



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT GARISSA

ELC CASE NO. 4 OF 2011

HUSSEIN MOHAMED KULA

HASSAN NUR ABRAHAM

IBRAHIM ALI HUSSEIN (Suing as office

Bearers of the WALKHABANA SELF-HELP GROUP)....PLAINTIFFS

VERSUS

BARISA SHINA ERGATA & 12 OTHERS.....DEFENDANTS

RULING

BACKGROUND

1. The application before me is the Notice of Motion dated 4th April, 2019 seeking to amend a witness statement filed by one Dawata Dilo Ergata in order to strike out the word “Wailwana” and replace with the name “Munyoyaya”. The Applicant/Plaintiff is also seeking a second order to consider the draft amended witness statement of the said Dawata Dilo Ergata duly filed and served upon payment of the requisite court fees. According to the explanation given in the affidavit supporting the said application, the Applicant argued that in his statement, he had identified himself as a member of Wailwana ethnic community which is an erroneous mistake. According to him, he belongs to Munyoyaya ethnic community and not Wailwana ethnic community. He is surprised that he had informed their lawyers on record that he was a member of Wailwana ethnic community. If indeed he ever informed him that, then that was an inadvertent mistake or a slip of the tongue which he is deeply sorry about. He stated that unless that mistake is corrected, it will substantially alter the very foundation of his statement and may therefore render him a stranger to this case and the ethnic community to which he was born into.

2. He further deponed that the Respondents will not be prejudiced if the said amendment is allowed since their lawyers will be at liberty to cross-examine him concerning his roots.

RESPONDENTS CASE

3. In reply to the said application, the Respondents instructed one Hassan Nur Abdirahman who filed a replying affidavit opposing the application. According to the Respondents, the Applicant’s application is a non-starter, incompetent and an abuse of the court process.

4. The Respondent contend that the application is baseless as the applicant has not shown any justifiable reason(s) upon which the orders should be granted.

5. The Respondents also argued that Dawata Dilo Ergata’s affidavit sworn on the 4th April, 2019 does not fall within the ambit of Article 159 of the Constitution of Kenya, 2010 on procedural technicalities. The Respondents further contend that this application is aimed at introducing new evidence which never existed before and that the Plaintiffs would not have an opportunity to rebut any new evidence having testified and tendered their evidence.

DISPOSITION

6. I have considered the application and the supporting affidavit. I have equally considered the replying affidavit and the submissions by the parties including the applicable law. A statement under the Black’s Law Dictionary, tenth Edition is defined as follows:

“1. Evidence- A verbal assertion or non-verbal conduct intended as an assertion.

2. A formal and exact presentation of facts. Also termed (for plaintiff) statement of cause of action.

3. Criminal Procedure- An account of a person’s knowledge of a crime, taken by the police during their investigation of the offence of confession.

4. Statement of the case.”

7. Order 7 Rule 5 reads as follows;

“Documents to accompany defence or counterclaim (Order 7, Rule 5). The defence and counterclaim filed under Rule 1 and 2 shall be accompanied by:

(a) An affidavit under Order 4 Rule (2) where there is a counterclaim;

(b) Written statements signed by the witnesses except expert witnesses; and

(c) Copies of documents to be relied on at the trial.”

8. A statement as defined above is a non-verbal conduct intended to be an assertion. It is filed alongside a statement of defence. It forms part of the pleadings which can be amended subject to amendment under the Civil Procedure Rules.

9. The enabling provisions of the law is found in Order 8 Rule 5 (1) Civil Procedure Rules which grants courts general powers to amend pleadings as follows;

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either in its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

10. In the case of **Eastern Bakery –Vs- Castelino (1958) EA 461**, Sir Kenneth O’ Connor P. espoused some of the principles on amendment of pleadings as follows:

“...it will be sufficient, for the purposes of the present case, 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....The court will not refuse leave to allow and amendment simply because it introduces a new case.....But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit.... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment eg by depriving him of a defence of limitation accrued since the issue of the writ.”

11. Again in Mulla the code of Civil Procedure, 8th Edition, Vol.2 at pages 1751-1752 sets out the following useful guidelines when dealing with amendments of pleadings;

“ on the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with applications for amendment of the pleadings;

(i) All amendments should be allowed which are necessary for determination of the real controversies in the suit.

(ii) The proposed amendments should not alter and be a substitute of the cause of action on the basis of which the original list was raised;

(iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment.

(iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

(v) Amendment of a claim or relief barred by time should not be allowed.

(vi) No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of times;

(vii) No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

(viii) The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

(ix) Error or mistake which is not fraudulent, should not be made a ground for rejecting the application for amendment of pleadings.”

12. I entirely agree with decision of the learned Judges which is binding on this court and the commentaries by the Learned Author. What the applicant seeks to amend is said to be a mistake/error in his own witness statement which the Respondent will have an opportunity to cross-examine the witness on the same. The Respondents in my respective view can also be compensated by way of costs.

13. In the final analysis, I find the Notice of Motion dated 4th April, 2019 merited and the same is hereby allowed as prayed subject to the applicant paying the requisite court filing fees for the amended witness statement within 7 days from today. The Applicant/Defendant will also pay the Plaintiffs costs for this application which I hereby assess at Kshs.5,000/= within seven (7) days from today.

14. It is so ordered.

Read, delivered and signed in the Open Court this 20th day of June, 2019.

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E. C Cheronno (Mr.)

ELC JUDGE

In the presence of:

1. Mr. Onono

2. Mr. Ombati

3. Amina-Court Clerk