



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 8 OF 2008

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JULIUS MWAMSAE.....1ST DEFENDANT

MOHAMED MAHFUDH.....2ND DEFENDANT

ISAAC MUNYI NJERU.....3RD DEFENDANT

KENNETH K. GITHII.....4TH DEFENDANT

RULING

(Application seeking leave to amend defence to introduce a counterclaim; principles to be applied; suit against the applicant being that the applicant's title was wrongly carved out of a road reserve; applicant opposing the suit by filing a defence; while the suit is pending, the Land Registrar issuing a Gazette Notice purporting to cancel the title of the applicant; applicant now wishing to amend defence to introduce a counterclaim on the cancellation of the title; application opposed as introducing a new cause of action; cause of action closely connected to the suit and may be allowed; application allowed.)

1. The application before me is that dated 31 May 2019 filed by the 2nd defendant. The applicant wishes to amend its defence to plead a counterclaim and he has annexed a draft amended defence and counterclaim to the application.
2. To put matters into context, the plaintiff filed this suit on 21 January 2008, claiming that the land parcel Mombasa Island/Block XI/983 (the suit land) was illegally allocated to the 3rd defendant who transferred his interest to the 1st defendant and the 1st defendant subsequently transferred his interest to the applicant. At the time the suit was filed, the applicant was thus the registered proprietor of the suit land. It was the contention of the plaintiff that this land was a road reserve to Tom Mboya Avenue in Mombasa and could not therefore be alienated as it was held in trust. In the plaint, the plaintiff sought orders inter alia of cancellation of the title of the applicant and vacant possession.
3. Through a Gazette Notice No. 11533 of 1 October 2010, the Land Registrar Mombasa published that the title herein, amongst others, had been revoked as it was illegally issued.
4. In this application, the applicant wishes to have orders for leave to amend so as to have the Attorney General, acting for the Chief Land Registrar and the Land Registrar, Mombasa, enjoined as defendants. The applicant has filed a draft amended defence where the Attorney General is proposed to be included to the suit as the 5th defendant, and an amended counterclaim where the parties are the same as in the plaint.
5. The plaintiff filed a Replying Affidavit, sworn by Elias Kipyego, to oppose the application. Inter alia it is deposed that the application is brought with the intention of defeating the plaintiff's suit and public interest. It is further contended that the application has been brought after undue delay of over 8 years. He has also justified the revocation of the title and has further argued that the amendment brings in a new cause of action.
6. I have taken note of the written submissions of Ms. Moolraj for the applicant and Ms. Abdulrahim for the plaintiff.
7. The application before me is that of amendment and generally, courts are liberal when it comes to amendments, although they may be refused if there will be prejudice to the other party. The principle was well stated by O'Connor J, in the case of *Eastern Bakery vs Castelino* (1958) EA 461, where the judge stated as follows at P462 :-

“It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the 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: Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. 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: Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

8. The applicant has proposed to amend certainly because the Land Registrar, decided to cancel his title before this case was heard and determined. The applicant is clearly aggrieved by that action hence the intention to introduce the Attorney General as a party to these proceedings. It may be argued that this is a new cause of action, which may be true, but it is a cause of action that is so closely connected to the plaintiff's claim and thus capable of being heard together with this suit. The core issue in this suit is whether or not the applicant's title was irregularly issued, and in case this court forms the opinion that it is a good title, then the issue of the revocation of the title by the Land Registrar, through a Gazette Notice will need to be addressed.

9. I do observe that the hearing of this case is yet to commence and the parties will have opportunity to present their respective cases. I therefore see no prejudice whatsoever that may be caused to the plaintiff.

10. The only issue I have with the application is in the manner in which the applicant proposes the parties to be identified. The applicant's amended plaint has the Attorney General as the 5th defendant in the main suit. I think the correct position should be that the Attorney General is a defendant in the Counterclaim and not the main suit. The applicant should be so minded when filing the amended defence and counterclaim. Save for this direction, I do allow the application to amend. The amended defence be filed in 14 days and be served in the usual manner.

11. I make no orders as to costs.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February, 2020.

MUNYAO SILA,

JUDGE.

IN THE PRESENCE OF:

Mr. Abdulrahim holding brief for Mr Makori for the plaintiff.

Ms N. Ali holding brief for Ms Moolraj for the 2nd defendant/applicant

Other parties; Absent

Court Assistant; David Koitamet.