



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 8 OF 2016**

**PETER ANDERA MASAKHALIA ..... PLAINTIFF**

**VERSUS**

**JONATHAN MAHINDU ANZONA**

**JAMES OLOO ATULE**

**COUNTY GOVERNMENT OF KAKAMEGA**

**LAND REGISTRAR KAKAMEGA COUNTY**

**LAND SURVEYOR KAKAMEGA COUNTY.....DEFENDANTS**

**RULING**

This application is dated 8<sup>th</sup> November, 2017 and is brought under order 8 rules 3 and 5 of the Civil Procedure rules 2010 Section 3A of the Civil Procedure Act seeking the following orders;

1. That the plaintiff/applicant be granted leave to amend his plaint.
2. That the filed amended plaint herewith be deemed as properly filed on payment of the requisite court fees.
3. That cost of this application be costs in the cause.

The applicant submitted that, he filed this suit against the defendants on or about 27<sup>th</sup> January, 2016 at the time of filing this suit he sought to prevent the 3<sup>rd</sup> defendant/respondent from digging and put up a public road on his suit land. Annexed herein is a copy of the official search certificate marked as "PAM-1" That on 24<sup>th</sup> March, 2016 the 3<sup>rd</sup> defendant/respondent put up a public road on the suit land in violation of a court order and in the process damaged his trees and food crops that were on that portion of the land. Annexed herein are pictures for the trees damaged, valuation report for damaged trees and valuation report for damaged food crops marked as annexure "PMA-2A", "PAM-2B" & "PAM-2C". That due to the changed circumstances he wishes to have the damage caused by the 3<sup>rd</sup> defendant, by its servants or agents be included in his plaint as special damages. That it was not possible at the time of filing this suit to include the said special damages as the damages were none existent and since the case has not commenced am entitled to seek for all the remedies in respect to the suit herein. That it is therefore necessary for him to amend the plaint in order to bring before the court the said information which is necessary for the effectual and complete adjudication of the real questions is controversy on their true and substantive merits. Annexed herein is a draft amended plaint marked as "PAM-3". That the proposed amendment will not cause prejudice to the defendants/respondents since the case had not commenced. That he is aware the time allowed under Civil Procedure Act and Civil Procedure Rules to amend plaint has expired but Procedural Rules should not deny an innocent litigant his substantive rights as provided under section 159 (d) of the Constitution and he therefore seek leave of this court to be allowed to amend the plaint as per the draft plaint.

The respondents opposed the application dated 8<sup>th</sup> November, 2017 served on 21<sup>st</sup> December, 2017, on the following grounds normally, that the amendment sought will bring a cause of action out of time. No leave of court has been sought. The application is misconceived, frivolous and vexatious and is an abuse of court process. The application is bad in law. The application is based on falsehood.

This court has carefully considered both the plaintiff's and the defendants' submissions and annexures therein. The application is based on the grounds that, at the time of filing plaint the third defendant/respondent had not dug a public road on the plaintiff's suit land and destroyed his trees and food crops but on 24<sup>th</sup> March, 2016 the 3<sup>rd</sup> defendant/respondent through his agents or servants dug a public road and destroyed trees and food crops on the suit land which the plaintiff seeks to include in his plaint as special damages of the trees and food crops damaged. That the failure to include special damages of damaged trees and food crops was unknown at the time of filing this suit. That the proposed amendments are intended to bring before this court the real issues in controversy between the parties herein so that the same are determined

on their true and substantive merits. That the time allowed under the Civil Procedure Act and the Civil Procedure Rules for amendment of pleadings has not expired. That the proposed amendment will not occasion any prejudice to the defendant/respondent. That it is therefore in the interest of justice that the plaintiff/applicant should be granted leave to amend the plaint filed herein.

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 Plaint is wide and unfettered except is 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 Plaint 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.AC.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. The application dated 8<sup>th</sup> November, 2017 is merited and I grant the same as prayed. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 16<sup>TH</sup> DAY OF MAY 2018.**

**N.A. MATHEKA**

**JUDGE**