



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC. CASE NO. 60 OF 2018

BRUNO AGONGA ODOURY.....PLAINTIFF/APPLICANT

VERSUS

MATHEWS OBUYA.....DEFENDANT/RESPONDENT

PETER AURA OLIECH.....DEFENDANT/RESPONDENT

FRANCIS OKELLO OLIECH.....DEFENDANT/RESPONDENT

RULING

The application before court is dated 12/5/2021 wherein the applicant seeks orders that the leave be and is hereby granted to the Plaintiff/Applicant to amend his plaint in terms of the Draft Amended Plaint annexed to his Supporting Affidavit. That the 1st Defendant Mathews Obuya be barred from being heard in these proceedings unless and until he purges the contempt he was found guilty of by this Court on the 5th December 2012. That the costs of this application be provided for.

The application is based on grounds that when this suit was filed in May 2010, the 1st Defendant herein had just planted maize crop in the plaintiff's land parcel no. WEST KISUMU/OJOLA/4155. He instructed his then Advocates NYANGA & CO. ADVOCATES to obtain an injunction restraining the Defendants from interfering with his land.

On the 4th July 2011 an order was recorded and issued by the court on the 25th July 2011 in the following terms:-

“That pending the hearing and determination of this suit there be an order of injunction restraining the Defendants herein whether acting by themselves, their agents and or anybody acting on their behalf from entering, trespassing, building or continuing to construct any structure or planting any trees or crops in the plaintiff's Land Parcel No. WEST KISUMU/OJOLA/4155.”

The 1st Defendant Mathews Obuya breached the said order and the plaintiff's then Advocates made an application on the 13.10.2011 for his imprisonment for being in contempt. On the 29th February 2012 when the Application for contempt came up for hearing before the Honourable Justice H. K. Chemitei, the court ordered the District Land Surveyor – Kisumu to ascertain the position on the ground and file his Report within 45 days.

That the District Surveyor J.K. TANUI filed his Report in court on the 18.10.2012 which stated that the plot in question was identified both on the Map and on the ground. There was a structure erected on the ground said to belong to Mr. Mathews Obuya and the whole plot was under maize cultivation except for the area occupied by the structure.

The Honourable Judge then delivered his Ruling dated 5th December 2012 committing the 1st Defendant to 30 days imprisonment for disobedience of the Court Order. Despite the imprisonment the 1st Defendant now decided to move and reside on the suit premises and has continued to cultivate crops on the land.

It has now become necessary to amend the plaint and pray for eviction and demolition of structures and crops on the suit land together with the loss the plaintiff has incurred to date for not using his land.

In view of the Defendant's conduct by blatantly disobeying the court order and failing to purge the contempt it behoves the court to bar him and his advocate from addressing the court unless and until he purges the contempt.

By letter dated 2nd October 2019 the Plaintiff's Advocates on record warned the 1st Defendant through his Advocates on record that an application barring him from being heard would be taken.

The Respondent field grounds of opposition that the application is misconceived, misdirected and an abuse of court process and based on wrong provision of law. There is no evidence of contempt of court. The Defendant avers that the claim to be included in the plaint amendment is time barred by limitation of time. Moreover, that there is no evidence of trespass and therefore the plaintiff is not entitled to the orders sought.

I have considered the application and the reply and the submissions on record and do begin with restating the law on the exercise of discretion to grant leave to amend pleadings that is Order 8 Rule 3 of the civil procedure rules 2010 that provides for amendment of pleadings with leave thus :-

(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.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment.

The issue for determination as far as this application is concerned is whether the Applicant's Notice of Motion for amendment has merit and ought to be entertained. The law as regards the grant of leave to amend is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs.

The main principle is that an amendment should not be allowed if it causes injustice to the other side (see "Chitale, P.BB"). On the same subject, in the case of Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint. The principles upon which a court acts in an application to amend a pleading before/during trial are also well settled and succinctly stated in Eastern Bakery v. Castelino, (1958) E.A.461 (U.) at p.462:

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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 same was later buttressed by Bramwell, LJ in Tildesley v Harper (1878), 10 Ch.D. at p.296 stated as under:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise."

In Budding v. Murdoch (1875) 1 Ch.D at p.42, it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case; in Ma Shwe Mya v. Maung Po Hnaung (1921), 48 I.A. 214, 48 Cal.832 the court said that the is no power to enable one distinct cause of action to be substituted with another, nor to change by means of amendment, the subject matter of the suit; in Raleigh v. Goschen, (1898) 1 Ch.73 it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character. In Weldon v. Neal (1887), 19 Q.B. D. 394 and Hilton v Sutton Steam Laundry, (1946) K.B. 65; (1945) 2 ALL E.R. 425, (Crawshaw, J.A, Forbes. V.P and Gould, J.A unanimously agreed); it was also asserted that where the amendment would prejudice the rights of the opposite party existing at the date of the proposing amendment, for instance by depriving his of a defence of limitation accrued since the issue of the writ.

Further, in the case of Simonian v Johar, (1962) EA.336 (K.), the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction. A wider footage on the same issue was given in a more recent case of Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991 the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:

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.

The above mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. What that means is that the court has a very wide berth in granting leave to amend. I have considered the application and do find that the applicant has satisfied this court that there is need to amend pleadings (Plaint) to bring out the best cause of cause of action and the plea of limitation of time cannot cause the court to deny a party the opportunity to amend pleadings. The Respondent has not demonstrated that any prejudice will be occasioned if the plaint is amended and that he cannot be compensated with costs. I do grant prayer 2 of the Notice of Motion. I do decline to grant prayer 3 as the applicant has not demonstrated that the defendant is in contempt of court order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2nd DAY OF DECEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE