



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

CASE NO. 51 OF 2015

LINET AOKO OGOLA.....PLAINTIFF

= VERSUS =

JOSEPH OMONDI ONYANGO.....DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 27th May 2019 filed under Section 3A of the Civil Procedure Act and Order 8 rules 3 of the Civil Procedure Rules. The Plaintiff/Applicant – **LINET AOKO OGOLA** – seeks leave to amend her plaint and include further affidavit evidence. In her supporting affidavit sworn on even date the Plaintiff states that she has experienced difficulty in the case as her key witness who transferred the suit property to the Defendant has since passed on. She therefore deems it necessary to amend the Plaint to include further evidence after reviewing the case with her advocates.

2. The Application is opposed vide the Defendant’s grounds of opposition dated 6th June 2019 which are as follows:

- a. The Applicant has not complied with the order of 21st April 2018
- b. There is no draft amended plaint annexed
- c. There is no new issue exhibited
- d. The Application is calculated to prejudice and embarrass the Respondent
- e. The Application lacks merit

3. Parties canvassed the Application by way of written submissions. The Plaintiff’s submissions were filed on 24th July 2019. Counsel for the Plaintiff/Applicant submitted that an amended Plaint was filed on 20th November 2018 on the mistaken assumption that leave to do so had been granted on 3rd October 2018. When the matter came up for hearing on 21st November 2018 the Defendant raised an objection that the amended Plaint had been filed without leave which development prompted the Plaintiff to file the present Application to regularize the Court record.

4. Counsel for the Plaintiff urged that the Application should be allowed to include details of the connection between Plaintiff and Defendant leading to the creation of a customary trust over the suit property on which the Plaintiff’s claim is based. He contends that these details are necessary to enable the Court to make a fair determination of the issues in question. It is further submitted that the Defendant will not suffer any prejudice if the Application is allowed as he will have an opportunity to respond via an amended Defence and also to cross-examine the Plaintiff on additional issues raised both in the Plaint and the Plaintiff’s Affidavit evidence. With regard to the Defendant’s contention that the draft amended plaint was not annexed to the Application, Counsel for the Plaintiff was categorical that the same was duly served.

5. The Defendant’s submissions were filed on 23rd July 2019. Counsel for the Defendant stated that the Plaintiff has gone ahead and filed the present Application without first complying with the orders of 21st November 2018 where the Plaintiff was ordered to pay the Defendant adjournment costs of Kshs.8,400 before the next hearing date. Further, a draft amended Plaint was not annexed to the Application and it was not mentioned in the Plaintiff’s supporting affidavit. The Defendant was therefore unable to respond as there was nothing on which to base his response. In any case, the contents of the supporting affidavit did not reveal any new issues omitted from the Plaintiff’s original pleadings. Counsel also submitted that the Plaintiff was deliberately delaying the case with the present Application, having been granted the last adjournment at her instance on 3rd October 2018. He prayed that the Application be dismissed with costs.

6. I have considered the Application, submissions in support and opposition and the Applicable law. The principles on amendment are well settled. In the case of **Philomena Ingosi Lumula Vs Jackton Mwanzi (2006) eKLR**, the Court succinctly stipulated them as follows:

“Rule 3(1) of Order VIA of the Civil Procedure Rules gives the court unfettered discretion to allow amendment of pleadings 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. Under Rule 5(1) of Order VIA, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs (and on such terms as to costs or otherwise as are just) for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings.

7. First of all, the submissions in support and opposition to the present Application necessitated a thorough review of the Court record to verify the version of events presented by both parties. This case was certified ready for hearing on 24th August 2016 where Counsel for the Plaintiff confirmed that parties had complied with pre-trial directions. The matter was then fixed for hearing on 7th February 2018. An adjournment was sought for the Plaintiff’s Advocate to file additional witness statements. On the next hearing date, 14th May 2018, the Defence sought and was granted an adjournment as they had just been served with the said statement. This brings us to 3rd October 2018. The Plaintiff’s Advocate once again sought an adjournment so as to study related proceedings in the lower Court. The Defence was granted costs and the same marked as the last adjournment at the instance of the Plaintiff. It is beyond me how Counsel for the Plaintiff who was physically present in Court mistakenly believed he was granted leave to amend the Plaintiff.

8. On 21st November 2018 on which date the matter had been fixed for hearing by consent, the Plaintiff’s Advocate sought another adjournment so as to file the present Application. The Defendant rightfully objected and was awarded costs to be paid before the next hearing date. The Plaintiff was ordered to pay Court adjournment fees. The record also reflect that an Amended Plaintiff was filed on 20th November 2018. There is no indication that the Court’s leave was sought nor was it mentioned in Court on the hearing date. This Application was then filed six months later, on 27th May 2019. It can only be concluded that the conduct of the Plaintiff’s case has been lackadaisical and reprehensible. Almost all adjournments were sought at the Plaintiff’s instance and instigation. The purpose of pre-trial requirements were totally disregarded with the Defence being bombarded with pleadings and statements a day to the hearing several times.

9. But I realise that refusal to allow amendment may hamper a party’s endeavour to obtain justice. As pointed out earlier, the court has a wide discretion to allow amendment in order to determine the real issues in dispute and/or to do substantial justice. The amendment can be done at any stage but within reasonable time provided costs can compensate the other side. In this case, though the Plaintiff’s/Applicant’s conduct has not been helpful at all, I consider that the Defendant’s side can be compensated with costs.

10. I realise that the Plaintiff/Applicant has not paid some costs earlier ordered to be paid. These costs should be paid forthwith. The court adjournment fees should also be paid. The application herein will be allowed not because the Plaintiff/Applicant is more persuasive than the Defendant/Respondent, but because, in my view, the interest of justice are better served by allowing it. I hereby allow the application. The Plaintiff/applicant should pay the costs of the application.

Dated, signed and delivered at Busia this 11th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel for the Plaintiff:

Counsel for the Defendant:.....