



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE MATTER OF THE LAND
DISPUTES TRIBUNAL ACT NO 18 OF 1990
CIVIL APPEAL NO 863 OF 2001
KISANDA KILANDA ENTERPRISES LTD APPELLANT
VERSUS
LETEIPA EKEDIENYE
OLE KISUA & 2 OTHERS RESPONDENTS
RULING

This is an application under Order VI A Rules 3, 5, 6, 7 and 8 of the Civil Procedure Rules (hereinafter referred to as “the Rules”), Section 100 of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law. In it the Appellant seeks the following orders:

- “1. THAT leave do be granted to the Appellant ... to re -amend Amended Chamber Summons dated 18 th July, 2003 in accordance with the draft Re -amended Chamber Summons annexed to the application.***
- 2. THAT the granting of the leave to Re -amend Chamber Summons annexed and marked “SKR 1” do be deemed to be Re-amended, filed and served on the day of granting leave***
- 3. (Costs).”***

What were the proposed amendments? The Appellant sought to change the title of the application from “Amended Chamber Summons” to “Re- Amended Notice of Motion.” He also sought to specify the property to which the action relates and to set out that the application was supported by the affidavit of Mr Julius Hailepo Totona sworn on 1st April, 2004 among other issues.

Mr Kinyanjui for the Respondents opposed the application arguing that “a chamber summons is not a pleading which can be amended” and that the amendment sought would confuse proceedings since the Appellant sought to change his application from a Chamber Summons to a Notice of Motion when the two are governed by different rules. He also attacked the affidavit of Mr Samuel Kanogo Ritho Advocate stated to have been sworn on 22nd April, 2003 saying it cannot be said to support the present application which is dated 22nd April, 2004 and filed in this court on 26th April, 2004. I will deal with this last issue immediately.

Order XVIII Rule 9 of the Rules is clear beyond peradventure that the court shall not reject an affidavit “because it was sworn before the filing of the suit concerned.” When one looks at these provisions by analogy, the court may also admit an affidavit sworn in support of an application even though it is sworn before the filing of the application. This happens in our courts every day and I do not think that Mr Kinyanjui’s objection to Mr Ritho’s affidavit was serious. In fact, it appears that that affidavit was sworn on 22nd April, 2004 when the application was drawn but erroneously shown as having been sworn a year earlier. However, that does not matter. I am satisfied that the application before me is properly supported by an affidavit and I will proceed to consider it as follows.

Although Order VI A of the Rules is titled “Amendment to Pleadings” Rule 5 of that Order specifically empowers this court (even on its own motion) to order any document to be amended as the interests of justice may demand. Such document includes an application. I have always understood it so and this court has applied the Rules of Amendment of Pleadings time and again to rectify documents and proceedings which do not exactly fit in the definition of the word “pleadings” as set out in Section 2 of Cap 21.

It must always be remembered that the power of the court to amend documents before it is a discretionary power which is to be exercised to enable it to decide the real issues in controversy. The practice of our courts has been to allow amendments freely where they do not occasion any undue prejudice to the innocent party.

Mr Kinyanjui did not show what prejudice his clients would suffer if the amendment sought was allowed. His clients will still have a right to respond and raise all objections they may wish to raise at the substantive hearing of the application sought to be amended. It does not matter to me that the Appellant seeks to change his application from a Chamber Summons to a Notice of Motion. That will not prejudice the Respondents in any way. In fairness to Counsel and for conclusiveness of record, I would like to state that I have perused the authorities cited (all of which are familiar to me) but I do not think that they affect in any way the decision I have come to.

I, therefore, allow the Appellant’s application dated 22nd April, 2004 with costs and direct that the Appellant shall file and serve the amended application together with the Supporting Affidavit within fourteen (14) days of this Ruling.

Dated and delivered at Nairobi this 10th day of August, 2004.

ALNASHIR VISRAM

JUDGE