



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. NO. 23 OF 2005

DAVID N. KITONYI

OBADIAH MUTISYA KITONYI

LABYUS KOTONYI.....PLAINTIFFS

BENJAMIN MUTUA KITONYI

AGNES MUENI KIOKO

V E R S U S

JOSEPH M. NZIOKA.....DEFENDANT

RULING

1. In the Notice of Motion dated 31st October, 2017, the Defendant is seeking for leave to amend the Defence as per the exhibited draft amended Defence and Counter-claim. The Application is based on the ground that the proposed amendments are necessary in order to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.
2. The Plaintiffs filed Grounds of Opposition in which he averred that the Plaintiffs' case is substantially heard and any amendment will prejudice the Plaintiffs. According to the Plaintiffs, the proposed amended counter-claim is incompetent and the same will delay the finalization of the suit.
3. The Defendant's advocate submitted that amendments allow the court to deal with real issues in controversy; that the amendments seek to bring to court up to speed to the market value of the suit property and that the proposed amendments do not introduce a new cause of action.
4. Counsel submitted that notwithstanding that the Plaintiff have already closed their case, the application is made in good faith and that any prejudice can be taken care by way of costs. Counsel relied on several authorities which I have considered.
5. The Plaintiffs' counsel submitted that the Plaintiffs' case has been heard and closed; that allowing the amendments at this stage is highly prejudicial to the Plaintiffs and that the purported amendments sought appear to be intended at raising a claim against a person who is not a party to the proceedings.
6. This matter commenced by way of a Plaint dated 8th January, 2005 and filed on 9th March, 2005. In the Plaint, the Plaintiffs have averred that they are the registered proprietors of the suit land. They are seeking for the lifting of the Restriction that was registered against the suit land.
7. The Defendant filed a Defence and Counter-claim. According to the Defendant, he purchased 20 acres of the suit land from the Plaintiff's father. The Defendant has sought in the Counter-claim for a declaration that the Plaintiffs are holding in trust the 20 acres that he bought from their father. The main issue that the Defendant is seeking to introduce in the proposed amended Defence and Counter-Claim is the current market value of the land he claims to have bought. The Defendant is also seeking to introduce an alternative prayer for the payment of the land he says he purchased at the market rate.
8. The matter was partly heard by Lenaola J (as he was then) on 20th April, 2009 and 21st October, 2009. When the matter came up for directions on 7th May, 2012, the parties agreed to proceed with the matter from where it had reached. Since the Plaintiffs closed their case in October, 2009, it was not until 1st November, 2017 that the Defendant filed the current Application.
9. Although Section 100 and Order 8 Rules 3 and 5 of the Civil Procedure Act and Rules respectively give the court the discretion to allow

amendments of pleadings at any stage of the proceedings, the court should be very slow in allowing amendments where one of the parties has testified and closed its case. I say so because a party should not be allowed, unless compelling reasons are given, to steal a march from a party who has already testified by filling the gaps which could have arisen during the testimony of the opposite party.

10. Where no good reasons are given as to why the proposed amendments were not made or sought for before the commencement of the suit, the discretion of the court should be sparingly applied, if at all, in allowing amendments which are sought after one party has testified.

11. The Defendant in this matter has not given to this court any reason as to why he never sought for the proposed amendments before the Plaintiffs testified, or even immediately after the said testimony. It is not enough, as he has deponed, that the proposed amendments will allow the court to deal with real issues in controversy, more so where the matter has been partly heard.

12. Having waited until the Plaintiffs have closed their case, the Defendants cannot be allowed to introduce the proposed amendments which invariably will require the Plaintiffs to also amend their Plaint and start their case *de novo*. This being a matter which was filed twelve (12) years ago, it will not be in the interest of the overriding objective of the Civil Procedure Act to allow the proposed amendments. Indeed, allowing this proposed amendments in this old matter which has been partly heard with be antithesis to the facilitation of a just, expeditious, appropriate and affordable resolution of a civil dispute as provided for under Section 1A of the Civil Procedure Act.

13. For those reasons, I find the Application dated 31st October, 2017 to be unmeritorious and I dismiss it with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 11TH DAY OF MAY, 2018.

O.A. ANGOTE

JUDGE