



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

E & L CASE NO. 153 OF 2014

RICHARD KIPMALEL CHESIMET.....PLAINTIFF/APPLICANT

VERSUS

NANDI COUNTY GOVERNMENT....DEFENDANT/RESPONDENT

RULING

Richard Kipmalel Chesimet, (hereinafter referred to as the applicant) has come to this court by way of application seeking for the amendment of plaint dated 12.5.2014 and that the draft amended plaint be deemed duly filed in court subject to payment of requisite court fees.

The application is grounded on the supporting affidavit of the said Richard Kipmalel Chesimet and grounds that there is need to amend plaint as demonstrated in the draft amended plaint. Moreover, that the amendment will not cause any prejudice to the defendant. In the supporting affidavit, the plaintiff states that on 12.5.2014, he did file the instant suit vide Plaint dated 12.5.2014, and that on 21.5.2014, upon being served with the Plaint, List of Documents, List of Witnesses and Witnesses' Statements, the defendant filed its statement of defence dated 19.5.2014. That he is thus advised by his Advocates on record which advice he believes to be true that the pleadings in this matter have thus been closed.

In his plaint dated 12.5.2014, he has sought several prayers amongst which he wants the Honorable Court to declare him as the lawful proprietor of all that parcel of land known as L. R. No. 7830/120 and also grant a permanent injunction restraining the defendant from trespassing into the plaintiff's commercial buildings on the land known as L. R. No. 7830/120 and demolishing structures thereon or in any other way interfering with his quite possession of the suit parcel of land. That in the said plaint, he did not plead particulars of the defendant's trespass and particulars of loss of income as a result of the said defendant's trespass. That he has therefore instructed his Advocates on record to amend the Plaint dated 12.5.2014 and plead these facts.

He is duly advised by his Advocates on record which advice he believes to be true that the defendant/respondent will not in any way be prejudiced if the Plaint is amended to reflect the said facts not pleaded. That he is further advised by his advocates on record which advice he believes to be true that leave if therefore necessary to amend the Plaint hence this application.

The respondent filed grounds of opposition stating that the case is already part-heard and Surveyor has filed a report in court. That the amendment will prejudice the defence case and that the application for Amendment be dismissed.

The general power to amend pleadings is donated by **section 100** of the *Civil Procedure Act* which is the

substantive law and its handmaiden **Order 8 Rule 5 of the Civil Procedure Rules**. That Rule reads as follows:

“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.”

Construing section 100 of the Civil Procedure Act, it expressly provides that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case.

*In **Bullen Leak and Jacobs Precedents of Pleadings, 12th Edition page 127** titled “amendment with leave-time to amend” it is stated that the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the adversary any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”*

In **Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR**, Lenaola, Mumbi and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

“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.”

In the case of **Eastern Bakery V. Castelino [1958] E.A. 461**, Sir Kenneth O’Conner, President of the then Court of Appeal for Eastern Africa, said at p. 462 –

“It will be sufficient ... 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 learned Judge concluded by observing, on the same page, that –

“The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

I have considered the application and grounds of opposition and do find that the applicant has demonstrated sufficient grounds for grant of leave to amend the plaint as he intends to bring in the claim based on trespass and relief of damages whilst the respondent has not demonstrated any prejudice that is likely to be suffered. The application for amendment is found with merit and is hereby granted. The plaint to be amended and served within 7 days.

Dated and delivered at Eldoret this 15th day of May, 2018.

A. OMBWAYO

JUDGE