



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 38 OF 2012

ATANUS ASIENWA MUTEKWA.....PLAINTIFF/RESPONDENT

VERSUS

SALIMU ASUMANI

MUSTAFA ASUMANI

SHARIFU ASUMANI

ASINAS VUGUTSA

NIFREDA IMUCHE

VERONIKA WANJIKO

BEATRICE ISAYA

JACKOB SUKUVI

ABRAHAM NYONGESA.....DEFENDANTS/APPLICANTS

RULING

This application is dated 28th September 2018 and is brought under order 1 rule 10 and order 8 rule 3,3 and 6 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act seeking the following orders;

1. This application be certified urgent and heard interparties on a priority basis.
2. The defendants be allowed to amend their defence and introduce a counterclaim in terms of the draft amended defence attached hereto.
3. The amended defence attached be deemed duly file and served upon payment of the requisite court fees.
4. This honourable court to order that one James Asienwa Mutekwa be enjoined as a party to this suit.
5. The costs of this application to abide the outcome of the suit.

It is based on the general grounds that, the amendment and the enjoinder sought is necessary and will assist this court to determine all the issues in controversy. The party sought to be enjoined is registered as the proprietor of Land parcel No. LUGARI/LIKUYANI BLOCK 1 (VIHIGA) 205 which is part of the subject matter of this suit. It will be fair and just that the party sought to be enjoined is notified so as to defend himself in accordance with the rules of natural justice. They also wish to introduce a counterclaim.

The respondents submitted that, before the trial commenced on 19/9/2018 the defendants had had more than 5 years to consider whether they wished to amend their pleadings or not. That on the said 19/9/2018 the plaintiff's testified and called one witness before closing his case. That after closing the plaintiff's case the defendants' counsel opened the defence case by calling 2 witnesses in rebuttal. That after the 2 witnesses the defence counsel applied for an adjournment to call and serve witness statements. That indeed the court granted the defence an adjournment for the defence case to 1/10/2018 to call their remaining witnesses. That the application seeking to amend the defence is under

all the circumstances an afterthought and in all fairness an abuse of the due process of the court. That it will be against the principles of natural justice that a matter that has reached this stage to be reopened as it will amount to parties litigating afresh and more so with the intended introduction of a 3rd party. That in any event the intended 3rd party is not the registered owner of land parcel No. kakamega/Likuyani/Block 1 (Vihiga) 204 and therefore to introduce him as a party will be superfluous. Annexed hereto and marked "AA1" is a copy of the certificate of official search of the said parcel of land which was and is still registered in his name prior to the filing of the suit herein.

This court has considered the application and the submissions herein. The principles 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. Thegege 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 pleadings is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. Be that as it may, the current application seeks to amend the pleadings after the close of the plaintiff's case and after 2 defence witnesses have given evidence. The defendant sought an adjournment thereafter to serve the plaintiff with witness statement only to appear with an application to amend. It seeks to introduce a counterclaim and this late our and enjoin a new party to the suit. It will cause *injustice to the other side as the plaintiff had closed his case*. This 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 21ST DAY OF NOVEMBER 2018.

N.A. MATHEKA

JUDGE