



**REPUBLIC OF KENYA**

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

**CHUKA ELC CASE NO 115 OF 2017**

**FORMERLY MERU ELC CASE NO 100 OF 2009**

**MARTIN MUGAMBI.....1<sup>ST</sup> PLAINTIFF**

**AGNES MWIMBI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NJERU NYAGA ALIAS NDURURU NYAGA.....DEFENDANT**

**RULING**

1. This application is dated **19<sup>th</sup> March, 2018**.

2. The application seeks the following **orders**:

1. The plaintiff be granted leave to amend his originating summons as per the draft attached.
2. That costs of the application be provided for.

3. The application has the following **grounds**:

- a. That the applicants originating summons requires to be amended to reflect the right acreage under paragraph 1 & 2 of the same.
- b. That the applicant's advocates erroneously stated that they were in exclusive user and possession of **2 acres** of **Karingani/Ndagani/294** for a period (sic) **instead of 5 acres of land**. Two acres occupied by 2<sup>nd</sup> applicant and 3 acres by the 1<sup>st</sup> applicant.
- c. That no prejudice shall be caused to any party if this application is allowed. However the amended (sic) is very vital in the interest of justice.

4. The application is supported by the supporting affidavit of **Martin Mugambi** sworn on **19<sup>th</sup> May, 2018** which states:

**"I, MARTIN MUGAMBI OF C/O P. O. Box 2387 – 60200 MERU** do hereby make oath and swear as follows:

1. That I am the applicant herein thus competent to make and swear this affidavit on my behalf and on behalf of the 2<sup>nd</sup> applicant. That I swear this affidavit in support of my application.

2. That when this matter came for hearing on **29<sup>th</sup> January, 2018**, I stood on the dock to make my testimony and give evidence before this honourable court.
3. That during my testimony I realized that my pleadings and originating summons of **13<sup>th</sup> July, 2009** had erroneously indicated that we were asked (sic) for 2 acres of land jointly with the 2<sup>nd</sup> applicant.
4. That it was my testimony that I ought to be given **3 acres** which we have been living in and occupying since the **1960's** while Agnes and Alexander lives (sic) on **2 Acres** of the suit land.
5. That we have cultivated thereon and developed the land, that I also have built semi permanent houses on the land as well as a cowshed, a house and a toilet.
6. That I now bring my application before court asking and praying for leave to file an amended originating summons as per the attached draft marked "**MM1**"
7. That I humbly pray that my application be allowed as prayed as it shall cause no prejudice to any of the parties.
8. That what is deponed to herein above is true to the best of my knowledge, information and belief.

5. The application was canvassed by way of written submissions which are reproduced in full herebelow.

6. The applicant's written submissions are in the following form:

#### **APPLICANT'S WRITTEN SUBMISSIONS**

Your honour this is the humble submissions of the applicants in respect to the application dated **19<sup>th</sup> March, 2018**.

As can be seen from the face of the said application, the amendment is in respect of the acreage of land in accordance to their testimony of which they have already been cross examined on.

It is trite law that an essential requirement of pleadings that material facts and necessary particulars must be stated in the pleadings and particulars are required to enable the court to decide true rights of the parties in trial. But many a time the party may find it necessary to amend his pleadings before or during the trial of the case as in this case before court.

The paramount object behind amendment is that the courts should try the merits of the cases that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. Amendment in the pleadings is a matter of procedure. Grant or refusal thereof is in the discretion of the court. But like any other discretion, such discretion has to be exercised consisted (sic) with settled legal principles.

Ultimately, the courts exist for doing justice (sic) the parties and not for punishing them, and they are empowered to grant amendments of pleadings in the larger interest of justice. Provisions for the amendments of pleading are intended to promote ends of justice and not for defeating them. The Supreme Court of India on this matter has observed.

***"Procedural law is intended to facilitate and not to obstruct the course of substantive justice. Provisions relating to pleading in civil cases are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really as (sic) issue between parties, and to prevent deviations from the course which litigation on particular causes of action must take."***

In the leading case of cropper v smith, (sic) the object underlying the amendment of pleadings has been laid down by **Bowen, L.J** in the following words;-

***“I think it is well-established principle that the object of the courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights.”***

In considering leave to amend pleadings, the guiding principle is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. The rule with regard to amendment of pleadings has been stated thus, under section 100 Civil Procedure Act Cap 21 Laws of Kenya ***“that a party is allowed to make such amendment 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 prejudice to the other side.”***

That therefore we urge this court to allow the application as prayed.

**Dated at Meru this 24<sup>th</sup> day of April, 2018**

**FOR: CHARLES KARIUKI & KIOME ASSOCIATES**

**ADVOCATES FOR THE APPLICANT**

7. The Respondent’s written submissions are in the following form:

**THE RESPONDENT’S SUBMISSIONS ON THE APPLICATION DATED 19<sup>TH</sup> MARCH, 2018**

Your Lordship,

The applicant herein filed the application dated 19<sup>th</sup> March, 2018 seeking the following orders:-

1. That the plaintiff be granted leave to amend his Originating Summons as per the draft attached.
2. The costs of the application be provided for.

The Respondent opposed the application vide a replying affidavit sworn on **17<sup>th</sup> April, 2018** and filed in court on same date. We wish to rely wholly on the said replying affidavit and further submit as follows:-

That the application is an afterthought, an abuse of the process of court and is intended to defeat the interests of justice. Your lordship, **Order 11 of the Civil Procedure Rules, 2010** enjoins the parties to settle all pre-trial preparations before the suit is fixed for hearing. This matter came up for pre-trial directions on **20<sup>th</sup> November, 2017** when it was fixed for hearing on **29<sup>th</sup> January, 2018**. The applicant ought to have ensured that his pleadings were in order before the matter proceeded for hearing.

We submit that the application being made at the very last stage is a demonstration of bad faith on the part of the applicant. The honourable court will note that the amendment sought is not a minor one such as a typographical error but rather a substantive and significant one which we submit is an effort to defeat the ends of justice as all parties have already testified and closed their respective cases.

It is further our submission that what the applicant is trying to do by filing this application after he

had already closed his case is to fill in the gaps and/or remedy the loopholes that arose in cross examination. In other words, he is attempting to re-open his case at the great expense of the Respondent.

Your lordship, the respondent herein would be occasioned prejudice in the event that the court were to allow the amendment sought. This is not only because the present application is brought too late in the day but also because the suit herein is now fully heard and parties have closed their respective cases.

Your Lordship, the alleged error made by the applicant's counsel by indicating that the applicant was claiming 2 acres from the defendant instead of 5 acres is not a genuine mistake which this court could excuse. The honourable court will note that in an earlier suit (**MERU HCCC NO. 6 OF 2006**), the applicant herein was seeking 3 acres of the suit land. This is at paragraph 5 of the Replying Affidavit. The applicant then filed the present suit vide Originating Summons dated **13<sup>th</sup> July, 2009** in which he was claiming 2 acres from the defendant. He now wants to amend the said Originating Summons to indicate that he is claiming 5 acres. These inconsistencies clearly prove that the plaintiffs are not truthful and credible witnesses and have brought this application **malafides**.

In conclusion, we submit that it is unjust and prejudicial to subject the defendant/respondent to an endless claim especially in view of the fact that he is at advanced **age of 90 years** and has a legitimate expectation to have the suit against him determined expeditiously.

We therefore urge this honourable court to dismiss the application with costs to the respondent.

**Dated at Embu this 14<sup>th</sup> day of May, 2018**

**JOE KATHUNGU & CO.**

**ADVOCATES FOR THE RESPONDENTS.**

8. There is only one overriding issue in this application. It is if or if not this court should allow amendments to a plaint or an Originating Summons after parties have closed their cases and produced apposite evidence.

9. I have perused the submissions proffered by the parties to buttress their diametrically opposed assertions. I opine that litigation must come to an end. Allowing amendments after parties have closed their cases is akin to allowing parties to engage courts in evidence seeking fishing expeditions. This is not a practice that should be countenanced by courts of law.

10. Whereas I note that the Plaintiff/Applicant claims that paragraph 1 of the Originating Summons was intended to **mean 5 acres instead of 2 acres**. I opine that this amendment, if allowed, would change the entire substratum of the suit. I find that this cannot be done after all parties have tendered evidence and closed their cases.

11. Having perused the case proffered by the applicant as an authority which is ***Nairobi Civil Appeal 149 of 1991 BETWEEN Joseph Ochieng and 2 Others and First National Bank of Chicago***, I opine that it is a good authority in its circumstances. The circumstances of this suit are different.

12. The plaintiffs have not explained to the satisfaction of the court why they **claim 5 acres and not 2 acres after the parties had closed their cases and almost 10 years since this suit was filed**. The proposed amendment if allowed would spawn the possibility of having the suit being heard afresh. I opine that the suit having remained in the Judicial pipeline (call it process) for close to 10 years, this is already a veritable aberration upon the functionality of our Judicial system. I decline to exacerbate this deprecation attracting situation by allowing this application.

13. As the Judge of Appeal in *Civil Appeal 149 of 1991 (op.cit)* opined: “*Justice works both ways*. The defendant is entitled to as much protection by the courts as the plaintiffs.”

14. In the circumstances, this application is dismissed. Costs are awarded to the defendant.

15. The plaintiffs'/applicants' are directed to file and exchange their written submissions, if they so wish, **within 14 days of today** and the defendant/respondent should **file and exchange his written submissions**, if he so wishes, **within 14 days** after receipt of the plaintiffs'/applicants' written submissions.

16. Parties are directed to come to court for apposite directions on **19<sup>th</sup> June, 2018**.

17. It is so ordered.

Delivered in open court at Chuka this **21<sup>st</sup> day of May, 2018** in the presence of :

CA: Ndegwa

Miss Kiai h/b Joe Kathungu for the defendant

Martin Mugambi – 1<sup>st</sup> plaintiff

**P.M. NJOROGE**

**JUDGE**