



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 123 OF 2016

VIRGINIA KATHAMBI MAINGI.....PLAINTIFF/APPLICANT

VERSUS

GERALD MBABU SILAS.....1ST DEFENDANT/RESPONDENT

ANTHONY KIRIMI..... 2ND DEFENDANT/RESPONDENT

SAAMY MURIITHI.....3RD DEFENDANT/RESPONDENT

CHARLES ARUNGA.....4TH DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR

MERU COUNTY (CENTRAL).....5TH DEFENDANT/RESPONDENT

COUNTY LAND SURVEYOR,

MERU COUNTY.....6TH DEFENDANT/RESPONDENT

RULING

1. Before me is a notice of motion dated 10/07/2020 brought pursuant to Order 1 Rule 10, Order 8 Rule 3, 5(1), 8 and Order 51 Rule 1 and 13(2) of the Civil Procedure Rules, as well as Section 1A, 1B, & 3A of the Civil Procedure Act. The applicant seeks leave to amend her plaint as per the annexed draft amended plaint, that the said amended plaint be deemed as duly filed upon payment of the requisite fees, and that the respondents be at liberty to file an amended defence to the amended plaint within fourteen (14) days of the granting of leave herein.

2. The application is based on the grounds on the face of it and on the supporting affidavit of the applicant. She avers that she filed this suit against the 1st -5th defendants in 2016. In March 2020 during a visit to the Meru lands office, she discovered a crucial document being the mutation to the subdivision of the mother title to the disputed parcels of land, and she realized that the measurements in the mutation and the title deeds in dispute are different. That the said document will aid the court to narrow down the issues in dispute and further aid the court to reach a judicious finding. She avers that she has been vigilant and persistent in obtaining the mutation and she makes this application in good faith.

3. The discovery of the document has made it necessary to amend her pleadings in order to add the County Land Surveyor as a necessary party owing to the implication of introducing the document. The proposed amendments arise from the same facts as pleaded in the plaint and do not constitute a new cause of action. That it would be just and fair if her application was allowed to enable her to prosecute the suit and no prejudice shall be occasioned on the defendants.

4. The application is opposed by the 1st – 4th defendant’s vide their grounds of opposition dated 17/10/2020. They contend that the civil procedure rules 2010 requires parties to furnish their evidence in advance before the commencement of the trial as per Order 3 Rule 2, that the plaintiffs and the 1st-4th defendants have already closed their cases and the introduction of the said document was not contemplated by the 1st -4th defendants during the trial. They also aver that the said mutation is being introduced 4 years after the suit was instituted and there is inordinate delay on the plaintiff’s part. Thus the application is an ambush on the 1st-4th defendants and it will fundamentally alter the character of the plaintiff’s case. They stand to be greatly prejudiced if the application is allowed and it will violate the provisions of Article 50(1) of the Constitution of Kenya.

5. The 5th and 6th defendants/respondents are not opposing the application.

6. The court directed the matter to proceed by way of written submissions but when the matter came for confirmation of filing submissions, orders were given for the application to be argued orally and virtually.

7. Mr. Aunga advocate for the plaintiff/applicants averred that prior to filing the suit, they had tried to get the documents in vain and the 5th defendant never brought the mutation forms. They only discovered the document later. It is important for the court to know how the mother title was sub divided and it will help the court to decide the matter as the plaintiff contends that she is supposed to occupy the land on the main road, even on the ground the 1st plot belongs to the 4th defendant but the same was cancelled.

8. M/s Mukaburo advocate for the 1st-4th defendants averred that the application introduces new evidence as the new mutations will talk about size of the land as opposed to placement of the land. The plaintiff has not disclosed how they obtained mutations 4 years after pleadings were closed.

9. Mr. Aunga rebutted by stating that they have explained how they came to find the mutation in the 1st paragraph of the supporting affidavit, hence they have laid a basis of how they got the documents. The amendment brings new issues but doesn't change the cause of action.

10. M/s Mukaburo added that the said document cannot be authenticated as they don't know how it was gotten or how cross examination will be done.

11. The issue for determination in this application is; whether the plaintiff has laid out sufficient cause to warrant the issuance of the orders sought. The rationale behind the requirement for parties to file all their documents prior to commencement of the trial is clear and straightforward; that by the time a party takes the witness stand, they ought to know the exact case of their opponent.

12. Section 100 of the Civil Procedure Act makes provisions on the General Power to Amend, and gives the Court the discretion on whether to allow an amendment or not. Further **Order 8 Rule 3 (1) 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.'

13. Further **Order 8 Rule 5 of the Civil Procedure Rules** provides:

(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.'

14. The essence of having the rule that parties table their evidence in advance, is so as to ensure there is a fair trial. In the case of **Raila Odinga & 5 Others v IEBC and 3 Others 2013 eKLR** the supreme Court stated as follows on the correct legal position where the court has to consider whether to admit or reject additional evidence filed outside the stipulated statutory timeliness:

"The parties have a duty to ensure they comply with their respective time lines, and the court must adhere to its own. There must be a fair and level playing field so that no party or the court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party or the court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue the court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon. If it is small or limited so that the other party is able to respond to it, then the court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so as to make it difficult or impossible for the other party to respond effectively, the court must act with abundant caution and care in the exercise of its discretion to grant leave for the filing of further affidavits and or admissions of additional evidence."

15. It is notable that the Civil Procedure Act and Rules particularly Section 1A and B, as well as Order 8 prescribes powers and procedures within which the court exercises discretion as the particular case demands. I think that the very nature of due process rules is shaped to cure the risk of error or omission inherent in the truth finding process applied in the adjudication of cases.

16. 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, 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..."

17. What the applicant states in paragraph 5 of his supporting affidavit is that;

“I have during the month of March 2020 in one of my numerous visits to the Meru lands office, discovered a crucial document at the District Land Survey, Meru office, being the mutation to the subdivision of the mother title.....”

18. From the aforementioned averment, the applicant does not state whether her numerous visits to the survey office was for purposes of looking for the document in question. She has not availed any document to show that she had been communicating with the relevant offices requesting for the document all along. The notion of persistence and vigilance in acquisition of the document is missing and the court is not persuaded to believe that the applicant has been making efforts to get the document. It appears that the discovery was by chance.

19. This is a case whereby a consent order was made after the close of the case of the plaintiff as well as that of the 1st- 4th defendants for the scene visit to be conducted in the presence of the county surveyor who was to avail the relevant mutation forms and a report was to be filed accordingly. It follows that the applicant already has a forum of raising her issues with the district surveyor.

20. All in all, I find that the application has been made rather late in the day. The application is not merited and the same is hereby dismissed with costs to 1st – 4th defendants/respondents.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 19TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 22.2.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the *Civil Procedure Rules* which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE