



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE 223 OF 2013

HEZRON SUDI INDENGEZI.....PLAINTIFF/APPLICANT

VERSUS

THOMAS SUTI MALUHA

BENARD TECHU BEYO.....DEFENDANTS/RESPONDENTS

RULING

The application is dated 29th June 2018 seeking the following orders;

1. That the plaintiff be given leave to amend his plaint and or pleadings in manner proposed in the draft originating summons.
2. That costs hereof be provided for.

It is grounded on the annexed affidavit of Hezron Sudi Indengezi and the following grounds that new issues have emerged which has necessitated the amendment of the pleadings herein. That the intended amendment is intended to bring out the real issues in contention herein. That a new party the 2nd respondent herein has been enjoined and or roped in to this suit. That the interests of the applicant and the 2nd respondent as against the 1st respondent are nearly similar though conflicting and or intertwined. That the said amendments to the pleadings herein are necessary for the proper adjudication and determination of the issues herein. That the respondents shall suffer no prejudice whatsoever if the said amendments are incorporated

The defendant/respondent herein opposed the plaintiff's/applicant's notice of Motion dated 29th June, 2018 on the following principal grounds; That the application is bad in law, misplaced, misconceived, inept and without any basis or justification. That the application lacks merit. That the application is irregular in law as it is an abuse of the due process of the court. That the proposed amendment seeks to introduce new cause of action in the suit. That the proposed amendments are not allowed in law and are irregular. That interest of justice dictate that this application should not be granted.

This court has considered the application and the submissions herein. The principles of amending pleadings were set out by the Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* (2000) eKLR 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.*

In the case of **Institute For Social Accountability & Another v Parliament of Kenya & 3 others** [2014] eKLR, Lenaola, Mumbi and Majanja J while determining whether to allow the petitioner to amend their consolidated petitions the court observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the

basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

In the case of **Eastern Bakery vs Castelino** (1958) E.A. 461, Sir Kenneth O’Conner, President of the then Court of Appeal for Eastern Africa, held at page 462

“It will be sufficient ... 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.”

So also in the cases of **AAT Holdings Ltd vs. Diamond Shields International (2014) eKLR**, **Peris Wachera Kamoche vs. Thegenge Enterprises Ltd & Anor (2013) eKLR** and **Andrew Ouko vs. Commercial Bank Ltd & 3 others (2014) eKLR** the gist of the court's finding was that amendments should be allowed to allow parties ventilate the real issues in controversy.

It is quite clear from decided cases above that the discretion of a trial court to allow amendments of a plaint is wide and unfettered except is should be exercised judicially upon the foregoing defined principles. The current application seeks to amend the plaint by replacing it with an originating summons. This is introducing a new cause of action and cannot be allowed. That the application is irregular in law as it is an abuse of the due process of the court. This application has no merit and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 19TH DAY OF SEPTEMBER 2018.

N.A. MATHEKA

JUDGE