



**REPUBLIC OF KENYA**

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

**ELC NO. 244 OF 2016**

**JONATHAN MAHUGI ODERA (suing as the grandson and legal representative of the estate of)**

**ROIDA KIHANGA (DECEASED).....PLAINTIFF**

**VERSUS**

**JOHNSTONE OGADA VIKIRU.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR VIHIGA COUNTY.....2<sup>ND</sup> DEFENDANT**

**HON ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

This first application is dated 11<sup>th</sup> October 2017 and is brought under order 80 rules 3 (1) & 5 (1) of the Civil Procedure Rules seeking the following orders;

1. That honourable court may be pleased to grant leave to the 1<sup>st</sup> defendant to amend his defence in terms of the draft attached to the affidavit in support hereof.
2. That the draft amended defence be deemed duly filed upon payment of court fees.
3. That costs be in the cause.

The applicant submitted that, that he filed his defence herein in person on 23/12/2016. That he needs to amend his said defence to include a defence of limitation of actions. That the amendment sought does not occasion any prejudice to the plaintiff. That only the honourable court has powers to grant the orders sought in order to meet the ends of justice and so as to determine all the real questions in dispute between the parties. He annexed a draft amended defence marked "JOV OO1".

The second application is dated 19<sup>th</sup> October 2017 and is brought under order 40 of the Civil Procedure Rules and section 63 of the Civil Procedure Act seeking the following orders;

1. That this suit be and is hereby consolidated with KAKAMEGA Environment and Land Case No. 163 of 2016.
2. Costs.

It is supported by the sworn affidavit of JONATHAN MAHUGI ODERA and based upon the following grounds. That the subject matter in this suit and in KAKAMEGA ELC No. 163 of 2016 is land parcel

number KAKAMEGA/BUGONDA/2069. The parties in both suits are the same. That both suits are pending for hearing and determination before this court. That it is trite law that the two suits be consolidated for hearing and determination. That no prejudice will occasion to the defendants if the orders sought are granted.

The 1<sup>st</sup> defendant with regard to his application dated the 11<sup>th</sup> October, 2017 seeking leave to amend his defence herein filed on the 22<sup>nd</sup> December 2016 submitted that, the dispute concerns the ownership of land title number KAKAMEGA/BUGONDA/2069 and the 1<sup>st</sup> defendant wishes to include in his defence, the defence of limitation of time. The application is brought under Order 8 Rule 3 (1) & 5 (1) CPR 2010. It is also largely informed by rules 3 and 4 generally of the same order and articles 10 and 159 (2) (a) & (d) of the Constitution of Kenya 2010.

Leave to amend may be granted at any stage of the proceedings even on appeal or a second appeal. In order to avoid multiplicity of proceedings, the tendency is to allow amendment at any stage if it can be done without prejudice or injustice to the other side. It should also be granted where both parties know what the case is and there is no element of surprise. The only condition would be costs (Mulla on Civil Procedure, 1<sup>st</sup> ed. 605).

The 1<sup>st</sup> Defendant submitted that, in the case of **General Manager, E.A.R. & H.A. vs. Thierstein**, the defendant had closed his case. As a result of submissions by the opponent, the defendant asked to amend it and it was held that;

1. *“It was not too late to make an amendment.*
2. *There was no accrued right in the plaintiff which would prevent an amendment being made.*
3. *The possibility of new evidence being made necessary, even if it existed, afforded no reason for not making an amendment.*
4. *Even if the plaintiff could not be adequately compensated by an order for costs in his favour, this was no reason for not making an amendment.”*

Amendment was ordered.

In the case of **Jane Muthoni Mungai & Another vs. Texcal House Service Station**, the Court of Appeal observed that amendments should be generally freely allowed even on oral applications when there is no prejudice to the other side. In the case, the trial court had denied an oral application to amend the plaint to include particulars of injuries in a running down matter and to effect some other minor corrections. The decision was reversed on appeal.

Therefore, the application has merit and ought to be allowed to enable the court to adjudicate over all the real questions in dispute particularly as the intended defence of limitation is not only critical to the case of the 1<sup>st</sup> defendant but has already been raised by the other defendants. The plaintiff cannot point at any real prejudice or injustice that would be suffered or that the 1<sup>st</sup> defendant's defence as already exhibited in the draft amended defence would take the respondent by surprise.

On the second application the 1<sup>st</sup> defendant opposed the plaintiff's application dated 16<sup>th</sup> October 2017 upon the following grounds; that consolidation is not necessary all circumstances considered. The issues in dispute in the two cases are different. The course of justice will better be served if the same are handled separately. That alternatively, KAKAMEGA ELC NO. 163 of 2016 being a burial dispute should be stayed pending the determination of ownership of KAKAMEGA/BUGONDA/2069, the main issue herein.

This court has considered both applications and the submissions therein. In the first application dated 11<sup>th</sup>

October 2017 the 1<sup>st</sup> Defendant seeks leave to amend the defence and is based upon the affidavit of JOHNSTONE OGADA VIKIRU filed and the following general grounds; that it is necessary to amend the defence of the 1<sup>st</sup> defendant filed herein on 23<sup>rd</sup> December 2016 to include the defence of limitation of actions so as to enable the court to determine all the real questions in controversy between the parties. That only this honourable court has powers to grant the orders sought. That the amendment sought will not prejudice the plaintiff in any way. I wish to refer to the authority mentioned above of In the case of **Jane Muthoni Mungai & Another vs. Texcal House Service Station**, the Court of Appeal observed that amendments should be generally freely allowed even on oral applications when there is no prejudice to the other side.

In the case of **AAT Holdings Limited v Diamond Shields International Ltd [2014] eKLR**, the court cited the principles as set out by the Court of Appeal in **Central Kenya Ltd case 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.*

It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.

In the case of **Isaac Awuondo vs Surgipharm Ltd & Another (2011) eKLR** the Court of Appeal had the following to say:

In **MOI UNIVERSITY v VISHVA BUILDERS LIMITED - Civil Appeal No. 296 of 2004** (unreported) this Court said:-

*“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.A.C.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-*

*“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”*

I see that no prejudice will be suffered by the parties should the amendment be allowed. I note that this application was filed way back in 2016. It is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The first application is dated 11<sup>th</sup> October 2017 is merited and I grant the same as prayed. Costs of this application to be in the cause.

The second application dated 19<sup>th</sup> October 2017 that this suit be consolidated with KAKAMEGA Environment and Land Case No. 163 of 2016 is supported by the sworn affidavit of JONATHAN MAHUGI ODERA and based upon the following grounds; that the subject matter in this suit and in KAKAMEGA ELC No. 163 of 2016 is land parcel number KAKAMEGA/BUGONDA/2069. The parties in both suits are the same. That both suits are pending for hearing and determination before this court. That it is trite law that the two suits be consolidated for hearing and determination. That no prejudice will occasioned to the defendants if the orders sought are granted.

The principles of consolidation of suits were stated in the case of **Stumberg & Another vs. Potgeiter 1970 E.A 323** as follows;

*“Where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action to render it desirable that the whole of the matters should be disposed off at the same time, consolidation should be ordered.”*

In the case of **Benson G. Mutahi vs Raphael Gichovi Munene Kabutu & 4 Others (2014) eKLR** the court held that the court should be guided by the following;

1. *“Do the same questions of law or fact arise in both cases?”*
2. *Do the rights or reliefs claimed in the two cases or more arise out of the same transaction or series of transactions?*
3. *Will any party be disadvantaged or prejudiced or will consolidation confer undue advantage to the other party?”*

In the case of the **Law Society of Kenya vs. the Center for Human Rights and Democracy, Supreme Court of Kenya, Petition No. 14 of 2013**, it was held as follows;

*“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was not meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it.”*

It is my considered view that this is a proper case for consolidation. The ultimate issue in this case is ownership of land parcel No. KAKAMEGA/BUGONDA/2069. The subject matter in this suit and in KAKAMEGA ELC No. 163 of 2016 is land parcel number KAKAMEGA/BUGONDA/2069. The parties in both suits are primarily the same. Both suits are pending for hearing and determination before this court. The same questions of law or fact arise in both cases and that is ownership of land parcel number KAKAMEGA/BUGONDA/2069. The rights or reliefs claimed in the two cases arise out of the same transaction or series of transactions. No party will be disadvantaged or prejudiced and the consolidation will not confer undue advantage to the other party. The second application dated 19<sup>th</sup> October 2017 that this suit be consolidated with KAKAMEGA Environment and Land Case No. 163 of 2016 is therefore merited and I grant the same as prayed and the costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7<sup>TH</sup> DAY OF FEBRUARY 2018.**

**N.A. MATHEKA**

**JUDGE**