



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE NO. 530 OF 2013**

**NYANGENYA ISABOKE MANIGA (Suing through**

**his attorney fact Joel Maniga).....PLAINTIFF**

**VERSUS**

**DR. ANDREW M. I. OCHOKI.....DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiff's Notice of Motion dated 18<sup>th</sup> July 2017. The application seeks the following orders:

**1. Spent.**

**2. That the honourable court be pleased to grant the plaintiff leave to further amend his amended plaint amended on 21<sup>st</sup> May 2014.**

**3. That the Defendant/Respondent be at liberty to file an amended defence if it so wishes.**

**4. That the honourable court be pleased to reopen the closed proceedings and takes new evidence in terms of the amended pleadings.**

**5. That cost of this application be in the cause.**

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he needed to amend the plaint so as to include a claim for adverse possession. The right to claim adverse possession arose in September 2016 after the suit was filed on 12<sup>th</sup> September 2013 and the plaint was amended on 21<sup>st</sup> May 2014. He explained that upon failure to obtain consent of the Land Control Board within six months after entry into the sale agreement that is the subject of this matter on 24<sup>th</sup> March 2004, time started running on 24<sup>th</sup> January 2004. He added that he had discussed with his previous advocates the need to amend the plaint to include the claim for adverse possession but the advocates failed to make the amendments. He further states that no prejudice will be occasioned to the defendant by the amendments.

3. The defendant opposed the application through a replying affidavit filed on 24<sup>th</sup> October 2017. It is deposed in the affidavit that if the amendment is allowed, the defendant will suffer prejudice by being forced to defend a completely new claim based on a new cause of action and that there will be great expense in terms of legal fees, court attendances and witness costs. The defendant added that the cause of action sought to be introduced cannot be made by way of a plaint.

4. The application was heard by way of written submissions. In submissions filed on behalf of the applicant, it was argued that though both parties' cases have been heard and closed, judgment has not yet been delivered. As such the hearing can be re-opened so as to do justice. The case of **Tulip Properties Ltd –vs- Mohamed Koriow & 6 others [2013] eKLR** was cited in support of the submission that amendments can be made at any stage before judgment. Further it was submitted that the court has discretion to allow the amendment at this stage in the case if it is just to do so.

5. For the respondent, it was submitted that the proposed amendments will alter the substratum of the suit and is a complete departure from the original claim. Further, that the respondent contended that the amendment will prejudice him since he will have to defend a completely new claim and that the amendment would amount to aiding a negligent pleader. The respondent cited the cases of Joseph **Tireiti –vs- Jacob Kisugot Arap Lagate & Another [2013] eKLR** and **James Ochieng Oduol t/a Ochieng Oduol & Co. Advocates –vs- Richard Kuloba [2008] eKLR**.

6. I have considered the application, the affidavits filed and the submissions. The plaintiff's case herein was heard and closed on 5<sup>th</sup> April 2017, after the court had taken the evidence of two witnesses. Subsequently on 14<sup>th</sup> June 2017, the defence closed its case without calling any witness. At the time the plaintiff's and defence cases were closed, the plaintiff was represented by M/s Olonyi & Co. Advocates. On 20<sup>th</sup> July 2017, M/s B. O. Akango Advocates came on record for the plaintiff and simultaneously filed the present application.

7. The application is stated to be brought among others under Order 8 rules 3 and 5 of the Civil Procedure Rules. Rule 3 provides:

**3(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.**

....

**(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.**

8. Rule 5 provides:

**5(1) For the purpose 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.**

**(2) This rule shall not have effect in relation to a judgment or order.**

9. In Eastern Bakery vs. Castelino (1958) E.A. 461, the court stated thus:

**It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... 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 proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ.**

10. Further guidance on the applicable principles is found in *Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1) at paragraph 76:-*

**...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...**

11. The principles are thus clear. The court has discretion to allow amendment of pleadings. Such discretion must be exercised judiciously. Amendments can be allowed at any stage of the proceedings before judgment provided that no prejudice which cannot be compensated by an awards of costs is occasioned to the opposite party.

12. As already noted, the amendment herein is sought after both the plaintiff's and defence cases have been closed and final submissions ordered to be tendered in writing. As at the date the application was filed, the plaintiff's claim was one based on a sale agreement dated 24<sup>th</sup> March 2004 pursuant to which the defendant is said to have sold to the plaintiff a portion of land measuring 1.5 acres to be excised from L.R No. 4730/114, I.R No. 57554/1. Based on the said sale agreement, the plaintiff sought judgment against the defendant for a declaration that he is the owner of the 1.5 acres, an order compelling the defendant to execute all necessary documents to facilitate issuance of title in his favour and in the alternative compensation equivalent to the current market value of the property. In the proposed "Further Amended Plaintiff" the plaintiff introduces a claim that he has in the alternative acquired proprietary rights over the 1.5 acres by adverse position.

13. There can be no doubt that the claim that the plaintiff has acquired proprietary rights over the 1.5 acres by adverse position introduces wholly new angle to the matter. It is an entirely new cause of action, even if arising in connection with the same suit property. It will call for fresh evidence and if allowed, the plaintiff's and defendant's cases will inevitably have to be reopened. Further, by procedure, a claim for adverse possession is to be by way of originating summons as opposed to the proceedings herein which were commenced by way of plaint.

14. While dealing with a similar scenario in Joseph Tireiti v Jacob Kipsugot Arap Lagate & another [2013] eKLR, Munyao J. stated:

**21. In this case, it is clear that what the plaintiff wants to do is to add a new cause of action, a claim by way of adverse possession, after the close of hearing of a suit that was seeking completely different prayers. The plaintiff was always at liberty to file suit to agitate a claim of adverse possession if he so wished. But he did not, and instead opted to file this suit, seeking declarations that he is entitled to 26 1/2 acres of the suit land. That was the choice he made, and it is on the basis of those pleadings, that the defendants filed defence and called evidence. They were never facing a claim by way of adverse possession .....**

15. The defendant has protested that the proposed amendment will prejudice him since among others he will have to defend a wholly new claim. The defendant's position is understandable. Litigation herein has so far proceeded on known positions by both sides. We are now at the tail end of the proceedings, a heartbeat away from judgment. If the amendment is allowed, all that will change. Litigation will start afresh, on new facts and law. I have no doubt in my mind that that will amount to serious prejudice to the defendant which cannot be compensated by an award of costs. Further, it is too late in these proceedings to allow the amendments sought. On the other hand, the plaintiff has not told the court what stops him from instituting the claim for adverse possession using the usual procedure prescribed for it.

16. From the foregoing discussion, I find no merit in the application. Notice of Motion dated 18<sup>th</sup> July 2018 is dismissed with costs to the defendant.

17. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 24<sup>th</sup> day of May 2018.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Opar holding brief for Mr. Akango for the plaintiff/applicant

Mr. Gatonye holding brief for Mr. Karanja for the defendant/respondent

Court Assistant: Gichaba/Lotkomoi