



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO.25 OF 2012**

**TULO HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**SATINDER SINGH KALSI.....1<sup>ST</sup> DEFENDANT**

**RAVINDER SINGH KALSI.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the Plaintiff's amended notice of motion dated 15<sup>th</sup> May 2018. The said application which is brought pursuant to Order 8 Rule 3 and 8 and Order 5 Rule 1,4, 7 & 8 of the Civil Procedure Rules seeks the following prayers:

i) That this honourable court be pleased to grant the applicant leave to amend defence and their counter-claim filed on 19<sup>th</sup> July 2013.

ii) That the draft amended Defence and counter-claim annexed to the application be deemed as duly filed and summons do issue to all the defendants in the Counter-claim for service.

2. The said application is supported by the affidavit of Satinder Singh Kalsi sworn on the 15<sup>th</sup> May, 2018. The main reason why the Plaintiff wants to enjoin Defendants in the Counter-Claim is to assist the court determine the real issue in dispute. This will also enable the court to effectually and completely adjudicate the issue involved in a suit.

3. One of the critical issues which the Applicants have raised in the application is the need to enjoin more parties to the suit as there are now two distinct grants over the suit land.

4. The original grant was granted on 29<sup>th</sup> June 1954 to JOHN STEVENTON BALLENTINE whereas the one which the Applicant considers to be fake was issued on 28<sup>th</sup> November 1979 to one JAMES RAYMOND NJENGA.

5. The Applicant wishes to enjoin the County Government of Kericho to shed some light as to why the Plaintiffs in the counter-claim were paying rates to the defunct Kericho Municipal Council and yet the property had been transferred to the Plaintiff (Tulo Holdings Ltd).

6. The Honourable Attorney General as a chief adviser of the Government is to be enjoined because the proposed 5<sup>th</sup> Defendant is an officer of the Government. He is rightfully enjoined by virtue of section 12 of the Government Proceedings Act and Order I Rule II of the Civil Procedure Rules.

7. Counsel for the Applicant has submitted that substitution and addition of parties in a suit is acceptable in law. He relies on Order I Rule 10(2) which provides as follows:

***“where a suit has been instituted in the name of the wrong persons as Plaintiff or defendant the court may at any stage if satisfied order any person to be substituted or added”.***

8. The application is opposed by the Respondents through the Replying Affidavit of Charles Maiyo sworn on the 22.5.2018 in which he deposes that the amendment sought, if granted would prejudice the plaintiff's case by introducing a new cause of action as new parties would be enjoined in the suit. He wonders what the significance of these new proposed parties is and contends that their addition would amount to reopening the case thus defeating the plaintiff's right to be heard. He contends that the proposed amendment would defeat the court's

Ruling delivered on 30.1.2018.

**Issue for Determination**

9. The main issue for determination if the plaintiff should be granted leave to amend his Plaintiff.

**Analysis and Determination**

10. The principles that should guide the court in dealing with applications for amendments are elaborated in **Mulla, the Code of Civil Procedure, 18<sup>th</sup> Ed, Vol 2 pages 1751-1752** which has been cited in various authorities including the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR** where it is stated as follows:

- i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;*
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;*
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;*
- iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;*
- v. Amendments of a claim or relief barred by time should not be allowed;*
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time*
- vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties*
- viii. The delay in filing the petitions for amendment should be properly compensated by costs*
- ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”*

11. In the case of **Joseph Ochieng & 2 Others V Frist National Bank of Chicago Civil Appeal No. 149 of 1991** the Court of Appeal while citing with approval Bullen, Leake & Jacobs in Precedents of Pleadings, 12<sup>th</sup> Edition remarked regarding amendment of pleadings as follows:

*“The power to so amend can be exercised by the court at any stage of the proceedings ( including appeal stage); that as a general rule however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side...that if the proposed amendment introduces a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which would more conveniently be made the subject of a fresh action..”*

12. From the foregoing it is clear that the court has a wide discretion in dealing with an application to amend pleadings unless the other side is able to demonstrate that they would seriously be prejudiced by the proposed amendment. The Respondent has not stated what prejudice he would suffer if the application was allowed.

13. Having carefully considered the application, affidavits, pleadings and submissions of counsel as well as the law on amendment of pleadings, and also mindful of the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes, I am of the view that the application is merited and I grant it. The applicants shall however bear the costs of the application to cushion the defendant from the inconvenience caused.

14. I further direct that draft amended Defence and Counterclaim be deemed as duly filed upon payment of the requisite court fees. The same should be filed upon the plaintiff and new defendants within 30 days.

**Dated, signed and delivered at Kericho this 19<sup>th</sup> day of July 2018**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Miruka for the Respondent
2. N/A for the Applicants
3. Court Assistant - Rotich