



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT MOMBASA
ELC NUMBER 467 OF 2011

MZURI MALAU MLAI

JUMAA KOMBE CHARO

PETER K. KALAMA

**JEFWA KAZUNGU KALUTE (suing on his own and on behalf
of Miritini Redeemed Gospel Church)**

TRUSTEES OF REDEEMED GOSPEL

CHURCH INCORPORATED.....PLAINTIFFS

VERSUS

BLUE HORIZON PROPERTIES LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF MOMBASA.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

RULING

1. Before me is the plaintiffs' application dated 16th September 2020 brought under Order 1 Rule 10 (2) (4), Order 51 Rule 1 of the Civil Procedure Rules 2010 and Section 1A, 1B and 3A of the Civil Procedure Act. The application is supported by the affidavit of Jefwa Kazungu Kalute and seeks the following orders:-

a) Spent

b) That this honorable court be pleased to grant leave to the plaintiffs herein to join Wycliffe Jorgenson Ginda Mukhongo trading as Creek Auctioneers to this suit as a 4th defendant.

c) That leave be granted to the plaintiffs to further amend the plaint accordingly.

d) That the annexed amended plaint be deemed as duly filed upon payment of fees.

e) That the costs of this application be provided.

2. The grounds in support of the application inter alia states that the proposed 4th defendant is a necessary party to the suit. That the 1st defendant in his statement of defence and list of documents purports to have bought the suit property from the proposed 4th defendant. That there is need to enjoin him as a party to the suit to enable the court to fully determine the issues pending before it. The applicants further stated that the defendants will not suffer any prejudice if the application is allowed.

3. The application is opposed by the 1st defendant vide grounds of opposition dated 26th October 2020. That the application is a delaying tactic, based in presumptuous evidence and does not raise any serious issues for determination. That the court should dismiss the application with costs to the defendant.

4. The applicants/plaintiffs filed their submissions on 9th November 2020, in which they cited Order 1 rule 10 (2) (4) (5) of the Civil Procedure Rules which provides that the court may at any stage of the proceedings, order that the name of any party that ought to be joined as a defendant to be added. That addition is made if the party's presence is necessary for court to effectually and completely adjudicate the issues before it. The applicants further relied on Order 8 rule 3 (1) of the Civil Procedure Rules that gives court the power at any stage of the proceedings allow any party to amend his pleadings.

5. They submitted that it's necessary to introduce the 4th defendant in order to ensure that this court is able to effectually and completely adjudicate on the issues and reach a conclusive judgement. The applicants further submitted that it was the duty of the 1st defendant to actually introduce the proposed 4th defendant into the proceedings. That it is the 1st defendant who disclosed in its pleadings the existence of the proposed 4th defendant as the one who sold to them the suit property.

6. The 1st defendant filed their submissions on the 23rd November 2020 and submitted that though Order 8 rule 3 allowed amendment of pleadings, the overriding consideration is whether the amendments are necessary for determination of the real question before court and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond monetary compensation. The 1st defendant further submitted that the proposed amendments will cause them prejudice as it has been brought 9 years after the suit was instituted. That the plaintiff had ample time to make an application for amendment but failed to do so, and that the amendment does not raise any serious issue that will determine the real dispute between the parties. The submissions concluded by requesting court to dismiss the application with costs to the 1st defendant.

Analysis and determination

7. Having considered the application, the grounds of opposition as well as their respective submissions, the issue before this court for determination is whether the plaintiffs should be granted leave to further amend their plaint to join one Wycliffe Jorgenson Ginda Mukhongo trading as Creek Auctioneers as the 4th defendant.

8. The addition of a party to a suit is guided by Order 1 rule 10 sub rule 2, that gives court the discretion at any stage of the proceedings to add a party into a suit as a defendant, in instances where their presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit. Sub rule 4 continues to lay out the procedure where a defendant has been added. The plaint shall be amended and the new defendant shall be served with the new summons and the amended plaint and where court deems fit to the original defendants too.

9. The principles that guide amendments of pleadings were discussed in the High Court case in **Joseph S. Wafula v Elena Chepkurgat Talam (Sued as the Legal Administrator of the Estate of the late Kiptalam Arap Kogo [2019] eKLR** where it held that:-

“The overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in Central Kenya Limited v Trust Bank limited (2000)2 E.A 365 as follows:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

10. In the present case the plaintiffs have amended their plaint on two previous occasions. The first amendment was by an application dated 3rd August 2012 where leave was granted to enjoin the Trustees of Redeemed Gospel Churches of Kenya Incorporated as the 5th plaintiff, the Municipal Council of Mombasa as the 2nd defendant and the National Land Commission as the 3rd defendant. The plaintiffs filed an amended plaint on 29th January 2014. The second amendment was done vide a further amended plaint filed on 7th February 2014. This is therefore the third application for amendment by the plaintiffs. No explanation has been given why the plaintiffs in the previous amendments did not include the intended 4th defendant.

11. Further to that, the 1st defendant in their list of documents filed on 30th September 2015 disclosed that Wycliffe Jorgenson Ginda Mukhongo trading as Creek Auctioneers sold to them the suit property. The 1st defendant even attached several documents to support that position including a copy of a Certificate of Title No CR 42684 dated 15th November 2007 and a copy of the transfer dated 12th March 2008. This is not disputed by the plaintiffs. It is therefore clear that as early as 2015 the plaintiffs were aware of the party that they now seek to enjoin as a fourth defendant and they took no action to enjoin him when making the previous application or soon after. Further to this, the case herein is part-heard as the first plaintiffs' witness testified on 17th September 2019. In my view, this application is clearly an afterthought meant to fill gaps in the plaintiffs' case that might have arisen during the hearing. This is a very old matter filed way back in 2011 which is 10 years ago. The amendment sought has been brought belatedly and if allowed will certainly be prejudicial to the defendants and delay the finalization of this very old case.

12. The Court of Appeal in upholding a denial of further amendment had this to say in **Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR:**

“We are afraid we cannot accept that invitation. The issues of delay, good faith and prejudice were certainly relevant for consideration and the trial Judge did not err in considering them. The learned authors of Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].

In our view, in considering the various factors he did, the learned Judge was simply balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. See the case of Selkent Bus Co Ltd t/a Stagecoach Selkent vs Moore [1996] IRLR 661. In any event, the intended amendments lost much of their force and relevance once the decision not to enjoin the company became inevitable. We find no good reason to disturb the Judge’s exercise of the discretion to reject the further amendment.”

13. In my view and being guided by the above decision of the Court of Appeal which is binding on me, the plaintiffs who have been granted leave twice previously to amend their plaint have not given any satisfactory explanation for the delay to amend their pleadings to include the intended party. In the absence of any explanation this court concludes that the amendments are not sought in good faith other than to delay the case. The upshot is that the plaintiffs’ Notice of Motion dated 16th September 2020 is disallowed and costs are awarded to the 1st defendant.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 4th DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE