



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 120 OF 2018

SILVESTER K. KAITANY.....PLAINTIFF

VERSUS

NYAYO TEA ZONE DEVELOPMENT CORPORATION.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

AND

NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY

KENYA FOREST SERVICES.....2ND INTERESTED PARTY

RULING

This ruling is in respect of an application dated 12th April 2021 by the 1st defendant/ applicant seeking for the following orders:

- a. Spent.
- b. THAT the 1st Defendant be granted leave to Re-amend its Amended Statement of Defence amended on 7th February 2019 so as to include a Counter-Claim.
- c. THAT the draft Re-Amended Statement of Defence and Counter-claim annexed to the supporting Affidavit of IRENE KAMANDA and marked as exhibit IR-I be deemed as duly filed and served upon payment of the requisite court fees.
- d. THAT the costs of this application be provided for.

Counsel agreed to canvass the application vide written submissions which were duly filed. The AG for the 2nd defendant stated that they did not wish to participate in the application but submitted that the application is brought too late in the day after the plaintiff has testified. The AG however left it to the court to give its decision.

1ST DEFENDANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application together with the affidavit sworn by Irene Kamanda stating that the 1st defendant intends to further amend the defence to include a counter claim which is crucial in helping the court to rule on the legality or otherwise of its occupation and possession of the suit property and the legal effect of the said Gazette Notice No. 265 of 1986 as modified by Nyayo Tea Zones Development Corporation Order, No. 30 of 8th March, 2002.

Counsel further submitted that the proposed further amendments raises, very serious legal issues which this Honourable Court can only consider if the application is allowed.

Mr Mubea Counsel for the applicant submitted that the plaintiff's allegation that if the application is allowed he will suffer prejudice is not merited as the plaintiff has not demonstrated what prejudice he will suffer. Further that the plaintiff can be compensated by way of damages and costs.

Counsel relied on Order 8 Rule 3(1) of the Civil Procedure Rules which provides that:

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,) arty party to amend its pleadings. "

Counsel urged the court to exercise its discretion and find that the application for further amendment is merited and cited the case of **Eunice Chepkorir Soi v Borner Water Company Ltd [2017]eKLR** where Justice Jane Onyango allowed an application by the Defendant for leave to file an amended defence out of time after both that the Plaintiff and the Defendant had testified and closed their respective cases.

Mr Mubea further relied on the case of **Consolidated Bank of Kenya LTD & Another [2016]eKLR** where the Court of Appeal expressed itself thus:-

"As regards the law, the High Court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously, It accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments."

Counsel submitted that there are cases where the court would not exercise discretion in favour of a party seeking amendments but the applicant has brought this application without undue delay. Counsel further took issue with the plaintiff's argument that the amendment seeks to introduce a new cause of action and submitted that the counterclaim is in line with the defendant's defence which it has pleaded that the claim is time barred and the challenge of the title.

Mr Mubea also cited the case of **Beatrice Gikunda v CFC Life Assurance Limited [2002]eKLR** where Muchemi J allowed a similar application which was filed 13 years after commencement of the suit and relied on the case of **Elijah Kipng'eno arap Bii vs. Kenya Commercial Bank Ltd [2013]eKLR** where the Court observed:-

"The law on amendment of pleadings 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-12^{CEI} Edition, in the case of Joseph Ochienq & 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 amendments is to determine the true, substantive merits of the case; amendments should be timeously applied

It was counsel's submission that Articles 25 (c), 48 and 50 of the Constitution of Kenya, 2010, a right to a fair hearing is a fundamental right which is protected under 'the Constitution and cannot be limited and cited the case of Bosire Ogero v Royal Media Services [2015]eKLR where Aburili J.held as follows:

"That the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may, be allowed before or at the trial or after trial or even after judgment or an appeal.

Counsel therefore urged the court to allow the application as prayed .

PLAINTIFF'S/RESPONDENT'S SUBMISSIONS

Counsel for the plaintiff/respondent gave a brief background to the case and the steps that had been taken before the filing of the current application. Counsel submitted that the parties went through pretrial directions and confirmed that the suit was ready for hearing but before the hearing commenced the defendant/applicant raised a preliminary objection which was heard and determined vide a ruling dated 24th November 2020 whereby it was dismissed with costs.

Counsel further submitted that the matter proceeded on 2nd February, 2021 when the Plaintiff partly testified, however he was stood down as the Defence objected to production of copies of documents in the Plaintiffs Bundle of Documents but later proceeded 4th March, 2021.

Mr Samora Counsel for the plaintiff/respondent submitted that the issue for determination is as to whether the application is merited and relied on Order 8 of the Civil Procedure Rules, 2010 Laws of Kenya and more specifically, Order 8 Rule 3 of the Rules which provides for amendments of pleadings at any stage .

Counsel relied on the case of **DAVID JONATHAN CRANTHAM & ANOTHER-VS- NATIONAL SOCIAL SECURITY FUND [2007] eKLR** where it was held that.

"...amendment should be timeously applied for (sic); power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); that as a general rule however late the amendment sought to be made should be allowed if made in good faith provided costs can compensate the other side..."

It was counsel's submission that as a general rule, a party is at liberty to amend its pleadings at any time before judgement and that the grant

of such application for amendment is discretionary and that the court will only grant such application for amendment if it is satisfied that:

“Would not 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 if his claim is by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of the court to still allow such an amendment notwithstanding the expiry of current period of limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment. ”

Mr Samora further submitted that there are some instances where the court will refuse the exercise of such discretion and such include delay and lack of reasons given for the delay, the addition of fresh causes of action and the judicial disruption of the administration of justice.

Counsel therefore urged the court to find that the Applicant is guilty of laches and has not given any reason thereto; that the intended amendment has departed from the original pleadings and introduced a totally new claim which alters the nature of the defence hence will occasion prejudice to the Plaintiff,

Counsel further relied on the case of **KASSAM -VS-BANK OF BARODA [2002] 1 KLR 294** where the court refused amendments pointing out that the same would be to facilitate abuse of court process. In that case, the Honourable judge went on to say that the power of amendment is to be jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense.

Further in the cases of **LAWRENCE OWINO OMONDI -VS- KENNETH INEA MUYERA (2017) eKLR** and **JOHN MULWA KANGÁATU V PAN AFRICAN INSURANCE CO. LTD (2015) eKLR** where the court refused an amendment on the ground that the same would occasion great prejudice to the opposing party which could not be made good by costs.

Counsel submitted on the issue of the further – further amendment amounts to a fresh cause of action which was neither in the defence and the further amended defence to include a counterclaim on adverse possession and cited the case of **JOHN MULWA KANG'AATU -VS- PAN AFRICAN INSURANCE**

ANALYSIS AND DETERMINATION

The issue for determination is whether the application for further amendment of the 1st defendant's defence has merit. The court is guided by the case of **Ochieng and Others -v- First National Bank of Chicago, Civil Appeal Number 147 of 1991** set out as follows the principles under which Courts may grant leave to amend the pleadings:

- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) 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;
- e) 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 Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

These principles for amendments of pleadings were further enumerated in the case of **Central Kenya Ltd v Trust Bank Ltd and 5 others (2000) eKLR** where the court stated as follows;

- i. That are necessary for determining the real questions in controversy.
- ii. To avoid multiplicity of suits provided there has been no undue delay.
- iii. Only where no new or inconsistent cause of action is introduced ie if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- iv. That no vested interest or accrued legal rights is affected.
- v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

Further in **Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76,**

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..."

In Mulla, The Code of Civil Procedure, 18th Ed, Vol.2 at pages 1751-1752:- sets the following on amendments of pleadings:-

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- v. Amendment of a claim or relief barred by time should not be allowed;
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
- viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
- ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

The court is further guided by the provisions of Order 8 Rule 3 of the Civil Procedure Rules on amendments.

From the foregoing, it should be noted that the 1st defendant had amended its defence and this is the second time it is seeking to amend its defence. The court is well guided by the law and precedent that amendments should freely be allowed so long as they are brought timely, in good faith, will not prejudice the opposing party and does not introduce new causes of action.

This matter has gone through pre-trial procedures where all the parties to the suit confirmed that they were ready for the trial of which the plaintiff gave evidence and produced documents in respect of the suit land.

It is also on record that the 1st defendant filed a notice of preliminary objection on the issue that the suit is time barred which application was heard and determined whereby the court dismissed the same. The 1st defendant indicates that further amendment will help the court in determining the legality or otherwise of the ownership of the suit land as the 1st defendant has established tea plantations and that it has been in possession over 35 years as per Legal Notice No 285 of 1986 which was repealed and substituted by Nyayo Tea Development Corporation Order No.30 of 8th March 2002. This information is and has been within the knowledge of the 1st defendant and is part of the defence that was mounted.

Such information being within the knowledge of the defendant, it beats logic why it did not raise it while filing the defence in the first instance or when it further amended the defence on 7th February 2019. Why wait until the plaintiff has given evidence and completed his case to raise the issue of amendment to include other claims of adverse possession, Is the amendment to fill the gaps and prejudice the plaintiff's case?

In the case of **Joseph Tireiti v Jacob Kipsugot Arap Lagate & another [2013] eKLR** Munyao J in declining to allow an application for amendment to bring a new cause of action for adverse possession stated that:

“ It will be seen from the above, that the court may be inclined to reject amendments which seek to fundamentally alter the character or subject matter of the suit, especially if such amendments come very late in the litigation. The effect of such amendments would ordinarily prejudice the other party as they are now forced to face litigation that is completely different from that which they have been defending. There is indeed danger that if such amendments are liberally granted, then a litigant would wait till the end of the suit to attempt to fill in the holes created by the other party during the conduct of the litigation. They are not amendments that should be encouraged except in very exceptional circumstances.”

Furthermore the 1st defendant claims at paragraph 3(a) to (k) of the amended defence that the plaintiff fraudulently acquired the title to the

suit land. It is trite law that for a claim of adverse possession to succeed, a party must concede and acknowledge that such party is the registered owner and lawful owner of the suit land as was held in the case of **Haro Yonda Juaje –v- Sadaka Dzenzo Mbauro & Kenya Commercial Bank (2014) eKLR** it was stated:

“ [29] One cannot succeed in a claim for adverse possession before conceding that indeed the registered proprietor of the land is the true owner of the said land. It does not lie in the mouth of a claimant to aver that the title held by the registered proprietor was fraudulently acquired and then claim the same parcel of land under the doctrine of adverse possession. If the Plaintiff's averment is that the title which was issued to the Defendant was fraudulently acquired, then his cause of action would be for the rectification of title by cancellation pursuant to the provisions of Section 143 of the Registered Land Act and not adverse possession. He cannot use the doctrine of adverse possession to go around the decision of the Minister.”

The applicant seeks to introduce a counterclaim on the doctrine of adverse possession of which allowing such an application for amendment would be an exercise in futility and an academic exercise. If you do not acknowledge that the plaintiff owns the title, then you do not have any business attaching the doctrine of adverse possession to your claim.

The court is alive to the fact that it should not evaluate the merits or strength of the proposed amendments as per Halsbury's **Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76**, which states:-

“On an interlocutory application for leave to amend, the court should rarely seek to evaluate the strength of the case sought to be argued, as to do so would anticipate the trial of the issues.”

As much as the court should not deal with the merits of the proposed amendments as was held in the case **Sajjan Kumar –vs.- Ram Kishan, (2005) 13 SCC 89**, where the Supreme Court of India at paragraph 11 observed:-

“ As to the submission made on behalf of the respondents that the amendments will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and will be open to the defendants-respondents to raise their objection in regard to the amended plaint by making any corresponding amendment on their written statement.”

When the sought amendment is glaring in relation to the defence already on record and will change the substratum of the case by introducing new causes of action then the court should not shy away from dealing with such issues.

Further in the case of **Abdul Wahid Al Abubakar v Osman Abubakar t/a Osman Woodworks & 2 others [2015] eKLR** Angote J in disallowing an application for amendment of pleadings stated that:

“indeed, the law allows a party to amend his pleadings at any stage of the proceedings. However, where a matter has been partly heard, the court ought to be slow in allowing an amendment to a pleading considering that such an amendment is likely to be prejudicial, especially where the opposite party has already tendered evidence.

Indeed, one of the issues that the court considers when the matter comes up for pre-trial directions is whether any of the parties would wish to amend his pleadings before the matter can be confirmed for hearing.”

The court further stated that

“allowing the amendment at this stage will be prejudicial to the Plaintiff because what is being sought to be introduced is a new cause of action, which has been brought after the Plaintiff has testified.”

The court of Appeal in the case of **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** where the Court declined to interfere with the discretion of the trial judge to refuse amendment of pleadings and observed:

“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.”

Having said that I find that the application lacks merit and will cause prejudice to the plaintiff and is therefore dismissed with costs to the plaintiff. Matter to be listed for further hearing.

DATED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2021

M. A. ODENY

JUDGE