REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 161 OF 2017

BENJAMIN WACHIA KONA.....PLAINTIFF/APPLICANT

VERSUS

MATO TALAI

WEST KENYA SUGAR FACTORY

DIOCESE OF KAKAMEGA

ST. BENJAMIN MACHEMO PRIMARY SCHOOL.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 21st May 2019 and is brought under Section 1A, 1B, 3, 3A, 18, 63 (e), 75 (1) (h) and 79G of the Civil Procedure Act, Order 42 Rule 6 of the Civil Procedure Rules seeking the following orders:-

1. That the applicant be granted leave to amend the plaint herein.

2. That the draft amended plaint annexed hereto be deemed duly filed upon payment of requisite fees.

The applicant submitted that he filed this suit in hurry and he had not collected all documents pertaining to this suit. That he has now received all documents that pertain to this suit and want to amend his plaint to reflect the true picture of the dispute herein. That the respondents will not be prejudiced by the intended amendment. That it is in the interest of justice that the orders sought herein be granted.

The 2nd defendant opposed the plaintiff's application dated 28th May, 2019 on the grounds that the proposed amendments to the plaint do not accord with the original plaint. Plaintiff's written statement, list of issues and reply to defence which documents have not been recalled for amendment. The intended amendment is not backed by any cogent and/or factual evidence. The plaintiff has not demonstrated the discovery of any new facts that were not at his disposal or discoverable with due diligence at the time of his institution of the suit. The application is brought on false hypothesis of facts that are non-existent. The delay in bringing the application has caused the 2nd defendant serious prejudice due to the case hanging over its head for a long time and the costs incurred in defending the matter. The delay in bringing the application for amendment is inordinate, unexplained and inexcusable. The application is not instituted in a manner to invoke this court's exercise of its discretionary powers to amend pleadings. The application is frivolous, incompetent, misconceived and a blatant abuse of the court process.

This court has considered applications and the submissions therein. It is grounded on the annexed affidavit of Benjamin Wachia Kona, the applicant and the following grounds that there is need to amend the plaint to bring out real issues in dispute. That the respondents will not be prejudiced by the amendment sought. That only this honourable court has powers to grant the orders sought. In the case of AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR, the court cited the principles for amendment as set out by the Court of Appeal in Central Kenya Ltd Case No. 222 OF 1998 as shown below:-

(i) That are necessary for determining the real question in controversy.

(ii) To avoid multiplicity of suits provided there has been no undue delay.

(iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.

(iv) That no vested interest or accrued legal rights is affected; and

(v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

It is quite clear from decided cases that the discretion of a trial court to allow amendments of a plaint is wide and unfettered except is should be exercised judicially upon the foregoing defined principles.

In the case of Isaac Awuondo vs Surgipharm Ltd & Another (2011) eKLR the Court of Appeal had the following to say:

In Moi University v Vishva Builders Limited - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

> *"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-*
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> *"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "* a triable issue*" that is an issue which raises a prima facie defence and which should go to trial for adjudication."*

I have perused the proposed amended plaint and find the amendments are with regard to the description of the suit parcels of land in question and the acreage. I see that no prejudice will be suffered by the parties should the amendment be allowed. I take note that this application was filed on the 1st July 2019, be that as it may, it is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated 28th May 2019 is merited and I grant the same as prayed. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 24TH SEPTEMBER 2019.

N.A. MATHEKA

JUDGE