



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CAUSE NO. 457 OF 2017 (OS)

IN THE MATTER OF LR. NO. KAJIADO/ KAPUTIEI CENTRAL/ 2303, 2304, 2305, 2306, 2307 AND 2308

AND

IN THE MATTER OF THE LIMITATION OF ACTIONS ACT, (CAP, 22 LAWS OF KENYA)

AND

IN THE MATTER OF THE LAND REGISTRATION ACT NO. 2 OF 2012

AND

IN THE MATTER OF THE REGISTERED LAND ACT, (CAP. 300 LAWS OF KENYA – REPEALED)

1. BERNARD ITUMO MUNGAL.....1ST APPLICANT
2. DAVID KASYAKU TUVA.....2ND APPLICANT
3. KAVEKE MBWIKA.....3RD APPLICANT
4. JOYCE MALUNI MUIA.....4TH APPLICANT
5. MUNINI MATOLO.....5TH APPLICANT
6. DAMIAN KYENGO MWANGANGI.....6TH APPLICANT
7. BONIFACE MBELENZU MULWA.....7TH APPLICANT
8. JOSEPH NZETU KATUE.....8TH APPLICANT

VERSUS

- PAUL KIMAKON.....1ST RESPONDENT
- JOSEPH SELELO MUTUTUA.....2ND RESPONDENT
- JONATHAN MUTUTUA KITULI.....3RD RESPONDENT
- MASENGOT OLE MUTUTUA SIRINGET.....4TH RESPONDENT

RULING

What is before Court for determination is the Applicants' Notice of Motion application dated the 9th May, 2019 brought pursuant to Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules. The Applicants seek leave to amend the Originating Summons dated the 30th December, 2014 and filed in Court on 3rd February, 2015. The Application is premised on the grounds on the face of it and the affidavit of JOSEPH NZETI KATUE who is one of the Applicant's herein where he deposes that there are several errors in the Originating Summons

hence the amendments are necessary to allow the Court determine the issues with clarity. He contends that the Respondents will suffer no prejudice at all if the Application is allowed.

The Respondents opposed the Application by filing Grounds of Opposition dated the 21st May, 2019 on the following grounds:

1. That the Application is a sham and a mere afterthought having been brought 5 years later.
2. That no reason and/ or authority has been given for the removal of the 1st, 3rd and 7th Plaintiffs yet they are crucial for the determination of issues in this suit.
3. The Application is a clear abuse of the Court process and the Civil Procedure Rules as the Applicant has failed to highlight all the amendments albeit mischievously as shall be proved at the hearing hereof.
4. No material facts and/ or new facts have been pleaded and/ or highlighted on the annexed draft Amended Originating Summons.
5. That in view of the foregoing grounds, it is clear that this is an attempt by the Plaintiffs to delay the hearing of this matter.
6. That the Application is an abuse of the Court process and should be dismissed with costs.
7. No Authority to swear affidavit has been filed/ annexed by the said deponent JOSEPH NZETI KATUE

The Applicants and the Respondents filed their respective submissions to canvass the instant Application.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 9th May, 2019 including the supporting affidavit, Grounds of Opposition and Submissions, the only issue for determination is whether the Applicants should be granted leave to Amend the Originating Summons dated the 30th December, 2014 and filed in Court on 3rd February, 2015.

The Applicants in their submissions averred that there were glaring errors on the face of the Originating Summons which ought to be corrected. They annexed a copy of the draft Amended Originating Summons to indicate the errors. They relied on section 100 of the Civil Procedure Act; Order 8 Rule 3 and 5 of the Civil Procedure Rules and the following cases: **Central Bank of Kenya Limited Vs Trust Bank Limited (2000) 2 EA 365 quoted in approval in the case of Tabitha Wandia Vs Francis Mwangi (2017) eKLR; Institute for Social Accountability & Another V Parliament of Kenya & 3 Others (2014) eKLR and Kampala Coach Limited Vs First Community Bank Limited & Another (2016) eKLR** to buttress his arguments. In opposition the Respondents submit that no reasons have been adduced to remove the 1st, 3rd and 7th Plaintiffs' names from the suit. Further, that this Application is an abuse of the Court process. They relied on the case of **Abdulla Abshir & 38 others V Yasmin Farah Mohammed (2015) eKLR** to support their arguments.

Section 100 of the Civil Procedure Act provides that: **'The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding'**

Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provide that: **'(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings. (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.'**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **'(1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.'**

In the case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR**, the Court of Appeal in dealing with issues of amendment held as follows: **'The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows: -**

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on

Limitation Acts.”

While in the case of **Central Bank of Kenya Limited Vs Trust Bank Limited (2000) 2 EA 365** the Court held that a mere delay is not a ground for declining leave to amendment’

Yet in another case of **Kampala Coach Limited Vs First Community Bank Limited & Another (2016) eKLR** where the Court held that:’ **Likewise, I am of the opinion that if the application for amendment is allowed, the Defendants will have the opportunity to respond to the amendment if they so wish. In sum, the first ground for opposing the application for amendment must fail. Turning to the second issue, the 1st Defendant submitted that allowing the amendment in the manner proposed would be tantamount to introducing a new and inconsistent cause of action.’**

In the current scenario, the Applicants sought to amend the Originating Summons to correct the errors glaring on the face of it. They have highlighted the proposed amendments in the draft Originating Summons. The Respondents insists that the application has been brought after a long delay and no reason and/ or authority has been given for the removal of the 1st, 3rd and 7th Plaintiffs yet they are crucial for the determination of the issues in this suit. On a keen perusal of the draft amended Originating Summons, it is my considered view that the removal of the 1st, 3rd and 7th Plaintiffs has not compromised the cause of action. In associating myself with the decisions and the legal provisions cited above, I find that the amendment sought is not prejudicial to the Respondents. Further, I hold that the said proposed amendments are pertinent to correct the errors in the Originating Summons and assist the Court in determining the real questions in controversy between the Applicants and the Respondents. I note the said proposed amendments albeit late have not brought in a new cause of action. In the circumstance, I will grant the Applicants’ leave to amend their Originating Summons and grant the Respondents’ corresponding leave to file a response to the said amendments.

On the Respondents contention that there is no authority filed by the Applicants in support of the amendments. I note at paragraph one (1) of the verifying affidavit in support of the application for amendment, the deponent confirms that he has authority from the other Plaintiffs and is hence competent to swear the affidavit. I opine that the issue of filing a written authority from the other Plaintiffs is a procedural one and not substantive. I find that the Respondents seek to rely on technicalities which offends the provisions of Article 50 (4) and Article 159 (2) (d) of the Constitution.

In the circumstance, I find the instant application dated the 9th May, 2019 merited and will allow it. I grant the Applicants leave of 14 days to file and serve the Amended Originating Summons. Upon service, I grant the Respondents leave of 14 days to file their response to the Amended Originating Summons if need be.

Costs of the Application is awarded to the Respondents.

Dated signed and delivered via email this 5th Day of May, 2020

CHRISTINE OCHIENG

JUDGE