REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 239 OF 2016

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF/APPLICANT

VERSUS

BONIFACE SHIBIRA

TATU MBASU

MATHEW SAMAKI

SAMMY SILAS KOMEN MWAITA

JUDITH MARILYN OKUNGU

VIOLET MERAB SONGA

EUDENE HARRY SONGA

EUNICE JEANTTE SONGA.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 27th June 2019 and is brought under Order 1 Rule 10 and Order 3 Rule 3 and 8 of the Civil Procedure Rules seeking the following orders;

(a) The honourable court be pleased to grant leave to the plaintiff to join Violette Merab Songa, Eugene Harry Songa and Eunice Jeanette Songa as defendants in the suit.

(b) The honourable court be pleased to grant leave to the plaintiff to amend its plaint in terms of the annexed amended plaint.

(c) The costs of this application be provided for.

It is supported by the affidavit of Koskey Robert Kimutai Bii filed in support of this Notice of Motion and on the grounds that, it is necessary to join the Violete Merab Songa, Eugene Harry Songa and Eunice Jeanette Songa as defendants in this suit to enable this court to eventually adjudicate upon and settle all questions in controversy once and for all. Leave of court is required to amend the plaint since the pleadings have closed. It is necessary to amend the plaint to enable the court to eventually and completely adjudicate upon and settle all questions related to the suit. This honourable court be pleased to give leave and adopt the amended plaint filed on 8th May, 2019. The suit is yet to be fixed for hearing. The current defendants will not suffer any hardship or prejudice if the application is allowed.

The 2nd and 3rd defendants/respondents opposed the application dated 27th June, 2019 on the grounds that the order of 23rd May, 2018 did consolidated this case with Kakamega HC ELC No. 239 of 2016 thus all the defendants are on board. That on the 6th May, 2019, the applicant was granted time to file and serve an application for leave to amend, and the same be heard on 21st May, 2019, the applicant failed to comply. That the 2nd and 3rd defendants moved the court on 21st May, 2019 and fixed this matter for hearing for 4th July, 2019 when it was evident the plaintiff was not acting in good faith. That the applicant was granted the last adjournment. That this case has been pending since 2009, a period of 10 years, and the plaintiff has failed to have it take off as all the adjournments have been at the plaintiff's instance. That the plaintiff has never been keen to have this case take off. That no new issue has been raised in the intended amendment. The

application is a clear abuse of the court process, is calculated to prejudice and embarrass the defendants. That the application lacks merit. The 2nd and 3rd defendants prays that the application be dismissed with costs.

This court has considered the application and the submissions therein. Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA NO. 222 OF 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

> *"all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."*

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. Be that as it may, the court order of 23rd May, 2018 did consolidated this case Kakamega HC ELC No. 154 of 2015 with Kakamega HC ELC No. 239 thus all the defendants are on board. On the issue of amendment of pleadings In the case of AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR, the court cited the principles 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 parties and prayers sought. I see that no prejudice will be suffered by the parties should the amendment be allowed. I take note that this matter was filed in 2009, 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 is dated 7th May 2019 is merited in terms of prayer (b) 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