



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

LAND & ENVIRONMENT CASE NO. 73 OF 2013.

- 1. BENJAMIN MURICH)**
- 2. STEPHEN NGOYA)**
- 3. FRED MUGOTITSA)**
- 4. DOROTHY KEYA)**
- 5. BENARD ORIAMA).....PLAINTIFFS.**

VERSUS.

MARY NASAMBU MAKANDA.....DEFENDANT.

RULING.

[1]. When this case came for further Hearing on 12th October, the Plaintiff called his last witnesses a Land Registrar Bungoma and County Surveyor Bungoma. Mr. Martinn Oseno the Land Registrar took the stand and was sworn. He gave his evidence and finished. He gave evidence on behalf of his predecessor George Opondo and he produced a report involving East Bukusu South Kanduyi 2591, 90, 92, 89 and 2702. It was produced as Plaintiff Exhibit 6. He said that the Land Registrar testified in the Criminal Proceedings and that an order was served upon him as land Registrar to open an access road on parcel East Bukusu/South Kanduyi/2590 91, 92, 2589 and 3568. I was told that this was the last witness for the plaintiff. Previously witnesses Benjamin Wabwire, Stephen Simiyu Ngoya, Dorothy Nasimiyu Keya had given evidence. They all referred to land parcel East Bukusu/South Kanduyi/2590. Cross Examination was done and the land was referred as LR No. East Bukusu/South Kanduyi. Someone however had tried to doctor the original record by inserting an “N” where the Judge wrote an “S”. This is an effort to make the suit lands read North Kanduyi instead of South Kanduyi. I can only imagine that this was done when the record of the proceedings herein was being typed. This would be an error since the trial Judge did not countersign the alterations on the original record.

[2]. The Letter by the Land Registrar to the OCS Bungoma dated 28th April, 2009 talks of E. Bukusu/South Kanduyi 2702 blocking the access road. The land Registrar says in that letter, that on the ground he observed that the road is blocked, ploughed maize planted on it and big thorny branches of trees placed on it. He recommended Hassan Kassim and Mary Kassim be arraigned in court for their actions. The letter was copied to;

Benjamin Muricho-E. Bukusu/S. Kanduyi/2590

Stephen Ngoya-E. Bukusu/S. Kanduyi/2591

Fred Mugotitsa-E. Bukusu/S. Kanduyi/2592

Dorothy Keya-E. Bukusu/S. Kanduyi/2589

Benard Oriama-E. Bukusu/S. Kanduyi/3568

[3]. Mary Nasambu Kassim the defendant herein was charged with the offence of interfering with boundary features Contrary to Section 24(1) and (2) of the RLA Cap 3000 in that on 8th August 2009 in Makutano village in Bungoma South District of Western Province interfered with boundary features (Euphorbia trees) boarding plot No. E. Bukusu/South Kanduyi/2702. The accused was convicted and fined KShs.2,000/= in default 2 months imprisonment. The Plaintiff in this case is for an order of injunction restraining the defendant from blocking ploughing or attempting to interfere with access road on land parcel No. E. Bukusu/S. Kanduyi 2591, 2590, 2592, 2589 and 3568. The 1st to 5th defendants state in paragraph 3 of the Plaintiff that they are the registered proprietors of land parcel numbers E. Bukusu/S. Kanduyi/2590, 2591, 2592, 2589 and 3568 respectively. In paragraph 5 of the Plaintiff they state that the defendant was charged with offence of interfering with boundary features and was convicted after a full trial. One Benjamin Muricho, Stephen Ngoya, Fred Mugotitsa, Dorothy Keya and Benard Orima each swore a separate affidavit to support the Plaintiff and swore Affidavits on 14/2/2010. In paragraph two and four the deponents of the said affidavits swore,

2“ That I have read and understood the contents of the Plaintiff to be filled herewith and hereby verify the correctness of the same which are as per my instructions to my counsel on record”.

4“ That I now swear this Affidavit verifying the correctness of the contents of the Plaintiff”.

The affidavits were sworn separately by each of the five defendants. They were sworn before Simiyu Makokha Advocate and Commissioner for oaths on 15th February, 2010.

It turned out that when Mr. Omundi Bw’ Onchiri advocate rose to Cross examine the Land Registrar, the Land Registrar stated that South Kanduyi and North Kanduyi are different registration sections. The Land Registrar stated that for all the parcels he had come to give evidence about, were for North Kanduyi not South Kanduyi.

[4]. All along, the defendant was accused of interfering with the boundary of Parcels of land in South Kanduyi. She was charged and convicted for interfering with boundary of parcels of land on South Kanduyi. The entire evidence adduced by the Plaintiffs was for a parcel of land in South Kanduyi. The Land Registrar referred to lands in South Kanduyi in his recommendation for the arraignment in Court of the defendant. The truth of the matter is that all the Plaintiff’s land are in North Kanduyi a different registration area altogether. Mr. Murunga learned counsel for the plaintiffs to save the blushes of the plaintiffs, applied orally in Court to amend Paragraph 3 and 7 of the Plaintiff under Sec. 100 of the Civil Procedure Rules. He called it a typographical error. He wanted the suit parcels now to read East Bukusu North Kanduyi 2590, 2591, 2592, 2589 and 3568.

[5]. The application was vehemently opposed by Mr. Omondi Bw’ Onchiri learned counsel for the defendant. Mr. Bw’ Onchiri stated that the application was seeking to amend evidence already adduced in Court. He argued that the only remedy open to the Plaintiff’s was to withdraw the suit. That his client was convicted with interfering with road of access parcels E. Bukusu/South Kanduyi 2591, 2590, 2592, 2589 and 2702. That the evidence of the Land Registrar is that he visited the ground on South Kanduyi. That this is not a typing error. Further, that application of this kind cannot be made orally in Court. He submitted that order 11 of the Civil Procedure Rules has been complied with and no application was in Court to set aside order 11.

[6]. Mr. Murunga denied that they are amending evidence. He stated that the court can apply Sec. 1B of the Civil Procedure Act to achieve the overriding objective and allow the amendment. Section 100 of the Civil Procedure Act gives the Court a discretionary power to amend any defect or error in any proceeding in a suit for the purpose of determining the real question or issue raised.

[7]. The stage at which the proceedings are and the nature of the amendment and the overall circumstances are matters to which the court has to give due consideration in determining whether or not to give due consideration in determining whether or not to exercise its discretion in favour of granting an application for amendment. It has been held in Nigerian Courts that an application for amendment of pleadings brought after the close of evidence on both sides may be allowed,

1. Where the court may be incorporating in the pleadings that which has emerged in the cause of trial as an issue between the parties.

2. Where the application points at any piece of evidence on record which is capable of supporting the proposed amendment.

In essence therefore, the amendment must be that it seeks to bring in pleadings in time with evidence already adduced and recorded. See Adeagbo Vs. Yusuf [1990] 6 NWLR (Pt. 158) 588, Olufon Vs. Hadaemec Limited [2001] FWLR

(Pt. 33) 208, Bamishebi Vs. Otte [1995] 8 NWLR (Pt. 411) The point was more clearly driven home by the Nnaemeka Agu, JSC (as he then was) in Imonikhe & Ors Vs. A.G. Bendel State & Ors [1992] 7 SCNJ @ 207 – 209, where he held thus:

“It is necessary to state that although by the rules an amendment to the pleadings can be made at any stage of the proceedings, different considerations apply depending on whether the amendment is being sought before or after close of evidence by the parties. But once the calling of evidence has been concluded, any amendment of the pleadings or claim can be justified or allowed only on premises that evidence in support of it is already on record; so it is necessary and in the interest of justice to allow the amendment in order to make the pleadings or the claim accord with the evidence already on record to settle the real issue in controversy between parties”.

In the South African case of *Fredrick Randa Appellant Vs. Radopile Projects CC respondent Case No. A 3003/20011*. Where similar circumstances as the case herein arose the High court held,

“We are now well advanced in a trial action. The amendment, if granted, will necessitate the recalling of witness and may also necessitate the need to subpoena witnesses whom it is not previously intended to call by the other party. The litigant seeking amendment ought reasonably to have known, along time ago, what his case was all about. If the amendment is granted, a postponement will have to follow. A postponement will result in a part-heard trial, bringing about massive inconvenience not only to the other side but also their witnesses and this court as well. The registrar's office will be vexed. Even if this court makes a costs order against the party seeking the amendment, it is far from certain that the other side will succeed in fully recovering costs upon taxation. If a debtor owes money, it is only right that the creditor is paid sooner rather than later. Interest a tempore morae does not relieve cash flow. Conversely, if a plaintiff's case is without merit, it matters greatly for the defendant to be discharged from liability sooner rather than to have the millstone of litigation around the neck. The application to amend is dismissed with costs.”

[8]. The plaintiff who has closed his case cannot reopen the same and call further evidence. This amendment will greatly prejudice the defendant who has been charged and convicted of blocking access road on parcel East Bukusu/South Kanduyi 2590, 2591, 2592, 2589 and 3568. The amendment sought to read North Kanduyi would therefore mean that the charge against the defendant was defective and she should not have been convicted. The charge was instigated by the plaintiffs herein. There is no evidence on record to show the land in question was East Bukusu North Kanduyi 2591, 2590, 2592, 2589 and 2707. The Plaintiff filed herein is supported by the affidavits of the five plaintiffs. The affidavits verify the truth of the contents of the Plaintiff. The lands are indicated as East Bukusu South Kanduyi 2590, 2591, 2592, 2589 and 3568. There is no contrary affidavit by the plaintiff's to say that is not so. With profound respect to Mr. Murunga Learned Counsel for the Plaintiff his attempt to amend the pleadings from the bar is misconceived. He cannot amend orally that which his own clients have sworn an affidavit

and swore it to be the truth. It is only the deponents of the affidavit that can apply to amend that through an application supported by a Sworn affidavit. What is more, the law requires the parties to comply with Order 11 of the Civil procedure Rules. If they did that they would have identified the contested and uncontested issues hence the so called typographical error herein would have been identified and probably rectified.

[9]. Having given due and keen consideration to this application and having heard both Counsels for the parties the prayer for amendment is misconceived and it therefore fails. I have found no merit in this application and the same is dismissed with costs to the defendant.

Ruling read in open court in the presence of Counsels.

Dated, signed and delivered on 8th November, 2016.

S. MUKUNYA

JUDGE

In the presence of:

Court Assistant - Joy

Mr. Murunga for the - Plaintiff

Mr. Kweyu for the - Defendant