



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC CASE NO. 153 OF 2012 (O.S)

LEONARD KIMEU MWANTI.....PLAINTIFF/APPLICANT

VERSUS

PATRICK KIRIMI THEOPHILUS.....1ST DEFENDANT/RESPONDENT

MARY KARAI M'ITONGA.....2ND DEFENDANT/RESPONDENT

THE PUBLIC TRUSTEE OF KENYA..3RD DEFENDANT/RESPONDENT

JUDGMENT

Introduction

1. Coming up for determination is the Plaintiff's Application dated 25th September, 2018 and filed on even date brought pursuant to **Section 1A, 1B, 3A, 63 & 100 of the Civil Procedure Act Cap 21** and **Order 8 Rule 3 & 5 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** seeking the following Orders:-

1) THAT the Plaintiff/Applicant be granted leave to further amend his Originating Summons and add JOHN NYAGA T. M'ITONGA as co-defendant, in terms of the annexed further amended draft.

2) THAT cost of the Application be in the cause.

2. The grounds in support of the application are that the amended originating summons does not reflect all the issues due for determination, and that the omissions which are sought to be introduced were left out due to inadvertent mistake by the Advocate who initially drafted the Originating Summons herein, and that the amended originating summons were drafted by the plaintiff himself as a lay person and therefore failed to include what they seek to introduce.

3. In addition, they assert that the person sought to be introduced is a necessary party having signed the application for Land Board Consent to transfer the suit land to the first defendant purporting to be the owner of the subject property.

4. In response to the application, the 1st Respondent filed a replying affidavit dated 8th November, 2018 and filed on even date in opposition to the Application. He alleges that the instant application is res judicata and an abuse of the court process, as the applicant had filed the same application on 30/12/2016 and filed on 5/1/2017 and canvassed before the court and a ruling delivered on 14/6/2018 where the applicant was given 21 days to amend his plaint but opted not to and has waited until some few days to the hearing of the matter on 13/11/2018 to file the instant application, further delaying the hearing of the matter, and sought dismissal of the same with costs.

5. In response to the above 1st Defendant/Respondent's allegations, the Applicant filed a further supplementary affidavit dated 12th November, 2018 and filed on even date where he denied the 1st Respondent allegations, and averred that the alleged ruling delivered on 14/6/2018 granted him leave to file a fresh application to amend the Originating Summons for purposes of including new evidence that touch on one John Nyaga M'itonga, and he was subsequently allowed to withdraw the application dated 24/4/2016. And that the failure to comply with timelines was as a result of difficulties in raising the Advocate's fees and the fact that he is a layman.

Submissions

6. Both parties filed their respective submissions. The Applicant's written submissions are dated 10th December, 2018 and filed on even date, whereas the 1st Respondent's written submission are dated 19th December, 2019 and filed on even date.

7. Vide their written submissions; the applicant reiterated the above grounds in support of the application. It is their submission that this court

has un-fettered discretion to allow the amendments sought in the interest of justice pursuant to Section 100 of the Civil Procedure Act and Order 8 Rule 3 and 5 of the Civil Procedure Rules, 2010.

8. Additionally, they submitted that the hearing of the matter has not started and that the 2nd defendant is deceased and therefore his name ought to be deleted from the proceedings. And that the alleged John Nyaga M'itonga sought to be introduced is a necessary party to this proceeding as he is the one who signed the Application for Land Control Board Consent as the owner of the subject parcel land and that he has not objected to his joinder.

9. Further, they submitted that no prejudice either real or perceived that would be suffered by the defendants, and in view of the fact that the 3rd Defendant is not opposed to the application. And that the court can freely allow amendments of pleadings at any stage of the proceedings before delivery of judgments, and in this regard they rely in the case of *Maria Rosita Cardozo Vs Robert Kibagendi Otachi & Another (2013) e K.L.R* and urged the court to allow the application as prayed

10. The 1st Respondent on the other hand submitted that this is the 3rd time the applicant is seeking to amend his Originating Summons, in that he amended the Original Originating summons on 12/11/2015, made an application dated 30/11/2016 where the court delivered a ruling on the same on 14/6/2018 and the applicant was given 21 days to amend his already amended Originating summons, where he failed to do so on flimsy reasons.

11. In addition, they submitted that the application is Res judicata as a similar application has been heard and determined. And that the person alleged to be enjoined was known to the applicant and mentioned in his Originating Summons and no reason has been tendered as to why he failed to enjoin him.

12. In sum, they urged the court to find that the application lacks merit and dismiss the same.

Issues and Determination

13. The main issue for determination is whether this court should exercise its discretion in Plaintiff's favour and grant him leave to amend his Pleadings.

14. The 1st Defendant has opposed the Plaintiff's application for among other reasons that this is the third time the applicant is filing a similar application and that the person who is sought to be introduced as a party was well known to the applicant and therefore he ought to have enjoined from the beginning.

15. It is the Plaintiff/Applicant's case that the person sought to be introduced as party is the person who executed the application for consent from the Land Consent Board purporting to be the owner of the suit land. And therefore having him enjoined to the suit would help determine the real issues herein. And that the reason he failed to introduce the amendment when he was earlier granted leave was because he did not have fees to instruct an advocate and he ended up doing it himself and as a result he omitted what he is now seeking to introduce.

16. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited Vs Trust Bank limited (2000)2 E.A 365* as follows:-

"A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

17. Additionally, in *Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition*, it provides as follows concerning amendment of pleadings:-

"... Power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action..."

18. Further, in the case of *Kenyatta National Hospital Vs Kenya Commercial Bank Ltd & Another (2003) 2 EA*, the court set out the principles that should guide a court considering an application for amendment. The holding of that case was;-

"The principles governing the grant of leave to amend pleadings are well settled. The general rule is that the 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 (EASTERN BAKERY Vs CASTELIN (1958) EA 461; OCHIENG AND OTHERS VS FIRST NATIONAL BANK OF CHICAGO Civil Appeal Number 149 of 1991 followed). It was in the greater interest of justice to breathe life into the plaintiff's action by allowing the amendment in order to properly constitute the plaintiff. Application allowed."

19. Consequently, the overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the true, substantive merits of the case of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. The power to grant leave to amend can be exercised by the court at any stage in the proceedings

Conclusion

In view of the above, I have considered the application herein and I do find that the same is merited. The court grants leave to the plaintiff to file and serve an amended originating summons in terms sought herein within 14 days from this date hereof. The defendant is granted a corresponding leave to file a further affidavit within 14 days of service. The 1st defendant is granted thrown away costs of the chamber summons dated 25th May 2018 assessed at Ksh, 5,000/= to be paid before the next hearing.

DATED and SIGNED at Kerugoya this 7th day of February, 2020.

.....

E.C. CHERONO

ELC JUDGE, KERUGOYA

READ, DELIVERED and SIGNED in open Court at Meru this 10th day of February, 2020.

.....

L.N. MBUGUA

ELC JUDGE, MERU

In the presence of: