



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI

ELC CASE NO. E011 OF 2021

JOHN NYAGAKA OSORO.....PLAINTIFF/ RESPONDENT

VERSUS

- 1. REYNOLD KARISA CHARO**
- 2. ISMAIL ENGE CHARO**
- 3. MRABU CHARO BAHA**
- 4. THE COUNTY GOVERNMENT**
- 5. THE CABINET SECRETARY, MINISTRY OF HEALTH**
- 6. THE HON. ATTORNEY GENERAL.....DEFENDANT/APPLICANTS**

RULING

This ruling is in respect of an application by the 1st, 2nd and 3rd Defendant/ Applicants dated the 17th May 2021 seeking for the following orders:

- 1. THAT the 1st, 2nd and 3rd defendants herein be granted leave to further amend their defence as per the draft further amended 1st, 2nd and 3rd defendants' statement of defence and counterclaim annexed hereto.**
- 2. THAT Costs in the cause.**

Counsel agreed to canvas the application vide written submissions which were duly filed.

1ST, 2ND AND 3RD DEFENDANT'S SUBMISSIONS

Counsel relied on the grounds on the face of the application together with the supporting affidavit of Salim K Khamisi.

Counsel submitted that the gist of the application is that the applicants are seeking for leave to further amend their statement of defence and counterclaim to respond to the plaintiff's amended plaint which was served upon the defendants after they had filed an amended defence.

It was counsel's further submission that the amended Plaint introduces new parties which makes a totally new claim that is inconsistent with what was raised in the original Plaint. Further that the amended defence and counterclaim filed on the 3rd day of May, 2021 does not capture the latest issues raised in the amended Plaint hence it is in the interest of justice that 1st, 2nd and 3rd defendants be granted leave to further amend their statement of defence and counterclaim for a just and conclusive determination of the real question in dispute.

Counsel listed two issues for determination as follows:

- a. Whether the amendment is necessary for determining the real questions in controversy between the parties.**

b. Whether the amendment will occasion any injury to the respondent.

On the first issue as to whether the amendment is necessary, counsel relied on the Court of Appeal case of Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365 where the court held that: -

"that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."

Counsel further cited the case of Eastern Bakery v Castelino (1958) 1 EA 461 (CAK) where the court held that; -

"Generally speaking, this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.

The court further held: -

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs....the court will not refuse to allow an amendment simply because it introduces a new case.....but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would 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 e.g by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side."

Counsel therefore submitted that the amendment will enable the court determine the real issues in controversy and avoid multiplicity of suits.

On the second issue as to whether the amendment will cause prejudice to the plaintiff, counsel submitted that the same will not cause any prejudice to the plaintiff in a manner that cannot be compensated by costs. Further that the plaintiff's main objection to the amendment is the applicant raising the issue of adverse possession by an amendment herein having raised it elsewhere in an earlier suit, allegedly but the respondent has not provided the alleged "other suit" hence the same is just a mere averment in an affidavit without proof.

Counsel further relied on the case of General Manager E A R & H A & Thierstein (1968) 1 EA 354 (HCK) where the court held: -

"The well-established practice in this country governing the amendment of pleadings is concisely stated in O.6, r 18 of the Civil Procedure (revised) Rules 1948, which, in the first place, enables the court, at any stage of the proceedings, to allow either party to alter or amend his pleadings in such a manner and on such terms as may be just and, in the second place, goes on to require in clear and mandatory language that "all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Counsel therefore urged the court to allow the application as prayed as it has been brought timeously.

PLAINTIFF'S SUBMISSIONS

Counsel for the plaintiff filed grounds of opposition and gave a brief background to the case to contextualize the Plaintiff/ Respondent's objection to the amendment. Counsel submitted that the application is an abuse of court process as the Applicants cannot raise the issue of adverse possession by an amendment, if they have already raised it elsewhere in an earlier suit before a court of competent jurisdiction.

Counsel further submitted that a claim to recover land cannot be joined with or conveniently tried alongside a claim for trespass, which has since mutated to one of exhumation. **Order 3 Rule 6** bars the joinder of a claim for recovery of land with certain actions.

Counsel therefore urged the court to dismiss the application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issue for determination is whether the court should allow the application for amendment of the defence and counterclaim. The general power to amend pleadings draws from Section 100 of the Civil Procedure Act. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules.

Order 8 rule 5 of the Civil Procedure Rules provides as follows: -

"For the purpose 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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per **Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition**, which provides as follows concerning amendment of pleadings:

“...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...”

Similarly, in *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 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...”

The applicants sought for leave to amend their Defence and Counterclaim so as to capture the latest issues raised in the amended Plaint which will help in the determination of all the issues in controversy.

The respondent has objected to the amendment solely on the ground that a claim of adverse possession cannot be brought together with a claim for trespass. The respondent has also not shown any prejudice that the amendment will cause to the plaintiff. The fact that a claim has been filed does not mean that the court will allow it without it being subjected to procedures and rules of proof. A party who alleges must prove hence the respondent will still have an opportunity to subject the claimant to cross examination and strict proof.

I therefore find that the application has merit and is allowed as prayed. Applicant to file amended defence and counterclaim within 15 days. Costs of the application in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 25TH DAY OF NOVEMBER, 2021

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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.