



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ELC CASE NO. 14 OF 2018

FAITH CHEPNGENO.....PLAINTIFF/APPLICANT

VERSUS

JOSPHAT KIPRONO.....1ST DEFENDANT/ RESPONDENT

DAVID KIRUI.....2ND DEFENDANT/ RESPONDENT

RULING

Introduction

1. By a Notice of Motion dated 9.11.2018 the Plaintiff moved the court seeking the following orders:

- a) That the Plaintiff be allowed to amend the Plaintiff as per the annexed Draft Amended Plaintiff.
- b) That the Draft Amended Plaintiff upon such leave being granted be deemed as duly filed and served upon payment of the requisite court fees.
- c) That the costs of this application be in the cause

2. The application is premised on the grounds stated on the face of the Notice of Motion and the Plaintiff's Supporting Affidavit sworn on the 9th day of November 2018. In the said affidavit, the Applicant avers that at the time of filing suit she erroneously sued the 2nd Defendant and also omitted material information in her Plaintiff. She further avers that she has now instructed the firm of M/S Koech Chepkurui & Associates to act on her behalf and she intends to amend the Plaintiff in terms of the Draft Amended Plaintiff attached to her Plaintiff. She states that the amendments will enable the court make a just determination in the matter.

3. The application is opposed by the 2nd Defendant through his Grounds of Opposition dated 8th February 2019 in which he contends that the proposed amendments are a kneejerk reaction to the Defence and statement of issues filed on behalf of the Defendants. It is further contended that the proposed amendments are so substantial that they would alter and substitute the cause of action as the allegations made therein negate the facts that were originally admitted by the Plaintiff. In essence it contended that the Plaintiff is attempting to steal a match as the amendments are a reaction to the issues framed by the defendants. For the foregoing reasons, the proposed amendments will prejudice the 2nd Defendant's case.

4. The application was canvassed by way of written submissions and counsel for the Plaintiff and the 2nd Defendant filed their submissions which I have considered.

5. The only issue for determination is whether the Plaintiff should be granted leave to amend her Plaintiff.

6. The Plaintiff's application is brought under Order 1 Rule 10 of the civil Procedure Rules which states as follows:

“Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit”

7. Sub-rule 2 provides that;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to be just, order that the name of the party improperly joined, whether as plaintiff or defendant be struck out and the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”

8. Counsel for the Plaintiff has submitted that the application for amendment has been made without undue delay and ought to be allowed. She has cited **Volume 2 of the 6th Edition, Air Commentaries on the Indian Civil Procedure Code by Chitty and Rao at page 2245** where the learned authors state as follows:

“That a party is allowed to make such amendments as may be necessary for determining the real question in controversy 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 amendment can be allowed without injustice to the other side.”

9. In his submissions, counsel for the 2nd Defendant has submitted that the Plaintiff seeks to make the 1st Defendant a second Plaintiff hence this is not a substitution and addition of parties as envisaged under order 10 Rule 2 of the Civil Procedure Rules. He argues that in this case a new and inconsistent case is being introduced by the Plaintiff which contradicts the Plaintiff’s own previous pleadings.

10. He has cited the case of **Central Kenya Limited v Trust Bank Limited (2000) 2 EA 365** where the court restated the position in Air Commentaries on the Indian Civil Procedure Code by Chitty and Rao cited above. Furthermore, he has submitted that the amendments would not be in furtherance of the overriding objectives of the Civil Procedure Act as the Plaintiff is not being sincere.

11. I have looked at the Plaintiff and I agree with counsel for the 2nd Defendant that it is difficult to discern what the cause of action against either of the Defendants is although the prayers suggest that the Plaintiff wants the 1st Defendant to be compelled to transfer a portion of land measuring 0.203 hectares to the Plaintiff while the 2nd defendant ought to be restrained from interfering with the survey exercise. In the proposed Amended Plaintiff, the Plaintiff turns around and wants the 1st Defendant made a second Plaintiff while leaving the 2nd Defendant as the only Defendant. This is a position that contradicts her initial claim and one that cannot be explained away as a bona fide mistake nor does it fall under the substitution of parties envisaged by the provisions of Order 1 Rule 10 of the Civil Procedure Rules. As submitted by counsel for the second Defendants, if allowed, such amendments will definitely prejudice the 2nd Defendant.

12. Even though the court has wide discretion to allow amendments, the same should not create confusion and prejudice the other side. Looking at the nature of amendments proposed, this is one of the rare cases where I will decline to grant the application as it would make more sense if the Plaintiff simply withdraws the plaintiff and files a fresh suit.

13. For the foregoing reasons, I find no merit in the application and I disallow it.

14. The costs of the application shall be in the cause.

Dated, signed and delivered at Kericho this 14th day of March, 2019.

J.M ONYANGO

JUDGE

In the presence of:

1. Miss Koech for the Plaintiff/Applicant
2. Mr. Onesmus Langat for the Defendant/Respondent
3. Court Assistant - Rotich