



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 1 OF 2010

CLIVE MUTISO.....PLAINTIFF

VERSUS

JOSEPH NDAMBUKI WAMBUA.....1ST DEFENDANT

LEAH KAKINDU.....2ND DEFENDANT

ANTHONY KAKINDU.....3RD DEFENDANT

RULING

1. In the Notice of Motion dated 13th March, 2018, the Plaintiff is seeking for the following orders:

a. This Honourable Court be pleased to allow and grant leave to the Plaintiff to amend his Plaintiff in the manner proposed in the Amended Plaintiff attached to the Affidavit in support of the instant Application.

b. The proposed Amended Plaintiff be filed and served within timelines to be issued by this Honourable Court.

2. The Application is premised on the grounds that the amendments have arisen as a result of disclosures made by the 2nd Defendant in the course of her testimony during the hearing of the suit; that the proposed amendments are proper and necessary to enable the court determine the real question in controversy between the parties; that the proposed amendments will not prejudice the Defendants and that any prejudice may be remedied by an award of costs.

3. The 2nd Defendant filed Grounds of Opposition in which he averred that the Motion is an afterthought intended to remedy, cure and otherwise correct the Plaintiff's case weakness that have emerged at trial to the prejudice of the 2nd Defendant; that the Application is seeking to substantially and materially alter the Plaintiff's case by introducing new causes of action which were never pleaded and canvassed at the hearing and that the intended causes of action are directed at parties who have not been enjoined in the suit and who will be condemned unheard.

4. In his brief oral submissions, the Plaintiff's advocate submitted that the 2nd Defendant contradicted her earlier Affidavit by saying that she was the registered owner of the suit land; that the 2nd Defendant testified that she was in the process of obtaining a Title Deed and that as a result of the said disclosure, there is need to amend the Plaintiff.

5. The Plaintiff's counsel submitted that a full survey of the land should be undertaken and that the amendments are necessary because in the event the court finds in favour of the Plaintiff, the Plaintiff will be frustrated in the enforcement of the Decree. Counsel submitted that pleadings can be amended at any time before the delivery of Judgment.

6. The 2nd Respondent's counsel submitted that the prayers being introduced in the proposed amendments are new; that the issue before the court is whether the suit land belongs to the 2nd Defendant or her late husband and that the said issue has been covered in the adduced evidence.

7. This matter was commenced by way of a Plaintiff dated 30th December, 2009. In the Plaintiff, the Plaintiff averred that he is the owner of a piece of land measuring 2¼ acres within Muka Mukuu Farmers Co-operative Society in Donyo Sabuk Division. According to the Plaintiff, he bought the suit land from the late Peter Wambua Kakindu in 1991 vide two Agreements that were witnessed by the 2nd Defendant. The Plaintiff sought for vacant possession of the suit land, *mesne profit* and damages for trespass.

8. In her Defence, the 2nd Defendant contended that she is the sole owner of parcel of land known as Plot No. 7-133 and that she rightfully

sold the land to the 1st Defendant.

9. This matter proceeded for hearing. The Plaintiff called a total of six (6) witnesses while the 2nd Defendant was the only witness who testified for the Defence.

10. The Plaintiff is now seeking to amend the Plaintiff after all parties have closed their cases. According to the Plaintiff, the only reason why he wants to amend the Plaintiff is because of the disclosure made by the 2nd Defendant during the hearing of the suit. The proposed amendment reads as follows:

“16A. The Defendants have now evinced that they have already applied for the issuance of Title Deeds which transfers the ownership of the suit property to the 1st Defendant and 2nd Defendants and the Plaintiff reiterates the contents of paragraphs 7 to 11 (inclusive) and avers that any such action is illegal, unlawful and fraudulent and which ought to be reversed by this Honourable Court”

11. Order 8 Rule 3 and 5 of the Civil Procedure Rules provides as follows:

“(3) An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(5) 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 in the suit by the party applying for leave to make the amendment.”

12. Although the court may allow amendments of pleadings at any stage of the proceedings, such amendments are allowed for the purpose of determining the real question in controversy or correcting any defect or error in any proceedings. However, the court cannot be used as a tool of filling up a party’s case by allowing amendments after the matter has been heard. To the extent that the only reason the Plaintiff is seeking to amend the Plaintiff is to counter the evidence that the 2nd Defendant tendered, I disallow the Application.

13. In any event, the 2nd Defendant clearly averred in her Defence that she was the owner of the suit land, and that she was entitled to sell the same to the 1st Defendant. That being the case, the Plaintiff cannot now feign ignorance and claim that the 2nd Defendant changed her version of events while testifying. And even if that is so, the only thing that the Plaintiff can do is to point out the contradiction in the 2nd Defendant’s evidence and pleadings but not seek to amend the Plaintiff.

14. Having heard the suit to completion, it will be prejudicial to the 2nd Defendant for this court to re-open the proceedings by a stroke of a pen. Indeed, the suggestion by the Plaintiff that the Plaintiff should be amended to cover what he ought to have known from the very beginning is not only an abuse of the court process, but is also against the tenets of what a fair trial entails.

15. Consequently, the Notice of Motion dated 13th March, 2018 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF JUNE, 2019.

O.A. ANGOTE

JUDGE