



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC CASE NO. 506 OF 2017

MURIELA SHIRANDULA SANYA.....PLAINTIFF/RESPONDENT

VERSUS

VINCENT OSUNDWA.....DEFENDANT

AND

ARON MIHESO SAGALA

MANASE AGUMBA.....INTERESTED PARTIES/APPLICANTS

RULING

This application is dated 11th September 2018 and is brought under order 8 rule 3 of the Civil Procedure Rules and seeks the following orders;

1. That the interested parties/applicants be and are hereby granted leave to amend their defence
2. That the draft amended defense and counterclaim hereto annexed be deemed to be duly filed and served subject to payment of the requisite court fees.
3. That costs of this application be provided for.

The 1st Interested party submitted that, prior to filing of this suit I was the absolute registered owner of land parcel NO. KAKAMEGA/MATSAKHA/2064. (copy of search hereto annexed and marked AMS 01). That the land is a sub-division from NO. KAKAMEGA/MATSAKHA/133 which was previously registered in the names of the plaintiff/respondent. That the plaintiff herein successfully filed this suit seeking orders for cancellation of the sub-divisions, got an ex parte judgment which he executed with the effect that the subdivisions were cancelled and the titles reverted to KAKAMEGA/MATSAKHA/133. (copy of green card hereto annexed and marked AMS 02). That he was not heard prior to the judgment and decree being delivered (copy of judgment and decree hereto annexed and marked AMS 02). That however he was enjoined to this suit as an interested party and the ex parte judgment and all consequential orders were set aside on the 4th October, 2017 but the changes at the lands registry are yet to reflect the order of the court. (Copy of ruling and order hereto annexed and marked AMS 03). That he had initially filed a notice of motion seeking for the cancellation of the entries in the lands register but he has upon being advised opted to seek the said orders by way of counter-claim, hence his application seeking leave to amend the defence. That the amendments are necessary to enable the court to properly adjudicate upon and/or determine the issues in controversy between the parties. That since the orders setting aside the earlier ex parte judgment are yet to be effected at the lands office with the effect that the new titles still remain cancelled he now seek the leave of court to amend the defense to include a counterclaim. The plaintiff/respondent opposes the application and states that he never sued the applicants and hence they have no right to amend their defence.

This court has considered the application and the submissions therein. 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 23RD DAY OF OCTOBER 2018.

N.A. MATHEKA

JUDGE