



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 181 OF 2014

(FORMERLY KERUGOYA ELC NO. 108 OF 2014)

JOSHUA MURIITHI NJIRU.....1ST PLAINTIFF

PETER NJUE NJIRU.....2ND PLAINTIFF

(Suing as personal representatives of the estate of Njiru Mutabi)

VERSUS

GEREVASIO NJIRU NYAGA.....1ST DEFENDANT

NGAUGE LAWRENCE MUNENE.....2ND DEFENDANT

HARRISON KIRINGA NYAGA.....3RD DEFENDANT

ALBERT NTHIGA.....4TH DEFENDANT

SIMON KARIUKI NAMU.....5TH DEFENDANT

JAMES KARIUKI NYAGA.....6TH DEFENDANT

NGAMBI GITURA.....7TH DEFENDANT

SIMON MURIUKI.....8TH DEFENDANT

RULING

1. By a notice of motion dated 5th April 2017 brought under the provisions of **Order 8 Rule 3 of the Civil Procedure Rules** the 1st and 2nd Plaintiffs sought leave to amend their plaint in terms of the annexed draft amended plaint. The application was based on the grounds that the plaintiffs wished to properly bring out the issues in controversy to enable the court to determine the case fairly. It was also contended that the Defendants shall not be prejudiced by the proposed amendment.

2. The said application was supported by an affidavit sworn by Njiru Mutabi on 5th April 2017 in which he reiterated the grounds enumerated on the face of the notice of motion. He further stated that he had filed the plaint whilst acting in person and that upon appointing an advocate and receiving legal advice, it had become necessary to amend the plaint to bring out the real issues in controversy hence the instant application.

3. The firm of Joe Kathungu & Co advocates for the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants filed grounds of opposition dated 10th May 2017 in opposition to the said application. It was contended, firstly, that the said application was bad in law, misconceived and an abuse of the court process. The second contention was that the Plaintiff was trying to introduce new causes of action through the intended amendment.

4. The record shows that while the said application was pending, the original Plaintiff (Njiru Mutabi) passed on and was vide a court order made on 11th June 2018 substituted with Joshua Muriithi Njiru and Peter Njue Njiru as his legal representatives.

5. When the said application was scheduled for hearing on 19th July 2018, the Plaintiffs' counsel informed the court that he had already filed written submissions in support of his application. The Advocates for the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants requested for more time to

file and serve their written submissions whereas the 6th and 8th Defendants did not attend court.

6. The court granted the firm of Joe Kathungu & Co Advocates 14 days to file and serve their submissions and fixed the matter for ruling on 20th September 2018. They consequently filed their written submissions on 2nd August 2018.

7. The court has considered the application for leave to amend the plaint, the submissions in support thereof and in opposition thereto and the grounds of opposition on record. The court has noted that there are some discrepancies between the original plaint and the annexed draft of the amended plaint. The Plaintiffs have not complied with the rules on amendment of pleadings as contained in **Order 8 Rule 7 of the Civil Procedure Rules**. This court shall, however, treat this anomaly as a mere irregularity.

8. The principles to be considered in granting or refusing an application for leave to amend a pleading are now fairly well settled. They were summarized in the case of **Eastern Bakery Vs Castelino [1958] EA 461 at p. 462** as follows;

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (1) (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R 262. The case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitale p. 1313”.

9. Those principles were reiterated in the case of **Central Kenya Ltd Vs Trust Bank Ltd & 5 others [2000] eKLR** where the Court of Appeal of Kenya held, *inter alia*, that;

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot be properly be compensated for in costs.”

10. Bearing those principles in mind, the court is satisfied that the Plaintiffs’ application for amendment of plaint should be allowed. It has not been demonstrated that the Defendants, or any one of them, will suffer any prejudice which cannot be remedied by an award of costs. As is usual with such applications, the Defendants shall be granted leave to respond to the amended plaint and to amend their pleadings, if need be.

11. The upshot of the foregoing is that the court finds merit in the Plaintiffs’ notice of motion dated 5th April 2017 and the same is hereby allowed in the following terms;

- a. Leave is hereby granted to the Plaintiffs to amend the original plaint and to file and serve the amended plaint within 14 days from the date hereof.
- b. The Plaintiffs shall strictly comply with the provisions of **Order 8 Rule 7 of the Civil Procedure Rules** in filing the amended plaint.
- c. The Defendants shall be at liberty to respond to the amended plaint within 14 days of service including the liberty to amend their own pleadings.
- d. Costs of the application to the 1st, 2nd, 3rd, 4th, 5th and 7th Defendants.

12. Orders accordingly.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **20TH** day of **SEPTEMBER, 2018**.

In the presence of the 2nd Plaintiff in person and Ms Kiai holding brief for Mr. Kathungu for the 1st – 5th and the 7th Defendants and in the absence of the 6th and 8th Defendants.

Court clerk Muinde

Y.M. ANGIMA

JUDGE

20.09.18