



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO 334 OF 1996

HALAI BROTHERS LIMITED.....PLAINTIFF

VERSUS

ROY RIMBA

ROY NYALE (on behalf of all the people squatting on

Plot No Kilifi/KIJIPWA/48).....DEFENDANTS

RULING

1. Before me for consideration is an application dated 26th October 2020 brought by the defendants under Section 1A, 1B, 3A of the Civil Procedure Act and Order 8 Rule 3, and Order 51 rule 1 of the Civil Procedure Rules. The application is supported by the affidavit of Roy Rimba and seeks the following orders:-

- a) *That leave be granted to the defendants to amend their defence and counterclaim in the manner shown in the draft amended defence.*
- b) *That the amended defence and counterclaim be filed and served upon the plaintiff within such time as may be determined by this honorable court.*
- c) *That the plaintiff be at liberty to amend its plaint within fourteen (14) days of service by the defendants of the amended defence and counterclaim.*
- d) *That costs of this application be provided for.*

2. The application is grounded on the fact that the intention of the proposed amendments is to bring the real issues before court for adjudication. The amendments introduces; the Director of Land Adjudication and Settlement, the Chief Lands Registrar, the Attorney General and the Lands Registrar, Kilifi who according to the defendants allegedly colluded with the plaintiff to defeat the claim of the defendants over the suit property. The supporting affidavit further stated that the defendants have lived in the suit property for over 80 years uninterrupted and in the year 1982 it was declared a settlement scheme held under a settlement trust fund in trust of among those the defendants. That while the defendants were waiting to be issued with title deeds to the suit property, the plaintiff supposedly connived with the intended defendants to the counterclaim to fraudulently deny the defendants their right to the suit property and instead issued the title deed to the plaintiff. That by amending the defence and counterclaim to introduce the intended parties' the court will be able to clearly identify the issues in dispute.

3. The plaintiff opposed the application through grounds of opposition dated 18th November 2020 and stated that the application should be dismissed with costs as it is defective and devoid of merit. That the proposed amendments introduced a new and inconsistent cause of action which would change the initial cause of action that can be adjudicated upon in a fresh action.

4. That I have considered the application, the grounds of opposition as well as the respective submissions. The issue before this court for determination is whether the defendants should be granted leave to amend their defence and counterclaim to add the intended parties as defendants to the counterclaim.

5. To get a clear perspective of this matter, I indulge into the court proceedings of this very old matter that should be concluded at the earliest convenience. The plaintiff has sought leave of court in two occasions to amend its plaint. The first amendment was done vide an amended plaint that was filed on 27th March 1997 and a further amended plaint that was filed with leave of court on 19th May 2017. Further to that, on

23rd July 2018, while giving a last adjournment, the court noted with great concern that the matter had been adjourned several times by both parties for one reason or another. The plaintiff having benefited from leave to amend its plaint twice and being an equal participant in seeking adjournments that have consequently delayed the matter over two decades cannot turn around and oppose the defendants' application to amend its defence and counterclaim. Despite having testified through its director and close its case on 12th March 2019, the court allowed the plaintiff to reopen its case on 24th July 2019.

6. Order 8 of the Civil Procedure Rules confers a very wide discretion on court in the matter of amendment of pleadings. As a general rule, leave to amend will be granted as to enable the real question in issue between parties to be raised in pleadings, where the amendment will occasion no injury to the opposite party and can be sufficiently compensated for by costs or other terms to be imposed by the order. As a matter of law, all amendments ought to be allowed which satisfy the two conditions; of not causing injustice to the other side, and of being necessary for the purpose of determining the real questions in controversy between the parties.

7. Even through the defendants are seeking leave to amend their defence and counterclaim two decades later, this court finds the intended amendments are necessary for determining the real question in controversy between the parties and do not cause injustice or prejudice to the other side. The court finds that the intended amendments do not introduce a totally different, new and inconsistent case nor does it change the fundamental character to the suit or defence.

8. I find merit in the Notice of Motion dated 26th October 2020 and make the following orders:-

- a) The defendants are hereby granted leave to join; The Director of Land Adjudication and Settlement, The Chief Lands Registrar, The Attorney General and The Lands Registrar, Kilifi as defendants to the counterclaim.
- b) The defendants are hereby granted leave to file and serve the amended defence and counterclaim upon the plaintiffs within seven (7) days from the date of this ruling.
- c) The plaintiff and the new parties shall thereafter be at liberty to file their responses or additional responses or amend any filed pleadings and serve the same within a period of seven (7) days following the serve of the amended defence.
- d) The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE