



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 257 OF 2015**

**DAVID KELI KIILU**

**NELSON N. OGOMBE (suing as the registered trustees of the ROYAL**

**AGRICULTURAL SOCIETY OF KENYA)..... PLAINTIFF**

**VERSUS**

**MASINDE MULIRO UNIVERSITY OF SCIENCE**

**AND TECHNOLOGY.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR, KAKAMEGA**

**SUED THROUGH THE HON. ATTORNEY GENERAL.2<sup>ND</sup> DEFENDANT**

**RULING**

This application is dated 4<sup>th</sup> June 2018 seeking for the orders that:-

- (a) Leave be granted to the plaintiff/applicants to further amend the further amended plaint in terms of the annexed draft.
- (b) Costs be in the cause.

It is supported by the annexed affidavit of Batram Muthoka Mutinda and on the following grounds that, the plaintiff/applicant filed a further amended plaint pursuant to leave that was granted by court on 11<sup>th</sup> October, 2011 bringing in the office of the Land Registrar sued through the office of the Honourable Attorney General. That the office of Attorney General did file their statement of defence which was served upon the plaintiffs on 9<sup>th</sup> of April, 2018 and bringing in new facts thus necessitating the plaintiffs herein to further amend their pleadings to address the issues raised therein. That it is necessary to amend the pleadings to include the Church Commissioners for Kenya who as stated by the 2<sup>nd</sup> defendant in its defence, purportedly hold a title to the suit premises being Kakamega Municipality/Block III/114 measuring 6.813 hectares or thereabouts. That it is necessary to further amend the plaint in order to incorporate important statement of facts and particulars and introduce the Church Commissioner and other parties as parties in this suit in order to match the claim and to place the correct evidence on record for proper determination of real matters in issue between the parties. That no prejudice will be occasioned upon the defendants/respondents herein.

The 1<sup>st</sup> respondent/defendant submitted that, all along from the time when the plaintiff filed the suit herein in 2008 they were aware that parcel No. Kakamega Municipality/Block III/114 was registered in the names of the Church Commissioners for Kenya. That the plaintiffs were aware that the intended defendants No. 3-11 were alleged allottees of part of the suit property. That no new matter is raised through the 2<sup>nd</sup> defendant's defence purportedly served on the plaintiff. That the time of seeking leave to file a further amendment to the plaint in 2017 facts relating to the intended defendant Nos. 3-11 were within the knowledge of the plaintiffs and nothing prevented them from including them at that point in time. The plaintiff's pleadings are sufficient to bring out the issues in dispute and any orders made at the conclusion of the court are unlikely to affect the intended additional parties since what the plaintiffs are claiming is separate from what is owned by the intended 4<sup>th</sup> to 11<sup>th</sup> defendants. That the delay concluding this suit is affecting the 1<sup>st</sup> defendant against whom injunctive orders have been obtained by the plaintiffs restraining the 1<sup>st</sup> defendant from utilizing the suit property since its allocation to them in 2007.

This court has considered the application and the submissions therein. The 2<sup>nd</sup> respondent did not oppose the application. The applicant submitted that, the office of Attorney General did file their statement of defence which was served upon the plaintiffs on 9<sup>th</sup> of April, 2018 and brought in new facts thus necessitating the plaintiffs herein to further amend their pleadings to address the issues raised therein. That it is

necessary to amend the pleadings to include the Church Commissioners for Kenya who as stated by the 2<sup>nd</sup> defendant in its defence, purportedly hold a title to the suit premises being Kakamega Municipality/Block III/114 measuring 6.813 hectares or thereabouts. That only this honourable court has powers to grant the orders sought. That the amendment sought will not prejudice the defendants in any way.

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 Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.

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.”*

I see that no prejudice will be suffered by the parties should the amendment be allowed. 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 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 25<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**N.A. MATHEKA**

**JUDGE**