



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 185 OF 2018**

**ALBERT OMARI .....PLAINTIFF**

**VERSUS**

**JOSEPH MBOYA AWINO (Suing as an executor to the  
estate of the late Patricia Schield).....DEFENDANT**

**RULING**

What is before Court for determination is the Defendant's Application dated the 3<sup>rd</sup> April, 2019 brought pursuant to Order 8 Rule 3 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act. The Applicant seeks leave to amend the Defence and file a Counterclaim. The Application is premised on the grounds that the material evidence to be adduced as per the Amended Defence will enable Court have all the facts and determine the matter in a just manner. The funds and the property bought with the said funds are in contention. The materials and facts to be included were not deliberately left out. Further, no prejudice will be suffered by the Plaintiff.

The Application is supported by the affidavit of the Defendant JOSEPH AWINO who is an Advocate of the High Court of Kenya as well as the executor of the Will of the late Patricia Schield. He contends that the Plaintiff caused the title number Kajiado/ Kaputie North/ 14766 to be fraudulently registered in his name. He claims that based on the documents submitted by the Plaintiff, the late Patricia Schield whose funds were used to purchase the said land actually lodged a caution upon learning of the fraud in 2005. He contends that she left it to the executor and her son Branden Schield to recover her property and money that was wrongly and fraudulently taken away from her. He insists the details of the funds in the matter is material and that in the period of about 8 months, the Plaintiff spent Kshs. 8.8 million of Patricia Schield's money without her consent including authority. He explains that the Plaintiff registered the title to the suit premises in his name although the funds were solely from account No. 013 – 0140XXXXXX Kenya Commercial Bank, City Centre Branch which belonged to the deceased with the Plaintiff only being a Trustee. He reiterates that it is necessary to amend the Defense to bring all players and all facts in controversy to light as well as to lodge a Counterclaim.

The Plaintiff had not filed an affidavit to oppose the instant application. The Defendant has filed submissions that I have considered.

The only issue for determination is whether leave should be granted to the Defendant to amend the Defence and include a Counterclaim.

Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provide 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 subrule (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 subrule if it thinks just so to do.'**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **'(1) For purposes 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.'**

**In the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR, the Court of Appeal in dealing with issues of amendment held a follows: 'The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-**

**"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be**

**exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”**

In the current scenario, I note the Defendant who is the executor of the deceased Will seeks to bring to fore certain information in respect of acquisition of the suit land, which is in dispute herein. As a Court, I opine that it is pertinent for all parties to present all facts in respect of a dispute to enable it make a proper determination on the true, substantive merits of the case. Since the Plaintiff failed to file a replying affidavit to oppose the instant application and in relying on the legal provisions certain above as well as associating myself with the quoted authority, I find the said application merited and will allow it.

I grant the Defendant leave of 14 days to file and serve the Amended Defence and Counterclaim. Upon service, I grant the Plaintiff leave of 14 days to file and Serve an Amended Plaint and Defence to Counterclaim if need be.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 14<sup>th</sup> day of October, 2019**

**CHRISTINE OCHIENG**

**JUDGE**

**IN THE PRESENCE OF:**

Court Assistant Mpoye

Both parties absent