



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 103 OF 2015

RAJU PANACHAND SHAH.....PLAINTIFF/RESPONDENT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA..... 1ST DEFENDANT

KAKAMEGA COUNTY ASSEMBLY SERVICE BOARD.....2ND DEFENDANT/APPLICANT

RULING

This first application is dated 2nd August 2017 and is brought under order 8 rule 3 and order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B & 3A of the Civil Procedure Act seeking the following orders;

1. That leave be granted to the to the 2nd defendant to amend within 14 days from the date of the order granting leave, its defence dated 18th December 2015 in terms of the draft defence and counter claim annexed in the supporting affidavit hereto.
2. That costs be in the cause.

The applicant submitted that, the amendment is to include a counter claim in pursuit of recovery of public land and that the effect of the amendments is that should the counter claim succeed, the certificate of lease over KAKAMEGA MUNICIPALITY BLOCK 4/465 currently in possession of the plaintiff stands to be revoked and the said land be reverted to the Kakamega County Assembly. That the application has merit and ought to be allowed to enable the court to adjudicate over all the real questions. The plaintiff cannot point at any real prejudice or injustice that would be suffered

The respondent in opposing this application submitted that the National Land Commission is the only Commission mandated to manage, protect and recover any land it deems fit to be public land. The National Land Commission is not party to these proceedings nor has it been enjoined and hence allowing the intended amended will be stepping into a mandate of a constitutionally established commission.

This court has considered the application and the submissions therein. The applicant submitted that, the amendment is to include a counter claim in pursuit of recovery of public land and that the effect of the amendments is that should the counter claim succeed, the certificate of lease over KAKAMEGA MUNICIPALITY BLOCK 4/465 currently in possession of the plaintiff stands to be revoked and the said land be reverted to the Kakamega County Assembly. The respondent in opposing this application submitted that the National Land Commission is the only Commission mandated to manage, protect and recover any land it deems fit to be public land. 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, the trial court had denied an oral application to amend the plaint to include particulars of injuries in a running down matter and to effect some other minor corrections. The decision was reversed on appeal.

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 defence is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. So as to enable the court to determine all the real questions in controversy between the parties for example the mandate of recovering public land the amendment ought to be granted and will not prejudice the plaintiff in any way.

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 Plaintiff 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.A.C.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.”

The defence raises triable issues. Therefore, the application has merit and ought to be allowed to enable the court to adjudicate over all the real questions. The plaintiff cannot point at any real prejudice or injustice that would be suffered. I see that no prejudice will be suffered by the parties should the amendment be allowed. I note that this application was filed way back in 2017. It is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated 2nd August 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 12TH DAY OF JULY 2018.

N.A. MATHEKA

JUDGE