



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

CIVIL CASE NO. 67 OF 2018

PROF. AGOLA AUMA OSOLO

(Suing as an administrator of the Estate of

The late GEORGE WILLIAM KHAMALA OSOLO alias

GEORGE WILSON KHAMALA OSOLO).....PLAINTIFF/APPLICANT

= VERSUS =

1. JOHN OJIAMBO OCHOLA

2. PAMELA MUGENI

3. SUSAN MAKOKHA

4. ASOSI NERIMA

5. OBIERO OCHOLA.....DEFENDANTS

R U L I N G

1. For determination is the notice of motion dated 11th March 2019 and filed on 12th March 2019. The application is brought under the provisions of Order 8 rule 3 of Civil Procedure Rules and Section 1A & 3A of the Civil Procedure Act. The Orders sought are;

a) Leave be granted to the applicant to file amended plead.

b) Costs of the application be provided for.

2. The application is supported by the grounds listed on its face stating thus;

(i) Remains of the defendant's brother MORRIS BARASA OCHOLA are already buried in the suit land hence matters relating to the disputed burial have been overtaken by that event.

(ii) The amendments are intended to bring out triable issues clearly.

(iii) The defendants will not suffer any prejudice if amendments are allowed.

(iv) That it is fair and just that the long lasting differences between the parties hereto be heard and determined.

3. The application is opposed by a lengthy list of grounds of opposition filed on behalf of the 1st – 3rd defendants. The grounds are *inter alia*;

(a) That the plaintiff's application is incompetent, mala fides, misconceived, mischievous, bad in law and patently an abuse of court process.

(b) That this is the third application seeking more or less the same outcome.

(c) That the plaintiff's first application is the Notice of Motion dated 17th July 2018 which was filed under a certificate of urgency.

(d) That that application was neither prosecuted nor withdrawn as the rules of procedure demands.

(e) That the application currently before the court does not specify which plaint is sought to be amended.

(f) That in any event, contrary to law and rules of procedure, the plaintiff's averment in paragraph 12 of all three plaints to the effect that there have been previous proceedings between the parties which were withdrawn is not accurate.

(g) That the truth is that there have been two previous suits in courts between parties by or those to whom they represent – one was Nairobi High Court Civil Case No. 371 of 1994 between WILSON OSOLO (now deceased) and a brother of the plaintiff against the first defendant in this case as he was in that case with 4 other co-defendants.

(h) That the plaintiff has no locus standi to instate these proceedings as he is a busy body trying to perpetuate the fraud committed by the late WILSON OSOLO in having the suit land fraudulently registered in a contrive name.

4. The applicant filed his written submissions on 12th November and submitted that the defendants were served with Summons to Enter Appearance on 19th July 2018 but they have failed to enter appearance. That the plaintiff filed an amended plaint on 25th July 2018 when no leave of the Court was required. The plaintiff further submits that the applications dated 17th July and 25th July 2018 have since been withdrawn. That the current proposed orders are made in line with the draft amendment dated 12/3/2019 as it seeks to amend the amended plaint. It is submitted further on behalf of the plaintiff that issues contained in paragraph 11 – 19 of the grounds ought to be raised in the defence. The plaintiff urged the Court to grant the leave sought.

5. In their replying submissions, the Respondents state that they have not been served with orders withdrawing the earlier applications. The Respondents state that the order for leave as crafted does not make it possible for them to know which plaint is being amended. That the draft amended plaint is in total discordance with the application it is attached to as it is not clear which parties are being added. The 3rd issue raised is that there is no evidence exhibited showing that the 2nd, 3rd and 4th defendants who are spouses of deceased persons obtained grant of representation in respect of their late husbands.

6. It is trite law that amendments of pleadings is allowed at any stage of the proceedings before judgment on such terms as to costs or otherwise as may be just (order 8 rule 3(1)). The Respondent stated that the present application is misconceived as it is seeking similar orders to the motions dated 17th July 2018 and 25th July 2018 yet they have not been served with orders withdrawing the two applications as submitted by the plaintiff. I have perused the record and noted that the two applications mentioned had sought for orders of temporary injunction under order 40 of the Civil Procedure Rules and not amendment of plaint.

7. The second reason for contesting the order for leave is lack of clarity on which plaint is being amended. The plaintiff submitted that he first amended his plaint on 25th July 2018 when no leave was required and served the amended plaint on the defendants on 26th July 2018. If this is true and correct then the only plaint capable of being amended is the one filed on 25th July 2018 and there can be no uncertainty about that.

8. The other issue of locus of the parties being added can only be determined once the parties have been joined. It is premature at this stage to determine whether they have letters of administration or note as the court does not know whether or not they are being sued in their individual capacities or otherwise.

9. In any event, the defendants will have an opportunity to file a defence to the amended claim. Consequently I find no prejudice they are likely to suffer if the proposed amendment is allowed. In the end, this court finds no justifiable reason to refuse the leave to amend. The same is granted on terms that the plaintiff shall file and serve further amended plaint within 14 days of delivery of this ruling. The existing defendants have corresponding leave to reply to the amended plaint upon being served. Each party to meet their costs of the application.

Dated, signed and delivered at BUSIA this 20th day of February, 2020.

A. OMOLLO

JUDGE