



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 462 OF 2016

MICHAEL THIONGO GATETE..... PLAINTIFF/APPLICANT

VERSUS

JAMES ONTONYI

BEATRICE ONTONYI

MACHUKA ONTONYI.....DEFENDANTS/RESPONDENTS

RULING

INTRODUCTION

1. By a Notice of Motion dated 15th July 2019 brought pursuant to the provisions of Order 8 rule 2 (b) and Order 51 Rule 1 of the Civil Procedure Rules as well as Section 1A, 1B and 3A of the Civil Procedure Act, the Plaintiff/ Applicant seeks leave to amend his Plaint. The main reason for the application is that there are new and critical facts that have arisen pertaining to his case which he wishes to include in his pleadings in order for the court to completely and fairly adjudicate on the real issues in controversy.

2. The application is anchored on the applicant's supporting affidavit sworn on the 15th July 2019 to which he has annexed the draft amended Plaint. In the said affidavit he depones that at the time of filing suit, there was a pending case that had been filed at the Kiogoro Land Disputes Tribunal which was decided in favour of the Defendants on 10.11.2011. Being aggrieved by the said decision, the applicant subsequently filed an application for Judicial Review to quash the said decision. The decision was quashed by this honourable court on 10th November 2017. The said decision materially alters the plaintiff's case, a fact which is important to bring to the court's attention.

3. The application is opposed by the Defendants through the Replying Affidavit of James Ontonyi Mabeya, the 1st Defendant herein, sworn on his own behalf and on behalf of the 2nd and 3rd defendants. In the said affidavit he depones that the application is a delaying tactic intended to further delay the hearing of this matter which has been pending in court since 2011. He further depones that there has been inordinate delay in filing this application and the orders sought will prejudice the defendant's case.

4. The application was canvassed by way of written submissions and both parties filed their submissions which I have considered.

ISSUE FOR DETERMINATION

5. The singular issue for determination is whether the Plaintiff ought to be granted leave to amend his Plaint.

ANALYSIS

AND

DETERMINATION

6. The principles that should guide the court in dealing with applications for amendment of pleadings are elaborated in **Mulla, the Code of Civil Procedure, 18th Ed, Vol 2 pages 1751-1752** which has been cited in various authorities including the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR** where the Court held as follows:

- i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original suit was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact

would not be allowed to be incorporate by means of amendments;

iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;

v. Amendments of a claim or relief barred by time should not be allowed;

vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time

vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties

viii. The delay in filing the petitions for amendment should be properly compensated by costs

ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”

7. In the case of **Joseph Ochieng & 2 Others V Frist National Bank of Chicago Civil Appeal No. 149 of 1991** the Court of Appeal while citing with approval Bullen, Leake & Jacobs in Precedents of Pleadings, 12th Edition remarked regarding amendment of pleadings as follows:

“The power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); 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 if the proposed amendment introduces 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 would more conveniently be made the subject of a fresh action..”

8. I am further guided by the case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR, where a 3-judge bench of justices** Lenaola, Mumbi and Majanja while determining whether to allow the petitioner to amend their consolidated petitions observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

9. From the foregoing it is clear that the court has a wide discretion in dealing with an application to amend pleadings unless the other side is able to demonstrate that they would seriously be prejudiced by the proposed amendment. The Defendants’ Replying Affidavit does not disclose any serious prejudice that they will suffer if the application is allowed.

10. Having carefully considered the application, affidavits, pleadings and submissions of counsel as well as the law on amendment of pleadings, and also mindful of the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes, I am of the view that the application is merited and I grant it.

11. I further direct that draft amended plaint attached to the 1st defendant’s supporting affidavit be deemed as duly filed upon payment of the requisite court fees.

The Plaintiff shall however bear the costs of the application.

Dated, signed and delivered at Kisii this 13th day of November 2019.

J.M ONYANGO

JUDGE