



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 110 OF 2015**

**NILS STAFFAN WIRELL..... PLAINTIFF/APPLICANT**

**VERSUS**

**EMILY CHEPKOSGEY.....DEFENDANT/RESPONDENT**

**RULING**

The application before court is dated 25.9.2017 wherein the plaintiff prays for amendment of Plaintiff in manner and style of the draft amended plaintiff. The application is based on grounds that the plaintiff had instituted this suit against the defendant for reliefs in terms of the prayers sought in the plaintiff and that the matter is urgent and ought to be heard on 21<sup>st</sup> November, 2017 as the plaintiff's houses in Sweden that had been mortgaged to secure funds to purchase the suit property at on the verge of being sold by the plaintiff's financiers for want of payment.

That the plaintiff is now retired and does not have any source of income to service his loans in Sweden. That the plaintiff is entirely reliant on the proceeds to be obtained from the sale of the suit property after severance to enable him service his loans in Sweden.

That it has become necessary upon looking at the plaintiff to amend the plaintiff to include a fundamental prayer that will give effect to the other prayers sought in the plaintiff.

To enable the court, determine the real issues in controversy then the intended amendment sought is necessary and therefore it in the interest of justice that the application be allowed. That the hearing of the suit is yet to commence. That it is fair, just and expedient that this application to be allowed. The amendment is meant to enable the court to adequately determine the real issues in controversy.

In reply, the defendant states that the application is made is frivolous and ought to fail. That the plaintiff is guilty of laches and is not deserving of the orders sought. Moreover, that the application introduces a new cause of action.

The concept of amendments in general is enshrined in order **8 rule 1 (1)** of the **Civil Procedure Rules** stipulates that;

***“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.”***

Under **order 8 rule 5** it is stipulated that;

***“An amendment shall 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”.***

Further, **Halsbury's Laws of England, 4<sup>th</sup> Edition (re-issue) Vol.36(1) at Paragraph 76** sets out the requirements for an amendment thus;

***“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.”***

In **Eastern Bakery vs Castelino (1958) EA 461**, Sir Kenneth O'Conner, President of the predecessor of this Court stated that;

***“It will be sufficient ... to say that amendments to 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 if the other side can be compensated by costs.”***

I have considered the application, supporting affidavit and the replying affidavit and do find that the application for amendment is brought before the commencement of hearing of this matter. There is no unreasonable delay in the bringing of the application.

Though a new cause of action is being introduced by the plaintiff, the same is not time barred and the defendant will have an opportunity to defend herself. The defendant has not demonstrated that she will be prejudiced with the amendment.

The upshot of the above is that the application for amendment is allowed. The plaintiff to file and serve amended plaint within 7 days. The defendant to amend defence within 7 days of service. Costs is cause. Orders accordingly.

**Dated and delivered at Eldoret this 25<sup>th</sup> day of April, 2019.**

**A. OMBWAYO**

**JUDGE**