



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO.63 OF 2006**

**PETER NDERITU GATUMBI ..... PLAINTIFF**

**VERSUS**

**KHADIJA OMAR & 6 OTHERS ..... DEFENDANT**

**RULING**

In **CENTRAL KENYA LTD -V- TRUST BANK & OTHERS C.A. CIVIL APPEAL NO.222 of 1998 (2000 KLR)**. The Court of Appeal stated as follows with regard to amendments of pleadings:

***“It is also trite Law that as far as possible, a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the Court will not later permit him to reopen the same subject of litigation (see O 11 Rule 1 of the Civil Procedure Rules) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend 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.”*** Emphasis added.

In the same case, the Court made the following observations:

***“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs.”***

I have before me the plaintiff’s Notice of Motion dated 17<sup>th</sup> July 2017 seeking the main prayer that he be granted leave to amend the plaint as per the further amended plaint and upon the grant of such leave, the further amended plaint be deemed as duly filed. The application is brought under the provisions of order 8 Rule 3(1) 5, 7 and 8 of the Civil Procedure Rules and is based on the grounds set out therein and supported by the affidavit of **HADIJA SHIRE** the plaintiff herein.

The gravamen of the application is that the proposed amendment shall reflect the true parties to the suit by bringing in the County Government of Bungoma and the National Land Commission as the 5<sup>th</sup> and 6<sup>th</sup> defendants respectively to replace the Municipal Council of Bungoma and the Commissioner of Lands.

The 1<sup>st</sup> and 2<sup>nd</sup> defendants have filed grounds of opposition to the application describing it as frivolous and vexatious and urging further that litigation must come to an end. The 3<sup>rd</sup> and 4<sup>th</sup> defendants did not file any response to the application.

The application has been canvassed by way of written submissions which have been filed both by **Mr. C.K. AREBA** Counsel for the Plaintiff and **Mr. OMUNDI BW’ONCHIRI** Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

I have considered the application, the grounds of opposition and the submissions by Counsel.

It is common ground that this suit was filed way back on 19<sup>th</sup> November 2006 before an amended plaint was filed on 11<sup>th</sup> December 2006 originally by three (3) plaintiffs. It is clear from the submissions by **Mr. C.K. AREBA** that the other two (2) Plaintiffs have passed away leaving only **HADIJA SHIRE** (the original 2<sup>nd</sup> plaintiff) as the sole plaintiff) and the proposed amendment seeks to enjoin the County Government at Bungoma and the National Lands Commission who have taken over the responsibilities previously handled by the Municipal Council of Bungoma and the Commissioner of Lands. However, **Mr. BW’ONCHIRI** for the 1<sup>st</sup> and 2<sup>nd</sup> defendants has submitted that this application is coming twelve (12) years from the date this suit was originally filed and this delay will prejudice the 1<sup>st</sup> and 2<sup>nd</sup> defendants as it will mean starting the case de-novo. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants has therefore urged me to dismiss the application with costs and

has cited the case of JOHN MULWA KANGAATU V PAN AFRICAN INSURANCE CO. LTD MILIMANI COMMERCIAL COURT CASE NO.331 of 2002 [2015 KLR] where GIKONYO J dismissed an application dated 3<sup>rd</sup> February 2015 to amend a plaint that had been filed in 2002.

It is clear from the case of CENTRAL KENYA LTD (supra) and which is binding on this Court, that *“mere delay is not a ground for declining to grant leave”* unless it *“is likely to prejudice the opposite party beyond monetary compensation in costs”*. While it is not in dispute that his suit was filed some twelve (12) years ago, there is nothing to suggest that the 1<sup>st</sup> and 2<sup>nd</sup> defendants will suffer prejudice that cannot be compensated in costs. All that I can see in the submissions is that the suit may have to commence de-novo. That in itself is not a prejudice that cannot be compensated in costs. There is no suggestion that the 1<sup>st</sup> and 2<sup>nd</sup> defendants or their witnesses are no longer available to testify. While this Court takes cognizance of the fact that this suit has been in Court since 2006, I must also take into consideration that the parties ought to be enjoined herein were only created under the 2010 Constitution which is really a matter beyond the control of the plaintiff herein.

I have also considered the ruling of GIKONYO J in the case of JOHN MULWA KANGAATU (supra) and I notice that in that case, which in any event is only of persuasive value, the Applicant, having filed his case in 2002, made no *“serious effort to set the suit down for suit for hearing”*.

Secondly, unlike in the JOHN MULWA KANGAATU CASE (supra) where the Applicant made no attempts to have the case heard and determined and was only engaged in making several applications, the plaintiff in this case cannot be said to be indolent because from the record, she testified on 19<sup>th</sup> March 2013 and even produced some documents. It was then adjourned for various reasons including due to the absence of Court for the 1<sup>st</sup> and 2<sup>nd</sup> defendants who was engaged in an election Petition in July 2013 and also an account of the filing of other applications by the plaintiff. The JOHN MULWA KANGAATU CASE (supra) is therefore clearly distinguishable from this case. I also find that costs will be sufficient remedy to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The up-shot of the above is that the plaintiff’s Notice of Motion dated 17<sup>th</sup> July 2017 is hereby allowed in the following terms:

- 1. Leave to amend is granted.**
- 2. The further amended plaint be served upon all the parties herein within (7) days of this ruling being delivered.**
- 3. The plaintiff shall meet the 1<sup>st</sup> and 2<sup>nd</sup> defendant’s costs occasioned by the said application.**

**BOAZ N. OLAO**

**JUDGE**

**18<sup>TH</sup> OCTOBER 2018**

Ruling delivered, dated and signed in open Court at Bungoma this 18<sup>th</sup> day of October 2018.

Mr. Amani for Mr. Situma for 4<sup>th</sup> Respondent present

Mr. Bwonchiri for 1<sup>st</sup> and 2<sup>nd</sup> Respondent – absent

Mr. Areba for Applicant – absent

**BOAZ N. OLAO**

**JUDGE**

**18<sup>TH</sup> OCTOBER 2018**