



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 460 OF 2013**

**JOHN GACHOKI**

**BENJAMIN MUCHIRI**

**HOSEA MWANIKI**

**ROBERT NYAGA (Suing as Pastor in Charge,**

**Chairman, Secretary and Committee Members**

**respectively on Grounds of Truth Church.....PLAINTIFFS**

**VERSUS**

**SILAS MWENDWA**

**SYMON NJERU MUKUOGO**

**JOTHAM N.W. NGURE**

**THE GROUDS OF TRUTH REGISTERED TRUSTEES.....DEFENDANTS**

**RULING**

The Plaintiffs/Applicants moved this Honourable Court vide a Notice of Motion application dated 3<sup>rd</sup> August 2017 seeking the following orders:

- 1. That the Plaintiffs/Applicants be granted leave to amend their plaint.***
- 2. That the draft amended plaint be deemed as duly filed.***
- 3. That costs of this application be provided for.***

The said application is based on grounds shown on the face of the application and the affidavit of John Gachoki sworn on 12<sup>th</sup> September 2017.

The 3<sup>rd</sup> Respondent filed grounds of opposition in which he stated that the application is bad in law, an abuse of the due process of the Court. The 3<sup>rd</sup> Respondent also contends that there is an inordinate delay in filing the application, the suit having been filed way back in 2009. The 3<sup>rd</sup> Respondent further opposed the application and averred that the delay will be prejudicial as the matter has already proceeded and that this is a delaying tactic to prevent the 3<sup>rd</sup> Defendant from utilizing his parcel of land. He also contends that the joinder of the 4<sup>th</sup> Defendant will prejudice and delay the hearing of this case. The 1<sup>st</sup> Defendant did not file any response in opposition to the application.

**PLAINTIFFS SUBMISSIONS**

The counsel for the Plaintiff submitted that ***Order 1 Rule 10 (a) of the CPR*** provides that the Court may at any stage of the proceedings either upon or without the application of either party, and as such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether plaintiff or defendant or whose presence before the Court effectually and completely adjudicate upon and settle all questions involved in the suit be added. The plaintiff further submitted that the 4<sup>th</sup> Defendants who are the Registered Trustees of

the Grounds of Truth Church are minded to hold all land, buildings and other immovable property and investment and securities in the Republic of Kenya and that should be construed to mean that the trustees then ought to be enjoined in the suit, being that they were to hold the suit land in trust on behalf of the said church. The plaintiffs cited the following cases in support of the application:

(1) *Tang Gas Distributors Ltd Vs Said & Others (2014) E.A, 448*

(2) *Nderitu Wachira Receiver & Receiver and Manager of Bulleys Tannevies Ltd (Under Receivership) & 4 Others Vs Siragi Enterprises Ltd & Another (2016) e K.L.R.*

On the second issue which the Plaintiff/Applicant sought to be determined on the application whether the application may be granted, he cited **Order 8 Rule 5 (1) CPR** which gives general power to amend for the purpose of determining the real question in controversy between the parties or for correcting any proceedings the Court may either of its motion or on an 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. He cited the case of *Central Kenya Ltd Vs Trust Bank Ltd (2002) 2 E.A. 365*. He also cited the case of *Elijah Kipngeno Arap Bill Vs Kenya Commercial Bank Limited (2013) e K.L.R and Joseph Ochieng & 2 Others Vs First National Bank of Chicago Civil Appeal No. 149 of 1991*.

#### 1<sup>ST</sup> AND 3<sup>RD</sup> RESPONDENTS SUBMISSIONS

The 1<sup>st</sup> and 3<sup>rd</sup> Respondent submitted that the application herein is an afterthought and falsehoods of the Plaintiff/Applicants to get orders from this Honourable Court. They cited the case of *Kenya Commercial Bank Ltd Vs John Benjamin Wanyama Civil Appeal No. 97 of 1999*. The Defendants/Respondents also submitted that the provisions of the law cited by Plaintiff/Applicant do not apply for amendment of plaint to enjoin a new party and that the right procedure for seeking amendment of pleadings to enjoin a party is **Order 1 Rule 10 and Order 8 Rule 3 CPR**. The 1<sup>st</sup> and 3<sup>rd</sup> Defendants also submitted that there is inordinate delay in filing the application and that the delay will be prejudicial to them as the case has already proceeded with the Plaintiffs closing their case. They cited the following cases:

(1) *John Kasaine & Others Vs Pasaye Ole Kereme ELC Cause No. 10 of 2017 (Formerly HCCC No. 246 of 2000)*.

(2) *St. Patrick's Hill School Limited Vs Bank of Africa Kenya Ltd Civil Case No. 7 of 2017*.

(3) *Ochieng and Others Vs First National Bank of Chicago – Civil Appeal No. 147 of 1991*.

(4) *Weldon Neal (1887) 19 Q B D 394*.

(5) *Kassam Vs Bank of Baroda (2002) e K.L.R.*

(6) *Lawrence Owino Omondi Vs Kenneth Inea Muyera (2017) e K.L.R and John Mulwa Kangatu Vs Pan African Insurance Co. Ltd (2015) e K.L.R.*

#### ANALYSIS AND DECISION

I have considered the application, the supporting affidavit, the grounds of opposition and the submissions by the parties. I have also considered the applicable law. The application dated 3<sup>rd</sup> August 2017 is brought under **Order 8 Rule 3 CPR** which provides as follows:

**“8 (3) (1) Subject to Order 1 Rules 9 & 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...”**

From my cursory look at the prayers sought and the draft amended plaint, the Plaintiff/Applicant is actually seeking to add a new party as the 4<sup>th</sup> Defendant in the suit. An application for addition of another party into a suit is founded under **Order 1 Rule 3 CPR**. Regarding amendment of pleadings and addition of new parties, the law provides that such amendments are freely given in order to effectually determine the real issues in controversy. It is also settled law that amendment of pleadings are underpinned on the sacred and sacrosanct principles of fairness, equity, equality, reasonableness, lawfulness, good conscience and morality. Based on these set down principles, the import of the Applicant's Notice of Motion must be looked whether they are intended to achieve the above principles. The entity which is sought to be enjoined into these pleadings as the 4<sup>th</sup> Defendant is described as **“The Grounds of Truth Registered Trustees”**. It is not in dispute that the Defendants herein have been sued in their capacity as officials of **“Grounds of Truth Church”**. The import of the proposed amendment as I understand is to bring the proper identity of the Defendants who are Registered Trustees of Grounds of Truth Church and therefore enable any orders that may ultimately be issued to be enforced against the proper entity. I agree with the submissions by the Plaintiff/Applicant that though the application has been brought too late in the date, the Defendants/Respondents will not be prejudiced if the same is allowed as they can be compensated by an award of costs. I also note that only the Plaintiffs/Applicants have given their evidence and even closed their case while the Defendants/Respondents are yet to give their side of the story.

In the case of *G.L. Baker Ltd Vs Medway Building and Supplies Ltd, (1958) 3 All E.R 540*, the Court stated as follows:

**“There is no doubt whatsoever that it is a guiding principle of cardinal importance on this question that, generally speaking, all such amendments ought to be made as may be necessary for the purpose of determining the real question in controversy between parties”.**

I agree with the principles of amendment as espoused in that case. In the circumstances of this case, the proper description of the Defendants as Registered Trustees of Grounds of Truth Church is aimed at determining the real question in controversy between the parties. I therefore find the application dated 3<sup>rd</sup> August 2017 merited and the same is allowed as follows:

***(1) The Plaintiff/Applicants be and are hereby granted leave to amend, file and serve the plaint herein in terms of the draft amended plaint annexed to the affidavit of John Gachoki within 7 days from today.***

***(2) The Defendants are granted corresponding leave to amend their pleadings within 14 days from the date served.***

***(3) The Plaintiffs to pay the Defendants/Respondents thrown away costs of Ksh. 10,000/= to be paid before the next Court action.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 14<sup>th</sup> day of February, 2020.

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**E.C. CHERONO**

**ELC JUDGE, KERUGOYA**

*In the presence of:*

1. M/S Githaiga and Mr. D.N. Gitonga for 1<sup>st</sup> and 3<sup>rd</sup> Defendants
2. Plaintiff – present