



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 6 OF 2017

JOHN MUTHOKA MUTUA AND OTHERS.....PLAINTIFFS

VERSUS

1. JOYCE W. KOMBE

2. HARRISON KATANA KATOI

3. CHIMWENGA KATANA

4. MTAWALI CHARO KATANA.....DEFENDANTS

AND

THE ATTORNEY GENERAL.....INTENDED DEFENDANT/APPLICANT

RULING

1. By this Notice of Motion dated 4th February 2019, John Muthoka Mutua (the Plaintiff) prays for leave to be granted to him to amend his Plaintiff in the manner shown in the draft annexed to the application.

2. The application which is supported by an affidavit sworn by the Plaintiff on 22nd May 2019 is premised on the grounds that: -

i) The Plaintiff instituted this suit against the 1st and 2nd Defendants who are the area Chief and Assistant Chief respectively for trespass and illegal occupation of the suit property.

ii) In a Ruling delivered on 19th September 2017, this Court declared that the two Defendants were erroneously sued in person since the acts for which they were sued were performed in their official capacity as Government Officers.

iii) The Plaintiff subsequently intends to enjoin the Ministry of Interior & Coordination of National Government as a party in the proceedings.

3. The application is however opposed. In Grounds of Opposition dated 15th March 2019 and filed herein on 19th March 2019, the Honourable the Attorney General previously representing the 1st and 2nd Defendants objects to the application on the grounds that: -

i) The application is an abuse of the Court process.

ii) The application is fatally defective as there is no suit against the named 1st and 2nd Respondents since the same was struck out by the Court.

iii) The Attorney General cannot be substituted as a party in this case.

iv) The Plaintiff discloses no cause of action against the Attorney General to warrant the joinder and/or substitution; and

v) The Orders sought in the application cannot issue.

4. I have perused the Motion and the response thereto. The sole issue for determination by this Court is whether this Court should exercise its discretion in the Plaintiff's favour and grant him leave to amend his pleadings to enjoin the Government as a party herein.

5. The application before me is expressed to be brought under Order 8 Rule 3(3) and (5) of the Civil Procedure Rules. Rule 3(5) provides as follows: -

“An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

6. As it were, the overriding consideration in an application such as this ought to be whether the amendments sought are necessary for the determination of all the matters in dispute. That was the position taken by the Court of Appeal in ***Central Bank of Kenya Ltd –vs- Trust Bank Ltd (2000) 2EA 365*** where the Learned Judges held as follows:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a 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. In the instant matter before me, the Plaintiff had by his Plaint filed herein on 12th January 2017 sought orders against the 1st and 2nd Defendants accusing the duo of illegally trespassing and encroaching upon the suit property which he claims to be his own.

8. Upon the said Defendants being served with Summons to Enter Appearance and an application seeking the grant of a temporary order of injunction against them, the Honourable the Attorney General filed an application herein dated 3rd February 2017 inter alia urging the Court to strike out the suit against the two Defendants.

9. Having considered the said application, this Court on 19th September 2017 struck out the suit as urged against the two Defendants having established that the said Defendants were the Mariakani Location Area Chief and his Assistant and that the projects complained of were the construction of the Area Chief's Office and that the two were only involved therein in their official capacities.

10. The Plaintiff now by this application admits that he was honestly mistaken in filing the suit against the two individuals and now seeks leave of this Court to join the rightful party in the proceedings. Having considered the same, I am satisfied that the amendment is necessary for the determination of the real question in dispute and that the Respondents including the Honourable the Attorney General who is yet to be enjoined formally herein shall not suffer any prejudice as they shall have an opportunity to respond to the amended suit.

11. In the result, I find merit in the application and I allow the same. The Amended pleadings to be filed and served upon all concerned parties within 21 days of the date hereof.

12. I make no order as to costs.

Dated, signed and delivered at Malindi this 25th day of September, 2020.

J.O. OLOLA

JUDGE