



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYAHURURU**

**ELC NO. 36 OF 2019**

**JOSEPH THUO KAGORO.....PLAINTIFF**

**-VERSUS-**

**JAMES MAINA MAAMI.....1<sup>st</sup> DEFENDANT**

**RULING**

1. By a chamber summons dated 29/3/2021 brought under **Order 2 Rule 6, Order 8 Rules 3 (1) and 8 of the Civil Procedure Rules 2010 (the Rules), section 3A of the Civil Procedure Act (Cap. 21), and all enabling provisions of the law**, the Plaintiff sought the following orders:-

- (i) That this honourable court be pleased to grant leave to the Plaintiff to amend his plaint in the terms of the draft amended plaint.*
- (ii) That this honourable court be pleased to enjoin the Director of Land Administration as an interested party.*
- (iii) That the Plaintiff be granted leave to file and serve the plaint so amended to the Defendant and proposed interested party.*
- (iv) That the costs of this application be in the cause.*

2. The application was based upon the grounds set out on the face of the chamber summons and the contents of the supporting affidavit sworn by the Plaintiff on 29<sup>th</sup> March, 2021 and the exhibits thereto. It was contended that since the filing of the suit the Plaintiff had come across new documents and information crucial to the case hence the necessity of amendment. It was further contended that the Defendant had raised some fundamental issues in his defence which necessitated amendment of the plaint.

3. The Defendant filed grounds of opposition dated 23<sup>rd</sup> April, 2021 in response to the application. It was contended that the proposed interested party was not a necessary party to the suit under **Order 1 Rule 15 of the Rules** and that the proposed amendment was intended to undermine the Defendant's right to a fair trial under **Article 50 (1) of the Constitution**.

4. The Plaintiff filed a further affidavit sworn on 11<sup>th</sup> June, 2021 in response to the Defendant's said objections. It was contended that there were in existence two allotment letters in this matter and that the proposed interested party was the issuing authority. It was further contended that the proposed interested party was the custodian of all the land records relevant to the dispute hence his presence was necessary for a complete and effectual adjudication of the dispute.

5. When the said application was listed for hearing, it was directed that the same shall be canvassed through written submissions. The record shows that the Plaintiff filed his submissions on 16<sup>th</sup> June, 2021 whereas the Defendant filed his on 23<sup>rd</sup> June, 2021.

6. The court has considered the Plaintiff's said application, the Defendant's grounds of opposition, the Plaintiff's further affidavit as well as the submissions on record. The court is of the opinion that the following issues arise for determination herein:

**(a) Whether the Plaintiff is entitled to leave to amend the plaint.**

**(b) Whether the Plaintiff is entitled to leave to join the Director of Land Administration as an interested party in the suit.**

7. The principles to be considered in granting or refusing an application for leave to amend a pleading were re-stated in the case of **Eastern Bakery v Castellino [1958] EA 461** at page 462 as follows:

**“ It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be done without injustice to the other side, and that there is no injustice if the other side can be compensated by costs...”**

8. Similarly, in the case of **Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR**, the Court of Appeal considered the applicable principles as follows:

**“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot be compensated for in costs.”**

9. The court has considered the Plaintiff’s application in light of the above guiding principles. The court is satisfied that the Plaintiff should be granted leave to freely plead his case as he deems fit for the purpose of determination of the real issues in controversy. The Defendant shall equally be accorded an opportunity to respond to the amended pleadings. There is no evidence on record to demonstrate that the Defendant shall suffer any prejudice if such leave is granted, let alone prejudice which cannot be compensated by costs. Accordingly, the court is inclined to grant the Plaintiff’s prayer for leave to amend the pleadings.

10. The court has considered the material on record on the second issue. The provisions of **Order 1 Rule 10 (2) of the Rules** stipulate as follows on joinder of parties to a suit:

**“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose 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, be added.”**

11. The test for joinder in proceedings was judicially considered in the case of **Shirvling Supermarket Ltd v Jimmy Ondicho Nyabuti & 2 Others [2018] eKLR** as follows:

**“The test in applications for joinder is firstly, whether an applicant can demonstrate he has an identifiable interest in the subject matter in the litigation though the interest need not be such interest as must succeed at the end of the trial. Secondly, and in the alternative, it must be shown that the applicant is a necessary party whose presence is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit.”**

12. The court is of the opinion that the presence of the proposed interested party is necessary for the purpose of effectually and completely adjudicating and settling the issues in controversy in the suit. It was contended by the Plaintiff that there are two letters of allotment over the same property hence it is necessary to have the issuing authority joined in the suit for a complete resolution of the dispute. Accordingly, the court is inclined to allow the application for joinder of the proposed interested party.

13. The upshot of the foregoing is that the court finds merit in the Plaintiff’s chamber summons dated 29<sup>th</sup> March, 2021. Accordingly, the court makes the following orders for disposal thereof:

- (a) The Plaintiff’s chamber summons dated 29<sup>th</sup> March, 2021 is hereby allowed in terms of Order Nos. 1, 2, 3 thereof.**
- (b) The Plaintiff shall file and serve the amended pleadings upon all concerned parties within 14 days from the date hereof.**
- (c) The Defendant shall be at liberty to file and serve an amended defence within 7 days upon service of the amended pleadings.**
- (d) Costs of the application shall be in the cause**

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 30TH DAY OF SEPTEMBER, 2021.**

**In the presence of:**

Ms Onyango holding brief for Ms. Ngetich for the Plaintiff

Ms Makokha holding brief for Mr. O’kubasu for the Defendant

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**Y. M. ANGIMA**

