



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. 22 OF 2018

PAMELA ALIVIDZA ABWAO.....1ST PLAINTIFF

MARGARITA KANDENYI.....2ND PLAINTIFF

STELLA NANGENDO ABWAO.....3RD PLAINTIFF

VERSUS

CHRISTINE LWANGA.....DEFENDANT

RULING

1. This is a ruling on the Notice of Motion dated 7th February 2019 brought under **Order 8 rule 3** of the Civil Procedure Rules and enabling provisions of the law.

2. It seeks order:-

(1) That this Honorable court be pleased to grant the Defendant leave to amend the Defence in the manner and style as annexed hereto and upon payment of the requisite filing fees.

(2) That costs be provided for.

3. The grounds are on the face of the application and are set out in paragraphs **1 (a) to (l)**.

4. The application is supported by the affidavit of Christine Lwanga, the defendant/applicant sworn on the **7th February, 2019**.

5. The application is opposed. There is a replying affidavit by the plaintiffs/respondents dated **6th March 2019**. The gist of the affidavit is that the proposed draft defence does not tally with the defence dated **27th March 2018** and that the draft defence and counterclaim is a completely different suit from one sought to be amended.

ANALYSIS AND DETERMINATION

6. After careful consideration of the notice of Motion, affidavits and the rival affidavit filed, the issues for determination are;

(a) Whether the application has merits and should be allowed.

(b) Whether allowing the Amended Defence will cause injustice to the Respondents

7. The general power of the Court to allow the amendment of pleadings is based on **Section 100 of Civil Procedure Act**, and the Parties to the suit have a right to amend their pleadings at any stage of the proceedings, as long as the same will enable the court to determine real issues in question. Similarly amendments of pleadings is allowed under the procedural provision of **Order 8 Rule 3(1) of Civil Procedure Rules**, which states that inter alia that;

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any

party to amend his pleadings.”

8. **Order 8 Rule 3(5)** of the Civil Procedure Rules provides that:-

“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 or substantially the same facts as a cause of action in respect of which relief has already been claimed on the suit by the party applying for leave to make the amendments”

9. Ordinarily, Courts usually adopt a liberal attitude when it comes to allowing a party to amend his pleadings, unless, it is demonstrated that great prejudice will be caused to the other party, which prejudice cannot be remedied by an award of costs. In the case of **Eastern Bakery v Castellino (1959) EA 461**, the court held that:-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs”.

10. The applicant has submitted that it is necessary to amend the defence to include a prayer that the plaintiffs are holding the suit land in trust and on behalf of the defendant and her family and further that the two title deeds in the names of the Plaintiffs be cancelled and the same be issued in the name of the Defendant/ Applicant and to include a counter claim to reflect the aforesaid changes.

11. The proposed defence in my view raises a fundamental triable issue, namely, whether the suit land is held in trust by the plaintiffs on behalf of the defendant. This is an issue that arises from the same allegations of fraudulent registration of the suit land in the plaintiffs' names. This question can only be answered if it is pleaded in the defence. I do not see how the amendment would, if allowed, prejudice the respondent. It is my considered view this proposed amendment will assist the court in determining once and for all, the real issues in controversy.

12. I am persuaded that the application is merited and no prejudice will be suffered by the plaintiffs if the same is allowed.

13. I accordingly allow the application and direct that the applicant do file and serve her amended defence within **seven (7) days** of this order. The costs of this application will be in the cause.

Dated, signed and delivered at Kitale on this 25th day of March, 2019.

MWANGI NJOROGE

JUDGE

25/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bungei holding brief for Mr. Bungei Snr. For plaintiff/respondent

N/A for applicant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

25/03/2019