



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC NO. 48 OF 2014**

**RUDI MARQUARDT ELECTRONIC CO. LTD .....PLAINTIFF**

**VERSUS**

**VALLERY JIMOI KHAZALWA .....1<sup>ST</sup> DEFENDANT**

**JOHN ODINDO OGILO ..... 2<sup>ND</sup> DEFENDANT**

**OSCAR OGILO ODINDO ..... 3<sup>RD</sup> DEFENDANT**

**STALINE YUAYA ODINDO ..... 4<sup>TH</sup> DEFENDANT**

**HON. ATTORNEY GENERAL .....5<sup>TH</sup> DEFENDANT**

**RULING**

The Plaintiff filed this application seeking to be granted leave to amend its Amended Plaintiff in terms of the draft Further Amended Plaintiff annexed to the affidavit in support, and for costs of the application to be in the cause. The application is based on the grounds that additional facts have been discovered on the circumstances in which the suit properties were alienated necessitating the amending of the Plaintiff. That granting of the application is in the interests of justice as it shall facilitate the institution of the Plaintiff and preclude multiplicity of suits between same parties arising from the same circumstances; and that it shall place or present all issues or facts before the court for purposes of determining the real question of controversy between the parties. That no prejudice shall be suffered by the Defendants who may amend their pleadings if necessary.

**Respondent's Response**

The 2<sup>nd</sup> Defendant filed a replying affidavit on behalf of himself and the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The 2<sup>nd</sup> Defendant asserted that there was no additional facts discovered after the suit had been filed. That the amended plaintiff is introducing a new cause of action based on trust on the strength of a letter written on 5<sup>th</sup> December 2013 and yet the suit was filed in March 2014; therefore the Applicant had the facts at the time of filing the suit. That the amendments sought intend to introduce a new cause of action which does not arise from the same facts as the cause of action in the plaintiff. That the application had been made in bad faith and that there has been a lot of delay since the matter was filed in court in 2014.

**Issues for Determination**

*1. Principles governing amendment of pleadings*

Order 8 Rule 3 of the Civil Procedure Rules provides for the amendment of pleadings with leave of the court thus:

**“(1) ... 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...**

**(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 Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd* [2000] 2 EA 365 held that “The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs... Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.”

*2. Whether orders sought are merited*

Considering that the claim based on trust arises out of substantially the same facts as the claims initially pleaded, that the claim concerns the same parties and subject matter, and that the Defendants have not demonstrated that allowing the amendment would result in prejudice or injustice incapable of being compensated for in costs, the application ought to be, and is hereby allowed with costs in the cause.

**DATED AND DELIVERED THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2020.**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

**In the presence of:**

**MR INDIMULI FOR PLAINTIFF.**

**MR BAGADA FOR 2<sup>ND</sup> DEFENDANT**

**CHELASHAW FOR I/P**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**