



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 263 OF 2015 (OS)**

**IN THE MATTER OF PROPERTY KNOWN AS L.R NO. NYERI/MUNICIPALITY BLOCK 11/89**

**AND**

**IN THE MATTER OF**

**THE ESTATE OF MOHAMED SHEIKH AND HALIMA YUSUF MOHAMED (BOTH DECEASED)**

**AND**

**IN THE MATTER OF THE ESTATE OF NGACHA NDEIYA (DECEASED)**

**AND**

**IN THE MATTER OF DECLARATION AND DETERMINATION OF A TRUST**

**BETWEEN**

**MARIAM YUSUF.....1<sup>ST</sup> APPLICANT**

**FATUMA YUSUF..... 2<sup>ND</sup> APPLICANT**

**-VERSUS-**

**MARGARET WANJIRU NGACHA**

***(Sued as the Administratrix of the Estate of Ngacha Ndeiya (Deceased)).....1<sup>ST</sup> RESPONDENT***

**NYERI MUSLIM HOUSING CO-OPERATIVE SOCIETY LIMITED.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By the Notice of Motion dated 2<sup>nd</sup> March, 2021 as filed herein on 8<sup>th</sup> March, 2021, Mariam Yusuf and Fatuma Yusuf (the Applicants) pray for orders that the court be pleased to grant them leave to amend their originating summons dated 29<sup>th</sup> October, 2015 and that the draft amended summons annexed to their application herein be deemed to be duly filed upon payment of the requisite fees.

2. The application which is premised on an affidavit sworn by the two Applicants is premised on the grounds *inter alia*;

*(a) That it is necessary to amend the originating summons dated 29<sup>th</sup> October, 2018 for the purpose of determining the questions in controversy between the parties;*

*(b) That the Applicants have obtained new material evidence in support of their claim and hence the need to amend the originating summons to include additional reliefs;*

(c) That no prejudice or injustice will be caused to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents rights if the application is allowed;

(d) That in the event the application is disallowed, the Applicants stand to suffer substantial loss and hardship as a result whereof they will suffer a grave injustice.

3. The application is opposed. In her Replying Affidavit filed herein on 6<sup>th</sup> April, 2021 Margaret Wanjiru Ngacha (1<sup>st</sup> Respondent) avers that the application for leave to amend has been brought too late in the day. The 1<sup>st</sup> Respondent further avers that while the hearing is yet to start, directions on the hearing had been given by the court on 5<sup>th</sup> October, 2017 and again on 11<sup>th</sup> July, 2016.

4. The 1<sup>st</sup> Respondent further asserts that the draft amended Originating Summons is an entirely new claim and not the amendment it purports to be. She avers that the Applicants ought to have withdrawn this claim and filed a new one. It is further her case that the effect of the amendment is to file a new claim which is barred by the Limitation of Actions Act as the cause of action accrued between the year 1992 and 1997. Accordingly the 1<sup>st</sup> Respondent urges the court to dismiss the application.

5. I have perused and considered the application for amendment and the response thereto. I have also taken into consideration the submissions and authorities to which I have been referred by the Learned Advocates for the parties. The 2<sup>nd</sup> Respondent did not file anything in response to the application.

6. The Applicants have sought the leave of this court to be allowed to amend their Originating Summons dated 29<sup>th</sup> October, 2015 on account that they have obtained new evidence which is material to their case and that the same would enable the court to effectively determine the dispute between the parties. The 1<sup>st</sup> Respondent is however opposed to the application accusing the Applicants of bringing up a completely new claim in the guise of an amendment.

7. The principles to be considered in an application such as this were long set out in **Eastern Bakery –vs- Castelino (1958) EA 461** where **Sir Kenneth O'Connor** held that:-

**It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs... the court will refuse to amend where the amendment will change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment... The main principle is that an amendment should not be allowed if it causes injustice to the other side."**

8. A perusal of the draft amended Originating Summons reveals that the Applicants are seeking to bring in the historical background of the suit property in an effort to back up their claim thereto. It is however apparent that their basic claim to their entitlement to the land remains the same.

9. While the 1<sup>st</sup> Respondent is opposed to the claim on the basis that it seeks to introduce a completely new claim that may be time-barred, it is clear to me that the suit is yet to proceed to hearing and that the 1<sup>st</sup> Respondent will not only have an opportunity to raise such issues in her amended statement of defence but also cross-examine the Applicants on the validity of their new claims.

10. At any rate a perusal of **Order 8 Rule 3 (5)** pursuant to which the application is instituted reveals that an amendment to a pleading may be allowed notwithstanding the fact that the effect of such an amendment would be to add or substitute a new cause of action where the cause of action is substantially similar to the previous one. Addressing a similar matter in **Tripple Eight Construction**

**Company (Kenya) Limited -vs- City Finance Bank Limited and 2 others (2018) eKLR**, the court observed thus:

**"On the issue that the intended amendments will introduce a new cause of action, it is clear both from a reading of Order 8 Rule 3(5) of the Civil Procedure Rules and on authorities that the mere fact that the amendment is likely to introduce or substitute a new cause of action is no ground to deny a party leave to amend as long as the new cause of action was in existence at the time the original plaint was filed and it arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."**

11. In the premises, I am persuaded that there is merit in the application and I hereby allow the same. The Applicants have 14 days from today to file and serve an amended Originating Summons upon the Respondents. In turn, the Respondents shall have 14 days from the date of service by the Applicants to file and serve any further responses they may deem appropriate to the Originating Summons.

12. The costs of this application shall be in the suit.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF NOVEMBER, 2021.**

In the presence of:

Ms Mungania for the Applicant

Ms Mwai for the Respondent

**J. O. OLOLA**

**JUDGE**