



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**MALINDI ELC CASE NO.3 OF 2016**

**AGGREY ANZALA OMU.....PLAINTIFF**

**VERSUS**

**KIZO LIMITED.....1<sup>ST</sup> DEFENDANT**

**PATRICK KAMUNZYU.....2<sup>ND</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**KETAN DOSHI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. By this Notice of Motion dated 1<sup>st</sup> May 2019 as filed herein on 23<sup>rd</sup> May 2019, Aggrey Anzala Omu (the Plaintiff) prays for an order that he be granted leave to further amend his Plaint to include prayers for specific damages and expand the particulars of his claim.

2. The application which is supported by an affidavit sworn by the Plaintiff on 8<sup>th</sup> May 2019 is premised on the sole ground that the proposed amendments will aid the Court in making a just decision on the Plaintiff's claim.

3. The application is opposed by the Defendants. In Grounds of Opposition dated and filed herein on 23<sup>rd</sup> July 2019, Kizo Ltd (the 1<sup>st</sup> Defendant) opposes the same on the grounds that:

***1. The Plaintiff's application has no merit to warrant this Honourable Court to exercise its discretion.***

***2. The application is misconceived and incompetent and ought to be dismissed with costs.***

***3. The Proposed Amendments raise new facts aimed at altering the cause of action in this matter contrary to Order 2 Rule 6(1) of the Civil Procedure Rules.***

***4. It is the 1<sup>st</sup> Defendant's legitimate expectation that litigation should come to an end and to allow this application amounts to prolonging the matter which is contrary to the overriding objectives in the Civil Procedure Act and the Judicial Process as a whole which advocates for expeditious disposal of suits.***

***5. The Proposed Amendments made by the Plaintiff will not enable the Court determine the real question in controversy but are rather aimed at defeating the efficient determination of the suit herein.***

***6. The Proposed Amendment of the Plaint by the Plaintiff will cause the 1<sup>st</sup> Defendant great prejudice which cannot be compensated in costs.***

4. The suit against the 2<sup>nd</sup> Defendant was withdrawn. On their part, the Chief Land Registrar and the Honourable the Attorney General (the 3<sup>rd</sup> and 4<sup>th</sup> Defendants) oppose the application on the grounds: -

1. ***That the Proposed amendments are contrary to the provisions of Section 100 of the Civil Procedure Act as they have not been made with the purpose of determining the real question or issue raised.***
2. ***That the application is an abuse of Court Process and is contrary to Order 3 Rule 4(2) of the Civil Procedure Rules as the Plaintiff/Applicant omitted to sue in respect of the claim in the Plaint and amended Plaint and cannot thus now seek to sue in respect of the portion omitted.***
3. ***The application is misconceived and lacking in merit as the allegations of fraud constitute a new suit against the 3<sup>rd</sup> Defendant/Respondent and will thereby occasion prejudice to the 3<sup>rd</sup> Defendant/Respondent.***
4. ***The application is incompetent since there has been an inordinate delay in making the application thus the Applicants are underserving of the orders sought; and***
5. ***The application is premised upon mere speculation as there is no indication that the substratum of the suit will be lost by the Plaintiff/Applicant for failure to amend the Plaint.***

5. I have perused and considered the Plaintiff's application and the Grounds of Opposition as filed by the respective Respondents. I have similarly perused and considered the written submissions as filed thereon by the Learned Advocates for the parties.

6. The principles upon which a Court acts in an application to amend a pleading before or during the trial were well-settled in ***Eastern Bakery –vs- Castelino (1958) EA 461*** where the Court stated: -

***“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”***

7. In the matter before me, this suit was instituted on 11<sup>th</sup> January 2016. Some three months down the line, the Plaintiff applied to amend the Plaint as it were to 'rectify' the name of the 1<sup>st</sup> Defendant and to enjoin the 5<sup>th</sup> Defendant into the suit. That amendment was allowed on 25<sup>th</sup> April 2019 and the Plaintiff now seeks a further amendment herein for what he states is the need to clarify the particulars of fraud against the Defendants and to widen the scope of the prayers to conclusively deal with the matter in dispute.

8. The Defendants are opposed to the application on the grounds inter alia that the same are coming four years after the suit was filed and that the same will prejudice them and confuse the issues for determination herein.

9. While I agree with the Defendants that the amendments sought by the Plaintiff have come rather late in the day, I did not think that the same are prejudicial to them and that the amendments sought are without merit. As it were, the law requires that where one pleads fraud, the particulars thereof must be clearly and distinctly stated in those pleadings. The statement of claim ought in such circumstances to contain precise and full allegations of facts and the circumstances leading to the reasonable inference that fraud was the cause of the wrong complained of.

10. I think it has long been accepted as a general rule that however late an amendment is sought, leave to amend should be granted unless the Court be satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise (***see Bramwell L J in Tildeshay –vs- Harper (1878) 10 Ch. D at Page 296***).

11. That being the case and in light of the fact that the trial herein is yet to commence, I am of the considered view that the Defendants objections to the amendment sought by the Plaintiff lack merit.

12. Accordingly, I allow the Plaintiff's application. The costs thereof shall abide the outcome of the main suit.

**Dated, signed and delivered at Malindi this 25<sup>th</sup> day of September, 2020.**

**J.O. OLOLA**

**JUDGE**