



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 32 OF 2018

(Formerly Kisumu ELCC No. 31 of 2006)

NAFTALI ADUGO NYATINDO.....PLAINTIFF

VERSUS

JOEL OYOKO OKENO.....1ST DEFENDANT

SHADRACK BONDERI.....2ND DEFENDANT

IBRAHIM OKOMO BARASA.....3RD DEFENDANT

WELLINGTON MAJUANGA OKEMBI.....4TH DEFENDANT

RULING

1. On 21st July, 2018, the 1st defendant (applicant) through the firm of M/s. Oguttu, Ochwangi, Ochwal and Company Advocates filed an application dated 23rd July, 2019, under Order 8 Rule 3 and Order 51, Rules 1,2 and 4 of the Civil Procedure Rules 2010, as well as Sections 1A, B,3, 3A and 63 (e) of the Civil Procedure Act (Cap 21). He is seeking the following orders:-

a) The Honourable court be pleased to grant leave and/or liberty to the 1st defendant/applicant to amend the statement of defence dated 4/4/2006 and lodged in court on the 8th March 2006 so as to include and/or incorporate a counter claim.

b) Consequent to prayer (a) hereinabove being granted, the draft amended statement of defence and counterclaim annexed herewith, be deemed as duly filed and served, upon payment of requisite court fees.

c) Costs of this application do abide the cause.

d) Such further and/or other orders be made as the court may deem fit and expedient.

2. The application is anchored on the applicant's supporting affidavit sworn on 23rd July 2019 together with annexed documents marked as "JOO1 (a), 1 (b) and 2" namely sale of land agreement made on 13th October 2004, sale of land agreement form and 1st defendant/applicant's draft amended statement of defence and counterclaim respectively. The applicant averred, inter alia, that his previous advocate did not conduct due diligence to bring on board all issues pertaining his interest in the suit property for an effective and effectual determination once and for all. That the intended amendment is calculated to bring the issues on board to avoid a multiplicity of suits and that the application has been made timeously, in good faith and with due promptitude. The suit property comprise of land parcel numbers 942,943, 944 and 945 at Kikongo market in Muhuru Bay, Migori County.

3. The application is further anchored on 17 grounds on it's face and the same include that:-

i. The instant suit touches and/or concerns the illegal claim by the plaintiff/respondent on the suit property which property was developed by the 1st defendant/applicant as soon as the same purchased the said property in October 2004.

ii. Consequently, it is imperative that the statement of defence lodged in court on the 8th March 2008 be amended to include a counterclaim.

iii. The intended amendment shall be in the interest of both parties.

iv. Unless the instant application is allowed, the 1st defendant/applicant would be precluded from ventilating and /or canvassing the entire case.

4. The plaintiff (respondent) was previously represented by Rogo, Okelloh, Wangari and Company Advocates. He acts in person further to notice dated 20th December 2018 and filed on 22nd January 2019. He was duly served and he appeared in court on 24th January 2019, 20th February 2019 and 1st April, 2019 when he was given an opportunity to respond to the application. He neither filed any response to the application nor submitted on the same.

5. Learned counsel for the applicant filed submissions dated 18th February 2019 whereby reference was made to the orders sought in the application. Counsel identified and analysed two (2) issues for determination namely;-

a) Whether the Honourable court can grant leave to amend the statement of defence and counter-claim dated 4th of March 2006.

b) Whether the 1st defendant/applicant's application has satisfied the condition to warrant granting such leave.

6. Counsel cited **Order 8 Rule 3 (supra)** under which the application is brought and **Article 50 (1) of the Constitution of Kenya, 2010** on the court's discretion to allow a party to amend pleadings and right to fair hearing respectively. To buttress the submissions, counsel relied on three (3) authorities namely **Cropper –vs- Smith (1884) 26 ch. D 700 (CA)**, **Central Kenya Ltd –vs- Trust Bank Ltd and 5 others (2000) eKLR** and **Harrison C. Kariuki –vs- Blue Shield Insurance Company Ltd (2006) eKLR**.

7. I have examined the entire application and the submissions thereon. The issues to resolve at this stage are the ones framed in the applicant's submissions which I embrace accordingly.

8. The application is brought under, inter alia, **Order 8 rule 3 (supra)** which provides that :-

1. "Subject to Order 1, rules 9 and 10, Order 24, rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.."

2. Where an application to the court for leave to make an amendment such as is mentioned in sub rules (3),(4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do" (Emphasis laid)

9. Quite clearly, it is within the court's discretion to allow the applicant to amend his pleadings at any stage of the proceedings. The central aim is to meet the ends of justice.

10. Moreover, **section 3A of the Civil Procedure Act (Cap 21)** provides that the court's discretion is exercised always for the purposes of upholding the law as far as is possible; see **Oraro –vs- Mbaja (2005) 1 KLR 142 at 149 and 150**.

11. **Articles 50 (1) (supra)** as read with **Article 25 (c) of the Constitution of Kenya, 2010** provides for the uncurtailed right to fair hearing. The respondent was given an opportunity on various dates as noted in paragraph 4 hereinabove to ventilate his issues to the application. However, he failed to utilize the opportunity or at all.

12. **Article 159 (2) (a) and (b) of the Constitution of Kenya, 2010** requires justice to be administered irrespective of status and that the same shall not be delayed respectively. The instant suit is a very old matter which calls for expeditious hearing and determination irrespective of the status of the parties herein.

13. The applicant has demonstrated by his supporting affidavit and grounds 1 to 17 of his application as well as in submissions that he is entitled to file and serve his amended pleadings in order to meet the ends of justice. I do bear in mind the overriding objective under **section 3 of the Environment and Land Court Act, 2015 (2012)** applicable herein. Therefore, I find the instant application unchallenged and meritorious.

14. The net effect is that the application dated 23rd July, 2019 by the applicant is hereby allowed in terms of orders 1, 2, and 3 sought therein.

15. It is so ordered.

DATED and SIGNED at MIGORI this 16th day of September 2019.

G.M.A. ONGONDO

JUDGE

In the presence of:

Mr. D. Adawo, learned counsel for the 1st and 2nd defendants

