



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KAJIADO

MISCELLANEOUS APPLICATION NO. 144 OF 2017

IN THE MATTER OF LAND DISPUTES TRIBUNAL ACT 18 OF 1990

AND

IN THE MATTER OF LAND DISPUTES TRIBUNAL CASE NO. TC661/07/2011 AT KAJIADO

AND

IN THE MATTER OF SENIOR RESIDENTS MAGISTRATES COURT CASE NO.99 OF 2011

AND

IN THE MATTER OF SECTIONS 45 LAWS OF SUCCESSION CAP 160 LAWS OF KENYA

IN THE MATTER OF ARTICLE 150, 159 AND 15 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION OF JUDICIAL REVIEW ORDER 53 RULE 1

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

BANJAMIN MAORA.....1st RESPONDENT

THE KAJIADO CENTRAL LAND DISPUTE TRIBUNAL...2nd RESPONDENT

THE HONORABLE ATTORNEY GENERAL.....3rd RESPONDENT

AND

PHILIP MAORA.....1st INTERESTED PARTY

NTOROS MAORA.....2nd INTERESTED PARTY

TIMAYIO MAORA.....3rd INTERESTED PARTY

LASITI MAORA.....4th INTERESTED PARTY

TAJEU MAORA.....5th INTERESTED PARTY

RULING

What is before Court for determination is the Notice of Motion dated the 26th February, 2019 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act; Order 8 Rule 3 and Order 51 Rules 1 and 4 of the Civil Procedure Rules. The Applicant seeks the following orders:

1. THAT leave be granted to the applicants/interested parties herein to amend the ex-parte Chamber Summons Application dated 18th November, 2011 and filed herein on 20th November 2011.
2. THAT the costs of this application be provided for.

The application is premised on the summarized that there is need to amend the ex parte Chamber Summons herein in order to clarify and bring all parties and issues properly before court. That there have been fundamental issues which were not addressed in the original application that ought to have been brought to the attention of the court so that it may adjudicate on all the matters in controversy and determine the suit quickly and conclusively. The present application does not introduce any new fact and has been filed on bona fide grounds. Further, no prejudice will be caused to the Respondents' if the application is allowed.

The application is supported by the affidavit of PHILIP MAORA, who is one the Interested Parties' where he reiterates his claim above and avers that present application for amendment does not introduce any new fact and is purely technical in nature. He contends that the application should be allowed to assist the Court to effectively determine the issues surrounding this suit on true substantive merits.

The application is opposed by the 1st Respondent who filed Grounds of Opposition where he contends that the Land Disputes Act No. 18 of 1990 and the Tribunal established thereunder ceased to exist. Further, that the Judicial Review Order of Certiorari ought to have been made within six months of the Land Dispute Tribunal Award dated the 15th September, 2011 and heard within 90 days as ordered in the Fair Administrative Actions Act. He claims there has been inordinate and inexplicable delay since 18th November, 2011 in seeking leave to amend the Chamber Summons filed on 18th November, 2011. The Intended amendment is not annexed and the Court is left guessing. Further, Interested Parties/Applicants lack locus standi to institute this suit as they do not hold a Grant of Letters of Administration to the estate of Maora Ole Lolpisia. He insists the Interested Parties failed to comply with the Court Order of 27th September, 2018 and have no audience before the Court.

The applicant filed submissions, which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application including the supporting affidavit, Grounds of Opposition and submissions, the following are the issues for determination:

- i) Whether the Applicants/interested parties herein should be granted leave to amend the ex-parte Chamber Summons dated the 18th November, 2011 and filed herein on 20th November 2011
- ii) Who should bear the Costs of this Application

As to whether the Applicants/interested parties herein should be granted leave to amend the ex-parte Chamber Summons dated the 18th November, 2011 and filed herein on 20th November 2011. I note the Chamber Summons dated the 18th November, 2011 and filed on 20th November, 2011 mainly sought for leave to institute judicial review orders of Prohibition and Certiorari with the leave sought to operate as a stay against the ruling of the Kajjado Central Land Dispute Case Number 661/07/2011 and subsequently proceedings in Land Dispute Case Number 99 of 2011.

The applicants submitted that he is entitled to the Orders sought and relied on the following cases: **AAT HOLDINGS LIMITED –VS- DIAMOND SHIELDS INTERNATIONAL LTD (2014) eKLR; MARTIN WESULA MACHYO –VS- HOUSING FINANCE COMPANY OF KENYA LIMITED & ANOTHER (2015) eKLR; CENTRAL KENYA LTD –VS- TRUST BANK LTD APPEAL NO. 222 OF 1998. TULIP PROPERTIES LTD –VS- MOHAMMED KORIOU & 6 OTHERS (2013) eKLR; and TIMOTHY NDALO OTIENDE –VS- JOSHUA A. OSEWE KISUMU HCCA NO. 73 OF 1996; DANIEL NGETICH & ANOR –VS- K-REP BANK LIMITED (2013) eKLR where he cited EASTERN BAKERY –VS- CASTELINO (1958) EA 46; KASSAM – VS- BANK OF BARODA (Kenya) Ltd (2002) IKLR 296; HIRAM BERE KINUTHIA & ANOR –VS- EDICK OMONDI & 3 OTHERS (2014) eKLR;** to support his arguments. Further, on the issue of costs, the Applicant submitted that awarding of costs is the discretion of the court but they generally follow the event. He relied on the cases of **REPUBLIC –VS- ROSEMARY WAIRIMU EXPARTE APPLICANT –V- S IHURURU DAIRY FARMERS CO-OPERATIVE SOCIETY (Judicial Review Application No. 6 of 2014); PARTY OF INDEPENDENT CANDIDATE KENYA –VS MUTULA KILONZO & 2 OHTERS HC EP NO. 6 of 2013 and JUSTICE KULOBA IN JUDICIAL HINTS ON CIVIL PROCEDURE 2ND EDITION PAGE 101** to buttress his arguments.

Order 53 rule 1 of the Civil Procedure Rules provides that Applications for mandamus, prohibition and certiorari to be made only with leave. Order 8, rule 5 of the Civil Procedure Rules provides that: **' (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of 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. (2) This rule shall not have effect in relation to a judgment or order.'**

Further, section 100 of the Civil Procedure Act provides that: **'The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.'**

In the case of *AAT Holdings Limited v Diamond Shields International Ltd* [2014] eKLR' the Learned Judge while dealing with an application for amendment observed as follows: ' Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in *CENTRAL KENYA LTD v APPEAL 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.'*

Further, the Court of Appeal in the case of *Central Kenya Limited vs Trust Bank Limited* [2000] 2 EA 365 outlined the principles for amendment of pleadings as follows:

“A party is allowed to make such amendment as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued right is affected and that the amendment can be allowed without injustice to the other side.”

In the current scenario, the Applicants are seeking leave to amend an application for leave to institute judicial review proceedings that has been pending for about eight (8) years. The Applicants have not annexed a draft of the proposed amendments. As a Court, I am unable to decipher whether the said proposed amendments would be prejudicial to the Respondents or not. Further, it is not clear if the proposed amendments will enable the court to determine the real questions in controversy. From the Applicants averments, they have not offered any explanation as to why there was a delay of almost eight (8) years to seek an amendment to the Application for leave. I note that on 27th September, 2018, the Court had directed the Applicants to set their application for leave for hearing within 21 days from the said date, which they failed to do.

In associating myself with the two cited decisions, I am unable to grant the orders of amendment sought by the Applicants.

In the circumstances, I find the instant application unmerited and will proceed to dismiss it with costs

Dated signed and delivered in open court at Ngong this 24th day of September, 2019.

CHRISTINE OCHIENG

JUDGE