



IN THE REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

ELC CASE NO. 78 OF 2012

BOMET TECHNICAL INSTITUTE LIMITED

T/A LOMU INVESTMENTS.....PLAINTIFF

VERSUS

JOEL RUTOH & 21 OTHERS.....DEFENDANTS

AND

THE COUNTY GOVERNMENT OF BOMET.....INTERESTED PARTY

RULING

1. Before me for determination is an application to amend plaint dated 23rd January, 2020 and filed in court on 28th January, 2020. It is a motion on notice expressed to be brought under Order 8 rule 3 of the Civil Procedure Rules, 2010 and all other enabling law. The applicant – **BOMET TECHNICAL INSTITUTE LIMITED T/A LOMU INVESTMENTS** – is the plaintiff in the suit while the respondents – **JOEL RUTOH, ZAKAYA MARITIM, ZAKAYO RUTOH, JOSEAH SITONIK, PHELIMONA SOI, JOHN KORGOREN, PETER MARITIM, STEPHEN RONO alias SEINO, ANDREW MARITIM, ANTONY BETT, BERNARD SANG, JOHN CHEPKWONY, JULIUS TOWETT, RICHARD CHELULE, JOSEA MUTAI, EDWIN NGENO, WILSON SANG, JOHN RUTOH, BERBAND SANG alias KOLONGE, KIBET RUTOH, GILBERT RONO and JOHN KORGOREN alias TALIBAN** – are the defendants. The matter also has an interested party- **THE COUNTY GOVERNMENT OF BOMET**.

2. The prayer to amend – prayer (a) – is the first one while the second one – prayer (b) – is about costs. More specifically, the prayers are as follows:

Prayer (a) – That the Plaintiff/Applicant be granted leave to amend its plaint as set out in the draft amended plaint annexed hereto.

Prayer (b) That the costs of this application be in the cause.

3. The application is premised on the grounds, inter alia, that the proposed 23rd defendant – **THE BOARD OF MANAGEMENT, ST. MICHAELS PRIMARY SCHOOL, BOMET** – is in possession and occupation of the suit property- **PLOT NO BOMET TOWNSHIP/270**; that it is in the interest of all parties that the plaint be amended; that the amendment will not prejudice the defendant; and that it is in the interest of justice to allow the amendment. The supporting affidavit that came with the application essentially explicated and amplified the grounds.

4. The respondents opposed the application vide grounds of opposition filed on 12th August, 2020. According to the respondents the application is brought late in the day, is an afterthought, will cause prejudice, is mischievous, and is meant to humiliate and frustrate them. The respondents position is that the applicant can file a fresh suit against the proposed party. Further, the applicant was said to have invoked the wrong law thus making the application bad in law, defective, and an abuse of the court process.

5. The interested party responded to the application via a replying affidavit dated 9th July, 2020 filed in court on 13th July, 2020. The interested party deposed, inter alia, that the application is a waste of court's time; is an afterthought and prompted by the intense cross-examination done during hearing; does not disclose a bonafide mistake as required by law, with the applicant being said to have all along been aware of the existence of the proposed party; and that the threshold required to satisfy amendment has not been met.

6. The application was canvassed by way of written submissions. The applicant's submissions were filed on 26th August, 2020. A summation of the case was given and it was reiterated that the proposed party is in possession and occupation of the suit property. The law was then adverted to, with the applicant emphasizing the right of a plaintiff to choose the parties to sue. Joinder of a party, which in this case is the reason for the requested amendment, was said to be necessary where, as stipulated in Order 10 rule 2 of Civil Procedure Rules, 2010, it

becomes necessary “to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.”

7. Various cases – including **PIUS MBUGUA NGUGI & 2 OTHERS V CHIEF LAND REGISTRAR & 7 OTHERS (2018) eKLR**, **THOMAS MAGUT SAMBU & ANOTHER VS COUNTY GOVERNMENT OF KERICHO & ANOTHER (2019) eKLR**, **JOSIAH MAGENA VS WAKENYA PAMOJA SACCO SOCIETY LTD: ELRC CAUSE NO. 510 OF 2014, NAIROBI**, and **SULEIMAN V KARASHA (1989) eKLR** – were cited to demonstrate the judicial approach and interpretation of the law on amendment. The court was ultimately asked to allow the amendment.

8. The respondents’ submissions were also filed on 26th August, 2020. According to the respondents, there is inordinate delay in filing the application and the application is predicated on the wrong law thus making it defective and an abuse of the court process. The applicant was said to have been indolent rather than vigilant and it was pointed out that “*from the onset has not acted in good faith and this (sic) tactics is part of the deliberate ploy to frustrate the defendants*”.

9. The interested parties submissions were filed on 22nd September, 2020. Like the respondents, the interested party accused the applicant of inordinate delay. The interested party made efforts to explain the applicable law as found in statutory provisions and decided cases. It was pointed out that while the power to grant leave to amend is discretionary, such power is not supposed to aid a party who is guilty of delay; has not demonstrated an error or defect in the proceedings requiring correction through amendment; is intent on prejudicing the opposite party; and/or has not deemed it fit to explain the delay. In this regard, the interested party submitted that “*such amendments must conform with the law and the laid down principles of amendments which requires that the amendment must be necessary to enable the court discern the real issues to be determine (sic) between the parties, the amendment should not be allowed to prejudice the adverse party and that the application for amendment must be brought without undue delay.*”

10. Both the respondents and the interested party cited case law – including **COMMUNICATIONS COMMISSION OF KENYA & 4 OTHERS VS ROYAL MEDIA SERVICES & 7 OTHERS (2014) eKLR**, **LOCHAB BROTHERS LIMITED VS PETER AMULAMA (2014) eKLR**, **ELIJAH KIPGENO arap BII VS KENYA COMMERCIAL BANK LIMITED (2013)eKLR**, **MOWA PUBLISHERS LIMITED & ANOTHER VS AG & ANOTHER (1991) KLR 46**, **KYALO VS BAYUSUF BROTHERS LIMITED CIVIL APPEAL NO. 38 OF 1983** and **PETER LETOTIN LEMOOSA VS RAEI CHEPNGETICH LANGAT and 5 OTHERS (2017) eKLR** – to reinforce their legal arguments.

11. I have had a look into the case as filed. I have also considered the application, the responses made, the rival submissions and the cited case law. Though the case against the respondents was filed way back in 2012, it is clear that the interested party only filed its responses last year, specifically on 28th May, 2019. The response came with a counter-claim where the proposed party – **BOARD OF MANAGEMENT ST. MICHAEL PRIMARY SCHOOL** – is expressly mentioned as an intended beneficiary of the outcome of the counter claim. The proposed party is desired to be a beneficiary though it is neither a party in the suit nor in the counter-claim itself.

12. The applicant is claiming the property, and with the proposed party being expressly mentioned by the interested party as deserving of entitlement, the need and logic for its joinder as a party seems to me plain and obvious. I am not persuaded that there is inordinate delay in this matter. Though both the respondents and the interested party would like to trace the running of time from 2012 in order to justify their allegations of delay, it is clear to me that the counter claim that mentioned the proposed party as a beneficiary was filed only last year. And as far as hearing is concerned, only one witness has been heard. All the other witnesses are yet to testify. I don’t think it’s too late to amend. Besides, the applicants claim as filed and the responses filed to the claim, when viewed against the reasons given for joinder of the proposed party, seem to me to suggest that the amendment to effect joinder is necessary for effectual and conclusive determination of the matter.

13. I need to point out that the court has a wide discretion to allow amendments to determine the real question in dispute and/or to do substantial justice. The amendment can be sought at any stage but within reasonable time, provided costs can compensate the other side. The circumstances under which amendments can be sought are wide and varied and each case should depend on its own facts. (See generally: **Merry Beach Limited Vs. Barclays Bank of Kenya and another: HCC NO.5 of 2014, MALINDI (2018) Eklr**).

14. But amendments can’t be allowed to change the character of the suit. It should logically arise or flow from the existing or original suit. In all cases amendments should be sought in good faith and the court will not allow amendment if it appears aimed at abusing the court process. And it may amount to abuse of the court process if the proposed amendment is immaterial, useless, or merely technical. (See the case of **Joseph Ochieng & 2 Others Vs First National Bank of Chicago: Civil Appeal No. 149 of 1991**). That does not appear to be the case here. There is evident merit and justification to allow amendment in order to bring on board the proposed new party.

15. Amendment should not work injustice to the other side. But an injury that can be compensated by way of costs is not treated as an injustice. Further, the court should aim to avoid multiplicity of proceedings and all amendments that should avoid such multiplicity should be allowed. (See the case of **EASTERN BAKERY V GASTELLINO (1958) EA 461 (V.) at P462**). And there is real possibility of such multiplicity here if amendment is not allowed. The likely scenario is that the proposed party will be sued in a fresh suit.

16. And as regards amendments relating to joinder as in this case, the law is that joinder should be allowed in all situations where parties are seeking rights or reliefs that arise out of the same acts or transactions. It is also allowed where common questions of law or facts would arise if parties filed separate suits. (See the case of **LUCY NUNGARI NGIGI & OTHERS VS NATIONAL BANK OF KENYA LIMITED: HCC NO 517 OF 2014, NAIROBI (2015) eKLR**).

17. It appears to me that allowing the amendment sought will help to obviate the need to file another suit. In other words, it will help to avoid multiplicity of proceedings. It also seems to me that both the respondents and the interested parties can be sufficiently compensated with costs. Add to this the fact that the costs of litigation will be considerably reduced if the whole suit is handled as one instead of two separate suits. The respondents and the interested parties have not factually and/or legally persuaded me that the amendment should not be allowed. When all is considered, the interest of justice is better served by allowing the amendment.

18. The upshot is that the application herein should be allowed. And I hereby allow it. Costs of the application however should be paid to the respondents and the interested party.

Dated, signed and delivered at Kericho this 26TH day of February, 2021.

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A. K. KANIARU

JUDGE