and cannot also be canvassed at this stage. Fourthly, I find that the proposed amendments touch the issue of existence of marriage and thus are relevant to the declaratory orders sought in the main suit and hence, if allowed, will not introduce any new cause of action. In the circumstances, I find that the said proposed amendments will not cause any injustice or prejudice to the Respondent because the said amendment, are, in good faith, intended to lay before this court all issues for determination and hence the said application is not frivolous, vexatious or an abuse of process and is accordingly allowed with costs to the Respondent.

DATED DELIVERD AND SIGNED AT NAIROBI this.....DAY

OF.....2004

P.J. KAMAU

AG. JUDGE