



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 482 of 2011

IN THE MATTER OF LAND PARCEL NUMBER L.R. 9509/34

AND

**IN THE MATTER OF SECTION 38 OF THE LIMITATIONS OF ACTIONS
ACT(CAP.22) LAWS OF KENYA**

MATHENGE WANDERI.....APPLICANT

VERSUS

JOSEPH MACHARIA MUCHIRI.....1ST RESPONDENT

JANE WAIRIMU MACHARIA.....2ND RESPONDENT

CITY COUNCIL OF NAIROBI.....3RD RESPONDENT

RULING

The 1st and 2nd Respondents filed an application dated 13/10/2011 seeking orders that the Court disallows the amendments contained in the Amended Originating Summons amended on 30/9/2011 and the same be struck out. That in the alternative and without prejudice to the foregoing, the Court does disallow the parts of the Amended Originating Summons substituting the property from parcel L.R. No. 9509/34 to part of parcel L.R. No. 9509/35 or any part thereof.

The application is premised on grounds and supported by an affidavit sworn on 13/10/2011 by the 1st Respondent. He deposes that the Applicant filed the Originating Summons dated 12/9/2011 seeking a Vesting Order in respect of part of parcel L.R. No. 9509/34 due to alleged adverse possession. That the Applicant through an Amended Originating Summons amended on 30/9/2011 is seeking to substitute the parcel of land in respect of which he is seeking a Vesting Order as a result of the alleged adverse possession from parcel L.R. No. 9509/34 to parcel L.R. No. 9509/35. That the purported substitution of the parcel of land in respect of which the Vesting Order is sought is an abuse of the Court’s process. Further that the proper procedure is for the Applicant to withdraw the suit he filed seeking a Vesting Order in respect of parcel L.R. No. 9509/34 and file a fresh suit seeking necessary orders in respect of L.R. No. 9509/35. That the amendments introduced by the Applicant are such that if they would have been brought to the attention of the Court when leave to amend was sought, the Court would not have granted such leave. Finally that parties in a dispute are bound by their pleadings and amendment of pleadings should not be used to attempt a cure of fatal errors.

The Applicant opposed this application by filing Grounds of Opposition dated 9/12/2011. The Applicant stated that the application herein is devoid of any merit, frivolous and vexatious and ought to be dismissed with costs. Further that the amendments in issue were done procedurally and within the relevant law relating to amendment of pleadings. Consequently, granting the orders sought in the application would be tantamount to festering the Plaintiff's right to present its cause before the court such that the court is able to determine the real issues in controversy between the parties. In any event the 1st and 2nd Respondents are not bound to suffer any prejudice by virtue of the amendments in issue and therefore the application ought to be refused.

The Respondents filed a Supplementary Affidavit sworn by the 1st Respondent on 25/5/2012, wherein he deposed that the amendments completely alter and/or change the substratum and/or fundamental character of this suit and should therefore be disallowed by the Court. It was his disposition that amendments should not be allowed to aid a negligent pleader by naming L.R. No. 9509/34 in the case title as subject matter of the suit whereas that is not the property that the Applicant intended to sue over. Further that the amendments to the case title as done by the Applicant is not that which can help the Court determine the issues in dispute between the parties. In any event the said amendments will only serve to obfuscate issues and confuse the Court and parties herein.

The 1st Respondent also deposed that the amendments if allowed, will occasion both the Respondents great prejudice since the same are an attempt to defeat a defence that has accrued to them. Further that the suit embodies an illegal claim and the proposed amendments perpetuate or further and illegal/invalid claim over an access road and accordingly the same should not be allowed.

The application was canvassed by way of written submissions. The 1st and 2nd Respondent filed submissions dated 25/5/2012. Therein they submitted that the general principle is that amendments may be allowed at any time before judgment. However, the Court exercises its discretion when deciding whether to allow or disallow amendments and the discretion is exercised judiciously. Further that the Court will in appropriate circumstances, deny leave to amend, refuse to allow amendments and/or strike out the amended pleadings. It was their submission that the amendments done by the Applicant are improper, irregular and consequently the same ought to be disallowed and/or struck out for reasons that;

- i) The amendments will alter the substratum/fundamental character of the suit and is a complete departure from the original claim.
- ii) Amendments cannot be used to aid a negligent pleader.
- iii) Amendments cannot be used to defeat an accrued defence.
- iv) The amendment to the case title is not an amendment that will help the Court to determine the questions in dispute between the parties.
- v) The amendments serve to unduly obfuscate the issues in dispute.
- vi) The amendments embody an illegal and/or invalid claim.

The Respondents relied on the decisions in the case of **Kassam v Bank of Barda (Kenya) Limited (2002)1 KLR 294**; wherein the Court held that in of the criteria used to determine whether to allow amendments is the extent to which the amendment departs from the original claim. If the departure is absolute... the amendments must be disallowed by the Court. **James Ochieng' Oduol t/a Ochieng' Oduol & Company Advocates v Richard Kuloba, Nrb. Civil Appeal No. 2 of 2002**; wherein the Court observed that the provisions of Order VIA rule 5(1) (*now Order 8 Rule 5*) of the Civil Procedure Rules are not intended to aid a negligent pleader more so where its effect will be to defeat an accrued defence. A careful reading of Order VIA rule 3 clearly shows that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances... the Court should be slow in allowing amendments to the Plaint which *prima facie* have the effect of defeating that defence. **Philip, Harrison &**

Crossfiled Limited v Kassam, Nrb. HCCC 1088 of 1971 wherein the Court held that an application for leave to amend should be allowed if it is necessary for the purpose of determining the real questions in dispute between the parties. This principle, however, only applies in respect of an amendment in the text of the pleading as distinct from the title.

The 3rd Respondent filed its written submissions on 30/10/2012 in support of the instant application filed by the 1st and 2nd Respondents. Therein it stated that it wished to add 3 pertinent issues to wit;

- i) That the Court did not grant the Applicant leave to amend the originating summons nor did parties get into consent to allow for amendments. Consequently, the same is an abuse of the court process amended originating summons is for striking out.
- ii) The 3rd Respondent was already a party to the suit and therefore there was no basis in law for the Applicant to add or substitute the 3rd Respondent in the proposed amendments.
- iii) There was no leave granted to file the affidavit sworn on 30/9/2011 and by sneaking in the said affidavit together with the bound amended originating summons was intended to cure a fatality raised by the 1st and 2nd Respondents in opposition to the suit.

The Applicant's advocate filed submissions dated 9/11/2011. Counsel contended that the Applicant sought leave to amend, which leave was granted on 22/9/2012 in Court in the presence of all counsels. Acting on leave granted, the Applicant filed and served the amended pleadings upon all counsels. Further that the 1st and 2nd Respondents did not challenge the leave granted but the contents of the amendments. It was his submission therefore that they ought to have objected at the time of grant of leave as opposed to filing the application later, thus wasting the Court's time. Further that the 1st and 2nd Respondent if dissatisfied with the leave order granted should have filed an application for setting aside and/or review and not the instant application.

The Applicant contended that the whole purpose of amendment of his pleadings was so as to bring out the proper description of the property. That he is the owner of property L.R. No. 9509/34 and to file a suit to vest a strip of land that already belongs to him is a genuine error. The Applicant seeks to have a 6 meter strip running parallel to his property L.R. No. 9509/34 be vested in him, which is the substratum of the amendment. The Applicant maintained that proceeding without amendments would have occasioned confusion and miscarriage of justice as the true position would not have been captured. Further that disallowing and/or striking out of the amendments would be tantamount to fettering the Applicant's right to present its case before the Court and that the Court would proceed to hear and adjudicate on erroneous facts and not deal with the correct and real questions in controversy. The Applicant referred the Court to the decided case of **Mechanized Systems Limited v Guardian Bank Limited HCCC No. 2 of 2005.**

The 1st and 2nd Respondents' counsel acknowledge that the Applicant obtained leave to amend orally in Court on 22/9/2011. I have had an occasion to peruse the Court proceedings, the aspect for leave to amend is not captured, but by virtue of the admission on the part of the 1st and 2nd Respondents' counsel, I shall take it that leave was indeed sought and granted.

The Applicant is of the view that the 1st and 2nd Respondent ought to have sought review of the order of the Court made on 22/9/2011 as opposed to seeking an order that the amendments contained the Amended Originating Summons be struck off. This application is brought under Order 8 Rule 2 which allows a party to make an application to court to disallow an amendment. The provision, however, is with respect to amendments that were made under rule 1(1) thereof which is without leave of Court. The amendment herein was done with leave of Court having been obtained orally in court on 22/9/2011. Nevertheless, I shall proceed to entertain this application seeing that the Applicant did not file an application seeking leave to amend his pleadings. It should not be noted that leave to amend is a Court's discretion and therefore filing an application in respect of the same is not therefore cast in stone, leave may very well be granted in an oral application. However, just be to satisfied that an amendment would be have been refused if the Court had knowledge of what the amendments were, it would be prudent for

this Court to adjudicate over this application.

The issue for determination is the contents of the amendments contained in the Amended Originating Summons dated 30/9/2011. The contents of the amendments are a substitution of L.R. No. 9509/34 with L.R. No. 9509/35 at the title of the suit, and 6 meter strip of land running parallel alongside L.R. No. 9509/34 marking a rectangle between coordinates N1, N2, N8, MV4 and NVIT has vested in the Applicant as opposed to 6 meter strip access road on to L.R. No. 9509/34 has vested in the Applicant. The Applicant contends that he is merely describing properly the property in dispute so that there is no confusion which will occasion a miscarriage of justice. On the other hand, the 1st and 2nd Respondents maintain that such amendments alter the substratum or fundamental character of the suit and are a complete departure from the original claim.

It is settled that amendments of pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice of the other side can be compensated by costs. **See Eastern Bakery v Castelino [1958] E.A. 461**. The Courts have also held that amendment of pleadings was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy... See **Central Kenya Ltd v Trust Bank Ltd (2000) 2 EA Pg. 365** This is also the law as provided under Order 8 Rule 5 (1) which provides,

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

The 1st and 2nd Respondents’ claim that the Applicant ought to have to file a fresh suit if desirous of obtaining a vesting order for parcel number L.R. No. 9509/35 and further that the amendments alter the fundamental character of the suit has been cured by the provision of Order 8 Rule 3 (5) which states,

“An amendment may be allowed under subrule (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 or substantially the same facts as a 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.”

I am of the view that the amendments made by the Applicant is so as to properly describe the 6 meter strip that is the subject matter of this suit and does not fundamentally alter the character of the suit. In any event, even if the amendments were seen as to alter the fundamental character of the suit, pursuant to Order 8 Rule 3 (5) this Court has discretion to allow amendments even where the effect would be to add or substitute a new cause of action so long as it arises out of the same or substantially the same facts. Further, I do not agree with the 1st and 2nd Respondents that the amendments will bring confusion in adjudicating the matter. As to whether or not the Applicant’s claim and amendment thereof is illegal and/or invalid is an issue which will be adequately be addressed upon the matter going for trial.

With respect to filing a fresh suit, due to an error on the part of the Applicant Hancox J. in **Philip, Harrison & Crossfiled Limited v Kassam, Nrb. HCCC 1088 of 1971**, observed that it may prove expensive and thereby occasion injustice. *“Accordingly, the tenor of the decisions is that amendments, at any rate, ought to be allowed if they can be done without injustice, because it would in many cases be exceedingly inconvenient and expensive to force the party who has by reason of his own error or otherwise, the misfortune to seek leave to amend, to bring a fresh suit, a course which itself may cause injustice to him.”*

The Court is also expected to give effect to the overriding objective of the Act and rules facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

I therefore dismiss the 1st and 2nd Respondents’ application dated 13/10/2011. Accordingly, the

Respondents are granted leave to file their defences to the Amended Originating Summons within 14 days from the date of this ruling. Costs of the application shall be in the cause.

Dated, Signed and Delivered this 8th day of April 2013

L.N. GACHERU
JUDGE

In the Presence of:-

.....For the Applicant

.....For the 1st and 2nd Respondent

.....For the 3rd Respondent

..... Court Clerk