



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 353 OF 2013

VINCENT GATIMU GITAKU.....PLAINTIFF

VERSUS

CHARITY WANGECHI NGARI.....DEFENDANT

RULING

This is a ruling from the Notice of Motion application dated 1st March 2019. In that application, the applicant sought the following orders:

(1) That this Honourable Court be pleased to grant the plaintiff/applicant leave to amend his Originating Summons dated 6th June 2008.

(2) Costs be provided for.

The said application is supported by the affidavit of the plaintiff/applicant and grounds shown on the face of that application. The application is opposed with a Notice of Preliminary Objection dated 25th March 2019.

APPLICANT'S CASE

The applicant stated that on 12th June 2008, he filed this suit against the defendant claiming 0.6 acres out of land parcel No. BARAGWI/KARIRU/186. He stated that he has been in occupation of 1 acre out of the suit land. He contends that the suit land was a subject of Succession Cause No. 237 of 1997 before the Senior Resident Magistrate (Kerugoya). The Court awarded him one acre out of the suit land. He attached a copy of the judgment in the alleged case.

He further stated that when he filed this suit, he was under the impression that the defendant was still ready and willing to give him the 0.414 acre portion as she had earlier applied in Succession Cause No. 237 of 1997.

He stated that on 6th May 2008, the confirmed grant was set aside by the High Court in Civil Appeal No. 44 of 2003. He stated that she has learnt from the defendant's documents and her statement filed in Court on 4th December 2018 that she is not willing to give him anything despite having been in occupation and possession of a portion of the suit land measuring 1 acre for more than 12 years since 1959. The applicant wishes to amend the Originating Summons to claim the 1 acre he has been occupying instead of 0.6 acres. He argues that the respondent shall not suffer any prejudice if the orders sought are granted.

RESPONDENT'S CASE

The respondent filed a Notice of Preliminary Objection in which she contends that the proposed amendment is likely to prejudice her as it will deny her the legitimate defence of limitation which she has already pleaded, filed and served over 10 years ago. The respondent also argued that the proposed amendment intends to introduce a new cause of action based on facts previously pleaded in is Originating Summons dated 6th June 2008.

LEGAL ANALYSIS

I have considered the application and the legal arguments by the parties. I have also considered the applicable law. The legal foundation for amendment of pleadings is by dint of the provisions of **Order 8 Rule 3 CPR** which provides that the Court may allow amendment of pleadings at any stage of the pleadings. The principles that guide the amendment of pleadings was set out by the Court of Appeal in the case of **Central Kenya Limited Vs Trust Bank Limited (2002)2 E.A. 365** where it was held as follows:

“A party is allowed to make such amendments 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 legal right is affected and that the amendment can be allowed without injustice to the other side”.

Again in the case of *Institute for Social Accountability & another Vs Parliament of Kenya & 3 others (2014) e K.L.R*, it was held as follows:

“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”.

I entirely agree with the holding by the Court in the two decisions. In applying the foregoing principles to the instant case, the applicant has explained that the proposed amendment has been necessitated by the fact that the respondent in her summons for confirmation in Succession Cause No. 237/1997 had applied that the applicant be given 0.414 acres out of the suit land. When he filed the instant suit, he was under the impression that she was still ready and willing to give him the alleged 0.414 acre as she had applied earlier. He contends that from the pleadings and list of documents filed in this case, the applicant has changed her mind and is not at all willing to give him any portion of the suit land despite having been in possession and occupation of a portion of the suit land for more than 12 years.

The respondent has objected to the amendment by stating that the proposed amendment if allowed will be prejudicial as it will deny him his legitimate defence of limitation which she has already pleaded. Looking at the defendant’s replying affidavit, affidavit sworn on 20th August 2008, I find that the proposed amendment does not in any way change the action into one of substantially different character. The applicant only seeks to alter the acreage of land from 0.6 acre out of the same parcel number BARAGWI/KARIRU/186 from the original acreage to 1 acre.

Faced with a similar dispute as in the present case, the learned Judge in the case of *Eastern Bakery Vs Castelino (1958) E.A. 462* held at page 462 as follows:

“The Court will not refuse to allow an amendment simply because it introduces a new case The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ”

I agree with the above decision. Suffice to say that on the circumstance of this case, the respondent will not be prejudiced if the application is allowed as he will have the opportunity to respond to the amendment if they so desire. The sum total of my finding is that the Notice of Motion dated 1st March 2019 is merited and the same is allowed as follows:

(1) The plaintiff/applicant is granted leave to file the Originating Summons in terms of the draft annexed to the Notice of Motion dated 1st March 2019 within 7 days from today.

(2) The defendant/respondent is also granted corresponding leave to file a further affidavit in response thereto within 14 days from the date of service of the amended Originating Summons.

(3) The plaintiff shall bear the costs of this application in any event.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 8TH DAY OF NOVEMBER, 2019.

E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019

In the presence of:

- 1.M/S Kiai holding brief for Kathungu for the Plaintiff/Applicant
- 2.Mr. Asimwe holding brief for Njagi for the Defendant/Respondent
- 3.Mr. Kabuta – Court clerk – present

M/S KIAI

We can take a date to confirm compliance.

COURT – By consent of the parties, mention on 23rd January 2020.

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E.C. CHERONO

ELC JUDGE

8TH NOVEMBER, 2019