



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 46 OF 2017

PETER KALERWA LUTA.....1ST PLAINTIFF

KHAYOMBE MERCY LEAH.....2ND PLAINTIFF/APPLICANT

VERSUS

WYCLIFFE OMOTO ALUSALA

MARGARET ANZETSE OMOTO.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 25th November 2019 and is brought under Order 51 Rules 1, Order 8 Rules and Order 1 Rule (1) and (2) of the Civil Procedure Rules 2010, Section 1A and 3A of the Civil Procedure Act Cap 21 seeking the following orders;

1. That this honourable court be pleased to grant the plaintiff/applicant leave to amend plaint.
2. That the draft annexed amended plaint be deemed duly filed and served.

It is premised on the sworn supporting affidavit of Peter Kalerwa Lutta and Khayombe Mercy Leah and on the grounds that at the time of filing the present suit the plaintiff was the sole registered proprietor of the suit land parcel No. Butso/so/Shibeye/2731. That the plaintiff sold the suit parcel to Henry Nathan Wati who later sold to Khayombe Leah Mercy the 2nd intended plaintiff and had the same transferred in her name. That the said Khayombe Mercy Leah is now the registered proprietor of the suit parcel and hence she has an interest. That it is fair, just and expedient that the prayers sought be granted and in such other and further grounds to be adduced at the hearing hereof.

The respondent's submitted that the intended plaintiff/applicant's application is fictitious, defective, mischievous, misconceived, unfounded, incompetent, frivolous, vexatious, its afterthought, lacks merit, an abuse of court process, it's a delaying tactic, its brought in bad faith, was overtaken by events, non-starter and should be dismissed with costs. That on or about 17th February, 2006 the plaintiff herein Peter Kalerwa Luta bought land parcel number Busotso/Shibeye/2731 from the original owner Seth Nashilobe as per the existing boundaries and beacons which had been demarcated by the said original owner Seth Nashilobe. That on or about 15th November, 2002 the defendants/respondents bought land parcel number Butso/so/Shibeye/751 from the original owner Seth Nashilobe who carried out demarcation and planted boundaries and beacons separating land parcel numbers Busotso/Shibeye/751 and Busotso/Shibeye/2731. That the intended plaintiff/applicant has not established and made a prima facie case because the interest of the plaintiff herein upon which the applicant's case is founded got extinguished upon sale and transfer of land parcel number Busotso/Shibeye/2731 to one Henry Nathan Wati on or about 19th July, 2017. That the plaintiff Peter Kalerwa Lutta never sold land parcel number Busotso/Shibeye/2731 to the intended plaintiff/applicant. That the intended plaintiff/applicant bought the suit land as it is on where it is basis after due diligence and investigations on 10th September, 2018 during the pendency of this suit from Henry Nathan Wati who is not a party herein. Attached is a copy of the green card in respect of Busotso/Shibeye/2731 marked "W.O.A-1".

This court has considered the application and the submissions therein. Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

"all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the that the

joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. On the issue of amendment of pleadings in the case of AAT Holdings Limited v Diamond Shields International Ltd (2014) eKLR, the court cited the principles as set out by the Court of Appeal in Central Kenya Ltd Case No. 222 OF 1998 as shown below:-

(i) *That are necessary for determining the real question in controversy.*

(ii) *To avoid multiplicity of suits provided there has been no undue delay.*

(iii) *Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.*

(iv) *That no vested interest or accrued legal rights is affected; and*

(v) *So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.*

It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.

In the case of Isaac Awuondo vs Surgipharm Ltd & Another (2011) eKLR the Court of Appeal had the following to say:

In MOI UNIVERSITY v VISHVA BUILDERS LIMITED - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “ a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

I have perused the proposed amended plaintiff and I see that no prejudice will be suffered by the parties should the amendment be allowed. I take note that this matter was filed in 2017, be that as it may, it is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated 25th November 2019 is merited and I grant it. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020.

N.A. MATHEKA

JUDGE