



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA IN BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 127 OF 2017

CLEOPHAS OMONDI.....PLAINTIFF

VERSUS

DISMAS WAMAYADEFENDANT

RULING

1. The application before me is a Notice of Motion dated 13/3/2018 filed in court on the same date. The application is brought under Sections 1, 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act (cap 21), Order 8 of Civil Procedure Rules, and Article 159 of the Constitution of Kenya, 2010. The Applicant – **CLEOPHAS OMONDI** – is the Plaintiff in the suit herein filed on 7/7/2017 while the Defendant – **DISMAS WAMAYA** – is the Defendant.

2. Three prayers are sought in the application. The prayers are as follows:

- (1) The Applicant/Plaintiff be granted leave to amend his pleadings.
- (2) That the draft amended pleadings be deemed duly filed and served upon payment of the requisite fees.
- (3) That costs of the application be provided for.

3. According to the Applicant, there was omission in the pleadings to state the correct land reference number. The amendment is therefore deemed necessary to make a correction so that the description of the land can read L.R. No. BUKHAYO/MUNDIKA/3357. The omission or mistake was attributed to counsel and the court was asked not to allow it to be visited on the Plaintiff. To the Plaintiff's counsel, the rest of the pleadings will remain undisturbed.

4. The Respondent responded to the application vide grounds of opposition filed on 23/3/2018. According to the Respondent, the application is premised on letters of Administration Ad Litem issued on 19/2/2018. It was averred that such letters do not operate retrospectively, the main suit having been filed on 7/7/2017. The application and the suit were termed as abuse of the court process in so far as the Applicant claims the interest of his late father without first obtaining a grant. It was averred too that the draft amended pleadings is not attached to the application.

5. The application was canvassed by way of written submissions. The Applicant's submissions were filed on 28/5/2018. It was submitted, *inter alia*, that the law allows for amendment of pleadings. It was averred that the Respondent will suffer no prejudice as he will be allowed to amend his pleadings too if need be. In a further attempt to persuade the court to allow the application, the Applicant availed a ruling in the case of **TABITHA WANDIA Vs FRANCIS MWANGI: ELCA No. 36 of 2015, NYERI** where the court allowed amendment to allow inclusion of documents that the Applicant had left out in her appeal.

6. The Respondent's submissions were filed on 21/5/2018. According to the Respondent, the Applicant want to use the opportunity to avail letters of administration belatedly, having failed to do so in the first place at the time of filing the suit. To the Plaintiff, the suit as filed is incompetent and the Applicant would wish to amend in order to be deemed to have filed the suit at the time the amended pleadings is filed. In simple terms, the Applicant would have circumvented the law as it would appear as if the suit was filed after letters of administration had been obtained. In this regard therefore, the application is seen as a contrived subterfuge to cure an incompetent suit.

7. To buttress the arguments concerning filing a suit to claim an interest of a deceased person without first obtaining the requisite grant, the Respondent cited the decided cases of **PATRICK KISEKI MUTISYA Vs KB. SHAGAN & SONS LTD & Another [2012] eKLR** and **VIRGINIA EDITH WAMBOI OTIENO Vs JOASH OCHIENG OUGO & Another (1982-1988)/ IKAR 1049** both of which stand for the legal position that any suit so filed is incompetent and/or a nullity.

8. I have looked at the suit as filed, the application, the response made, and the rival submissions. The Respondent made a relevant point namely: that the draft amended plaint was not attached to the application. This omission is not trivial. Such draft amended plaint is meant to clearly show the court the kind of amendments being effected. And this is necessary because not all kinds of amendment can be allowed. An amendment that for instance changes the entire character or nature of the suit cannot be granted. In a case like this one, it was even more crucial to avail the draft amended plaint because the Defendant is already suspicious that the amendment is intended to achieve objectives different from those expressed.

9. But I do not agree with the Respondent that the amendment is a backdoor attempt to legitimize the suit by introducing letters of administration. The application express no such intention and the submissions filed by the Applicant do not make reference to such letters. The issue of such letters is solely raised by the Respondent, who then proceeds to submit on it extensively. It all starts on the mistaken hypothesis that the application is premised on such letters.

10. In my view, such an issue should be raised as relating to the suit, not the application. The Respondent raised it in the defence and expressed intention to raise a preliminary objection. That is the proper way to go. Raising it as an attack on the application is an attempt to jump the gun. Even if the court were to accept it, desired results would not be achieved as the suit would still be left standing even if the application is dismissed. The Respondent should have appreciated better the context in which decisions in the case he availed were arrived at. The aim was to dismiss or strike out the suits, not to dismiss interlocutory applications.

11. But even as I make these observations, I must admit that the expressed aim of the intended amendment is abit baffling. The stated aim is to correct the plaint so that the disputed land should become L.R. BUKHAYO/MUNDIKA/3357. One is then bound to ask: what is the description of the disputed land in the plaint? The answer is simple. And it is as follows: wherever there is reference in the plaint to the disputed land, the description is L.R. No. BUKHAYO/MUNDIKA/3357. Such description is clearly noticeable at paragraphs 4, 5 and 8 in the plaint. Quite clearly, this is the same description stated in the application for amendment. It is the same intended description in the amendment. What emerges then is that there is no necessity to amend since no mis-description of the disputed land has been shown.

12. But for these shortcomings in the Applicant's application, the law is generally in favour of allowing amendments. The critical objective in allowing amendments is that the court should try the merits of the case in order to determine the real issues in controversy. And while this is being done, care is taken to ensure that no injustice or prejudice is caused to the other side. Amendments are allowed to achieve the ends of justice, not to defeat them. In sum, the law is stated well in the very ruling availed by the Applicant. And the critical part of that law is that amendment of pleadings is meant to enable the parties to conduct the litigation between them not on the false hypothesis of the facts already pleaded or the relief or remedy sought, but rather on the true state of facts or the true relief or remedy sought.

13. The Applicant in this case totally fails to give justification for amendment. What he expresses as the aim of amendment is not demonstrated at all by the records in the court file. Worse still, the Applicant fails to avail the draft amended plaint. It is possibly because of this that the Respondent read ulterior motives behind the application for amendment.

14. The upshot is that the application for amendment is found unmeritorious and the same is hereby dismissed with costs to the Respondent.

Dated, signed and delivered at Busia this 11th day of July, 2018.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff.....

Counsel of Defendant.....