



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAKAMEGA**

**ELC CASE NO. 337 OF 2013**

**ELIAB IMBIAKHA MUSHA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**RODGERS ORATA KWEYU.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**ERNEST OLUMU WAMACHE .....2<sup>ND</sup> DEFENDANT/APPLICANT**

**HARRISON MASANGA MUTOBERA..... 3<sup>RD</sup> DEFENDANT/APPLICANT**

**RULING**

The application is dated 20<sup>th</sup> August 2018 and brought under section 3A of the Civil Procedure Act, order 8 rule3, of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified urgent and heard on priority basis.
2. That the first defendant be allowed to amend his statement of defence dated 27<sup>th</sup> February, 2015 to include a counterclaim and the statement of amended defence and counterclaim attached hereto be deemed duly filed and served on payment of the requisite court charges.
3. Costs be provided for.

The applicant submitted that, the plaintiff filed this suit and then closed his road of access and annexed part of his land. That he has no road of access. That at the time of filing of the defence the plaintiff had not interfered with the boundary and close his road of access. That he could not therefore include a counter claim in this suit. That the issue of boundary and road of access had already been determined by due process. That the issue of re-opening of the road of access has not been brought out in their pleadings and he wishes to bring it out as per the draft amended defence and counterclaim.

The respondent submitted that, the applicant has already testified before this honourable court hence the act of trying to bring back other issues is an abuse of the law process. That this matter is in its final stage of completion but the applicant is trying to delay the process by bringing in new issues for the sole reason of denying justice to the plaintiff. That the applicant had enough time to seek leave to amend his defence before this matter came up for hearing of the main suit but he never bothered to do so. That the applicant herein is aware that there is only one witness remaining to testify in this matter before the matter is fixed for judgment. That indeed the land registrar and land surveyor visited the land and opened the access route as indicated on the map. That to the best of his knowledge, he has never closed the applicant's access road instead he is the one who has been encroaching on his land.

This court has considered the application and the submissions therein. The grounds are that, this matter is part heard. It emerged from the evidence of the Land Registrar, PW2 that the issue of road access is yet to be resolved. There is need that the said issue together with trespass be addressed by this court to fully determine the dispute at hand. The said issue has not been pleaded by either side and it must be raised in this case or never again. The amendment will not prejudice the plaintiff in any manner. It is in the best interest of justice that this application be allowed for the court to determine all the issues involved in this dispute all once.

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 Plaint 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 Plaint 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.AC.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 have perused the court file and the prayers in the plaint is for the surveyor and land registrar to mark the access road. The counter claim is proposing the restoration and opening of the access road. I find these endless applications by the litigants in this matter frivolous and an abuse of the court process. The matter is at defence hearing with only the district surveyor left to testify. I find 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 24<sup>TH</sup> DAY OF OCTOBER 2018.**

**N.A. MATHEKA**

**JUDGE**