



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 204 OF 2012

DAVID OWINO OKONG'O.....PLAINTIFF

VERSUS

MARY KEKE.....1ST DEFENDANT

CHECHO KEKE.....2ND DEFENDANT

DANIEL MAGERO.....3RD DEFENDANT

EZEKIEL ODUK..... 4TH DEFENDANT

RULING

1. What is before me is the plaintiff's Notice of Motion application dated 18th March, 2013 brought under sections 1A, 1B and 100 of the Civil Procedure Act and order 8 rules 5 and 3 of the Civil Procedure Rules. In the application, the Plaintiff has sought leave of the court to amend the plaint filed herein. The application is brought on the ground that the intended amendment is necessary for the effective trial of the issues in controversy in this suit and that the defendants would not suffer any prejudice if the amendment is allowed. In his affidavit in support of the application, the plaintiff has stated that there are facts which would assist the court in resolving the issues raised in this suit which were not pleaded in the original plaint. These are the facts which are intended to be introduced by the intended amendment. In his submissions in support of the application, the plaintiff's advocate Mr. Okungu relied entirely on the contents of the said affidavit in support of the application and urged the court to allow the same.
2. The plaintiff's application was opposed by the defendants. Through their grounds of opposition dated 28th June, 2013 and filed in court on 1st July, 2013, the defendants contended that the causes of action sought to be introduced by the plaintiff through the intended amendment are time barred and as such the amendment sought if allowed would defeat the defendant's defence of limitation which has accrued. The defendants contended further that the issues sought to be introduced by the intended amendment were all along within the knowledge of the plaintiff and the plaintiff has failed to give a reasonable explanation as to why the same were not included in the original plaint. The defendants contended further that the application has been brought after unreasonable delay and that the plaintiff is not deserving of the exercise of this court's discretion due to his penchant for disobeying court orders. In his submission in opposition to the application, Mr. Ochwangi advocate who appeared for all the defendants relied entirely on the said grounds of opposition and urged the court to dismiss the plaintiff's application with costs.

3. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the defendants grounds of opposition to the application. The law on amendment of pleadings is now well settled. Applications for leave to amend should be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs(See **the court of appeal cases of, Central Kenya Ltd. vs. Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998(unreported)** and **Robert Ombaso Nyareru & another vs. Beldina Mokaya, Court of Appeal at Kisumu, Civil Appeal No.200 of 2011(unreported)**). The law is that, parties should be allowed to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided, there has been no undue delay, no new or inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side. From the foregoing legal principles, what is expected of an applicant for leave to amend a pleading is for him to satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties or that it would avoid multiplicity of suits. The onus then shifts to the party opposing such amendment to show that the amendment sought would result in prejudice to him which cannot be compensated in costs and/or that the amendment sought would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him.
4. I have looked at the draft amended plaint which the plaintiff is seeking leave to file. The plaintiff intends to plead the fact that the plaintiff's father on behalf of whose estate this suit has been brought had leased the parcel of land known as LR No. Kamagambo/ Kanyimach/ 155 (hereinafter referred to as "**the suit property**") to the 3rd defendant and that the 3rd defendant through acts of fraud and taking advantage of the plaintiff's deceased father's illiteracy, converted the said lease to an agreement for sale and in the process ended up acquiring title to the property. The plaintiff also intends to plead that, following the said illegal acquisition of the suit property, the 3rd defendant proceeded to sub-divide the suit property of which he retained a portion measuring 2.8 ha. and transferred a portion measuring 0.1 ha. to one, Silpa Ayoma Okong'o in unclear circumstances. The plaintiff would also wish to plead that the 3rd defendant has since transferred a portion of the suit property that remained in his name to the 4th defendant who is using the same for cultivation and fish farming and that the 1st and 2nd defendants have encroached on the suit property and are illegally tilling the same. The plaintiff also intends to seek two additional reliefs against the defendants namely, the cancellation and/or nullification of the title deeds for LR. Nos. Kamagambo/ Kanyimach/ 901 and 902 and a declaration that the title of the suit property is intact and that it belongs to the deceased, Samson Okong'o Oende. It is the plaintiff's contention that these amendments will enable the court to determine the real questions in controversy in the case. As I have mentioned at the beginning of this ruling, the defendants have opposed the plaintiff's application on various grounds. I am satisfied that the intended amendments if allowed would enable this court to determine the real issues in dispute in this suit. The defendants have not convinced me that the intended amendments would cause them prejudice or that they would suffer injustice as a result thereof. The defendants have claimed that the intended amendments would deny them the defence of time bar that has already accrued in their favour. The defendants have not come out very clearly in what respect the new causes of action sought to be introduced by the plaintiff herein would be time barred. I therefore see no merit in this objection to the application. The defendants had also contended that the issues sought to be introduced by the plaintiff through the intended amendments were within his knowledge at the time this suit was filed. This to me is not a good ground on the basis of which the court should decline to allow an application for leave to amend. The defendants have not disclosed the source or the basis of their claim that the plaintiff was all along aware of the issues being raised now in the draft amended plaint. The defendants' objection to the application on account of unreasonable delay does not also hold water. This suit was filed in the year 2012 and since then, the parties (the defendants in particular) have been pursuing one interlocutory application after the other. The case has not even been set down for pre-trial conference. I do not therefore see how the plaintiff can be said to have brought the present application late in the day. Furthermore, as I have stated above, an amendment can be

allowed at any stage of the proceedings.

5. Due to the foregoing, I am not persuaded by the defendants that the intended amendment of the plaint would cause them any prejudice or injustice. The plaintiff's application dated 18th March, 2013 is therefore well merited. The same is allowed. The plaintiff shall file the amended plaint within 14 days from the date hereof. The defendants are at liberty to amend their defences within 14 days from the date of service upon them of the amended plaint. The costs of the application shall be in the cause.

Dated, signed and delivered at KISII this 7th day of October, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

No appearance for the plaintiff

Mr. Otieno holding brief for Oguttu for the defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.