



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 176 OF 2018

KAZUNGU KARISA HAZIZI KASICHANA KARISA HAZIZI

(Suing as the legal representative of the Estate of **KARISA HAZIZI NGUNGI Ad Litem**).....**PLAINTIFFS**

VERSUS

JOSEPHINE WANJIKU MWAGHOTI.....DEFENDANT

RULING

1. By this Notice of Motion dated 29th January 2019, Kazungu Karisa Hazizi and Kasichana Karisa Hazizi suing as the Legal Representative of the Estate of Karisa Hazizi Ngungi (the Plaintiffs) pray for orders:-

1. That this Court be pleased to grant leave to the Plaintiffs to amend their Plaint to include and enjoin the Proposed 2nd to 9th Defendants as captured in the draft Amended Plaint annexed thereto;

2. That the Amended Plaint annexed (to the application) be considered as duly filed with leave of the Court upon payment of requisite fees; and

3. That (the) costs of this application be provided for.

2. The application which is supported by an affidavit sworn by the 1st Plaintiff-Kazungu Karisa Hazizi is based on the grounds:-

a) That upon service of the Plaint as filed on 11th September 2018, it emerged from the Defendant's Statement of Defence that she had sold portions of the suit premises to the Proposed 2nd to 9th Defendant; and

b) That it is in the best of interest of justice that the proposed Defendants be allowed to participate in these proceedings as they are likely to be affected by any orders issued herein.

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 8th April 2019, Josephine Wanjiku Mwachoti (the Defendant) avers that the proposed amendment if allowed would bring an entirely new case against new parties who have no interest at all on the suit property.

4. In this respect, the Defendant avers that the proposed 9th Defendant bought his parcel of land directly from the 1st Plaintiff's father and that enjoining him herein would prejudice the fair trial of this suit. The Defendant further asserts that the dispute revolves around Plot No. Kilifi/Mtondia 2916 which is in her name and not the names of the Proposed 2nd and 9th Defendants and the attempts to enjoin them is only meant to delay the fair trial and determination of the matters in controversy.

5. I have perused and considered the application together with the response thereto. I have also perused and considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

6. Order 8 Rule 3 of the Civil Procedure Rules provides that the Court may at any stage of the proceedings allow any party to amend his pleadings on such terms as to costs or otherwise as may be just and in such a manner as the Court may direct. Considering this discretion given to the Courts in **Central Kenya Ltd –vs- Trust Bank Ltd (2000) 2 EA 365**, the Court of Appeal held:-

“.... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or

to avoid 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.”

7. Thus, what is paramount for consideration by the Court in an application such as this is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond a point where costs would amount to adequate compensation.

8. In the matter before me, the Plaintiffs filed this suit on 11th September 2018 accusing the Defendant of sub-dividing their parcel of land described as Plot No. Kilifi/Mtondia/195 and selling the same to “unwary buyers”. The Defendant upon being served with the pleadings filed a Statement of Defence and Counterclaim on 25th September 2018 in which she asserts that six acres of the said Plot No. Kilifi/Mtondia/195 was sold to her husband the late Mwaghoti Mwanyasi Mwasaru.

9. The Defendant further asserts that the sub-division of the suit property created Plot No. Kilifi/Mtondia/270 comprising of the sold six acres and that it is the said Plot No. 270 that she has since sub-divided into many portions and disposed to other parties.

10. As it were, the application to amend the Plaintiff was made barely some four (4) months after the Defence and Counterclaim was filed and served upon the Plaintiffs and the Plaintiffs assert that the amendments are necessitated by the statements made in the said Statement of Defence and Counterclaim.

11. While the Defendant submits that allowing the amendments in the manner proposed would be tantamount to introducing a new and inconsistent cause of action in the suit, such a situation would not be entirely undesirable or prejudicial. Order 8 Rule 3(5) stipulates that an amendment may be allowed notwithstanding that the effect would be to add or substitute a new cause of action provided such cause of action arises out of the same facts or is substantially similar to the cause of action out of which relief has been claimed in the suit.

12. In the premises, I did not think the Defendant stood to be prejudiced in any way and that there was any basis for her objection to the amendments sought by the Plaintiffs.

13. The application dated 29th January 2019 is accordingly allowed. The Plaintiff shall in that respect have 21 days from today to file and serve the Amended Plaintiff.

14. The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 10th day of July, 2020.

J.O. OLOLA

JUDGE