



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 141 OF 2013

CHRISTOPHER MAKOKHA OKOYO.....1ST APPLICANT

FREDRICK ODUOR.....2ND APPLICANT

HUMPHREYS ODUOR.....3RD APPLICANT

PROTUS ODUOR.....4TH APPLICANT

GREGORY OMONDI OTIENO.....5TH APPLICANT

JOSEPHAT OCHIENG OTIENO.....6TH APPLICANT

VERSUS

ALI MALALA WAMUKOYA.....RESPONDENT

RULING

1. The application for determination before me is a Notice of Motion dated 4/11/2015 and filed on 5/11/2015. It is expressed to be brought under Order 8 Rules 3, 4, 7(3) and 8 of Civil Procedure Rules. The Applicants are **CHRISTOPHER MAKOKHA OKOYO, FREDRICK ODUOR, PROTUS ODURO, GREGORY OMONDI OTIENO** and **JOSEPHAT OCHIENG OTIENO** and they are seeking the following orders:

(1) That this honourable court be pleased to grant leave to the Applicants to further amend the amended Originating Summons and file further affidavits and that the further amended Originating Summons together with the further affidavits annexed hereto be deemed duly filed upon payment of the requisite fees.

(2) That the costs of this application be provided for.

2. The grounds on which the application is anchored stipulate, *inter alia*, that land parcel No. BUKHAYO/ELUKHARI/2667 has a charge over it; that it is necessary to enjoin the chargee as 2nd Respondent for all issues to be canvassed once and for all; that the Applicant had not counter-checked the details behind the copy of register to discover the said charge; and that the Applicants will suffer irreparable loss if the orders sought are not granted. The grounds are further amplified in the supporting affidavit that came with the application. In particular, it is stated that the chargee – **AGRICULTURAL FINANCE CORPORATION** – which is the party intended to be enjoined knew or ought to have known that the chargor's rights or title to the land had been extinguished by operations of the law.

3. The chargor is **ALI MALALA WAMUKOYA** who is the one sued by Applicants seeking to wrestle title from him through adverse possession. Both the chargor and the chargee were said to have known as a matter of fact that the Applicants were in possession and occupation of 8.5 acres of the land for a period exceeding 12 years.

4. Another reason is introduced in the affidavit though not stated in the grounds. And the reason is that one of the Applicants – **FREDRICK ODUOR** – has become mentally incapacitated and it has become necessary to remove him from these proceedings as he will not be able to testify.

5. The Respondent – **ALI MALALA WAMUKOYA** – responded to the application vide a replying affidavit filed here on 23/2/2018. He stated, *inter alia*, that this suit was filed in 2012 and has been pending for over 5 years. The Respondent entered appearance and thereafter counsel for Applicants sought to amend the Originating Summons. He was allowed to do so and the amended Originating Summons dated 3/9/2013 was filed. From then on, the Applicants are said to have occasioned several adjournments until the court at one time felt impelled to give them last adjournment.
6. The hearing of the matter then started and at one time counsel for Applicants sought to amend the matter yet again. The court refused to allow amendment this time round. And owing to that application, this application itself is said to be *RESJUDICATA*. Further, the information sought to be incorporated in the amended Originating Summons was said to have been available all along, even at the time of filing the suit. The application is said to be a clear abuse of the process of court and is said to be calculated to prejudice the Applicants.
7. Not to be outdone, or probably to even out scores, the Applicants filed a further affidavit on 7/3/2018. It was denied that a request for amendment was declined by the court. And the adjournments alleged were said to have been occasioned by both sides on various occasions and not one side only. Counsel for the Applicant explained that though information about charging of the land had been recorded all along, he had not seen it and this is probably because it is normally indicated on a separate back page. Counsel averred that there are new triable issues that have emerged and that the application is therefore not an abuse of the court process.
8. The application was canvassed by way of written submissions. The Applicants' submissions were filed on 7/3/2018. They submitted, *inter alia*, that the application has merit and should be allowed. The substance of the application and the further affidavit filed in response to the Respondents' replying affidavit show merits that warrant allowing the application. The application is said to be intended to enjoin a second Respondent and if not granted the Applicants will allegedly suffer prejudice as the land was charged when the title of the person sued had been extinguished by operations of the law. The Respondent was said not to have shown how the intended amendment will prejudice him. It was submitted further that the application is based purely on law and that order 8 Rule 3(1) of the Civil Procedure Rules, 2010, enables the court to allow any party to amend pleadings at any stage of the proceedings on such terms as are just.
9. The Respondent's submissions were filed on 23/2/2018. A general overview of the application was given, with emphasis being placed on the history, background and/or antecedents surrounding the case. The Applicants were accused of not being keen to have the matter concluded even after the court gave last adjournment on 2/2/2015. They were further accused of employing all kinds of tactics to delay the matter, with this application being one such tactic. The application was said to be **"made in bad faith"** and **"is clear abuse of the court process calculated to delay the finalization of this case"**.
10. It was reiterated that the application herein is *res-judicata* as the Applicants **"orally applied for leave to further amend their pleadings, which application was rejected ..."**. No new issues were said to be disclosed and as regards the alleged sickness of Fredrick Oduor, the Respondent submitted that no medical records were availed to back it up. The application was said to lack merit and the court was urged to dismiss it with costs.
11. I have had a look at the pleadings in the court file and I have also considered the application, the response made and the rival submissions. It is true that the matter was filed long ago. It is also true that the Applicants sought to effect amendments, were allowed to do so, and infact amended the Originating Summons. But the allegation that there was yet another request to amend is not borne out by court records. The court records of 8/7/2015 when the other request to amend was allegedly made show something different. This being the position, it becomes difficult to agree with the Respondent's counsel that this application is *res-judicata*.
12. Even then, there is some justification regarding allegations of delay made by the Respondent concerning the joinder of the intended second Respondent. The Applicants have been in possession of the copy of land register all along and due care on their part would have seen them enjoin the intended 2nd Respondent during the first amendment or even included that party as a Respondent in the initial filing of the suit. If the court were to be strict, it would agree with the Respondent on this issue. But the approach urged is not one of strictness. The court is always urged to take a liberal approach on issues of amendment and joinder of parties so that the interests of justice are served.
13. The wide powers given to the court to allow amendment are meant or designed to prevent failure of justice due to procedural errors, mistakes or defects. They are intended to make more effective the function of the courts to determine the true substantive merits of a case. Amendments are usually focussed on substance rather than the form and thus free the court from technicality of procedure. The objective is always to ensure that litigation between parties is conducted not on the false hypothesis of the facts already pleaded but rather on the basis of true state of facts or the true relief or remedy which the parties intend to seek.
14. It is because of this that the court may at any time, and on such terms as to costs or otherwise as it may think fit, allow amendment of any defect or error for the purpose of determining the real issues in controversy and to further the interests of justice.
15. Generally, the principles to guide the court are as follows:
- (a) **The amendment should not work injustice to the other side but an injury that can be compensated by way of costs is not treated as injustice.**
 - (b) **Multiplicity of proceedings should be avoided as far as possible and all amendments meant to avoid such multiplicity should be avoided.**
 - (c) **An application which is made malafide should not be allowed.**
 - (d) **No amendment should be allowed if it is expressly or impliedly prohibited by law.**
16. This application is as much about joinder of parties as it is about amendment. Joinder, like amendment, is allowed at any stage of

proceedings. Under Order 1 Rule 10 of Civil Procedure Rules, joinder can take place at any stage of the proceedings provided only (see sub rule 2 thereof) the aim is **“to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit”**.

17. There was a second reason given for seeking amendment. The reason has to do with the sickness of one of the Applicants. This second reasons seems more plausible to me. There was reference to sickness of this party on 8/7/2015. Nobody invites sickness on himself. When it comes, we all need to empathise. It is necessary to allow the Applicants to do what they intend to do. This ground is persuasive to me. The other ground – that of joinder of intended 2nd Respondent – is not very persuasive. I am alive to the fact that leave to amend is not normally granted where the necessity of such amendment was obviously apparent long before trial and was not asked for. That seems to be the position here.

18. But because amendment will be allowed on the ground of sickness of one party, it is only fair that the Applicants are also allowed to effect this other amendment. I consider that the Respondent can be adequately catered for by way of costs.

19. Ultimately then, the application herein is allowed with costs to the Respondent. And I would urge the Applicants side to consider carefully any other need for amendment and do it this time round. I am making this observation because another application for amendment would surely vex the Respondent and also test the patience of the court.

Dated, signed and delivered at Busia this 15th day of May, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

1st Applicant: Absent

2nd Applicant: Absent

3rd Applicant: Absent

4th Applicant: Absent

5th Applicant: Absent

6th Applicant: Absent

Respondent: Absent

Counsel for the Applicants: Present

Counsel for the Respondent: Present

Court Assistant: Nelson Odame