

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC LAND CASE NO. 161 OF 2013

MONICA WAMBUI KAMAU

ZACHARIA NJENGA KAMAU (Suing as legal Representative Of the estate of

JAMES KAMAU THIONGO.....PLAINTIFFS/APPLICANTS

-VERSUS-

GOLDEN SPARROW TRADING CO. LTD.....1ST DEFENDANT

THE REGISTRAR OF TITLES (MSA).....2ND DEFENDANT

RULING

1. The plaintiffs/applicants filed an application dated 3rd May 2016 seeking leave to amend the plaint in terms of the draft amended plaint. The application was supported by the affidavit sworn jointly by the applicants and also dated 3rd May 2016. The nature of the amendment sought is to add additional defendants.
2. The application is opposed by the 1st Respondent vide a replying affidavit deposed to by Mr Joseph Mwella. Mr Mwella deposed that he is the legal officer of the 1st defendant. He states that the 1st defendant has filed an application dated 12th August 2016 seeking to strike out the entire suit and chose to rely on the contents of his affidavit in support of that application. Further he opposes the amendment because the intended amendment does not alter the cause of action he deposes is otiose by virtue of the reasons he gives in paragraph 9 (i) – (viii) of his affidavit. The brief summary that the land plot No 755/MN/VI which is the subject of the dispute in this plaint ceased to exist when the government compulsorily acquired it vide gazette notice of 12th March 1976.
3. Subsequently the applicants filed an amended notice of motion dated 27.10.2016 which is supported by the affidavit of Jeremy Njenga advocate. Mr Njenga proceeded to annex a draft plaint containing further amendments sought to be introduced. Some of the amendments sought to be introduced includes the introduction of new plot numbers MN/VI/4838 being an amalgamation of plot Nos MN/VI/1515, 1673, 1674, 1798, 3690, 4734 and 4810.
4. The parties argued the application by way of oral submissions after the Court gave directions that this application for amendment be heard first as it was filed before the application seeking to strike out the suit. Mr Kiragu advocate submitted that the proposed amendments give the chronology and history of the land in dispute and is intended to show that no compulsory acquisition took place. In support of their application, the applicants have cited the cases of **Bosire Ogero vs Royal Media Services Nairobi HCC 292 of 2013** and **Peter S. Leroka vs Middle Africa Finance Co. Ltd Nairobi HCC 113 of 1988** which espoused the principle that amendment should be freely allowed if it causes no injustice to the other side.
5. Mr Busieka advocate for the 1st defendant relied on the replying affidavit filed on 23rd September 2016 and submitted that amendments should not just be allowed for the sake of it. He continued that they have provided evidence to show that the land in dispute has been compulsorily acquired and that the intended

amendment will not improve the suit but instead prolong the hearing of this case. He urged the Court to disallow the application.

6. I have considered the pleadings as filed and submissions rendered by both sides. In this case, the pleadings have not closed. The amendment sought is to add parties not original sued but who are likely to be affected by the decree and or orders emanating from this suit. The 1st defendant in opposing the application stating that the proposed amendment will not alter the cause of action herein as the land in dispute had been compulsorily acquired by the government. The two decisions cited by the applicants have quoted the decision in **Eastern Bakery vs Castelino (1968) E.A 461** where the Court of Appeal held 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.”*

7. The reason put forth by the 1st defendant that the subject property does not exist will be relevant in my opinion at the stage when his application to strike out the suit is being heard. It is premature to bring it up in an application for amendment. Order 8 rule 5 of the Civil Procedure Rules gives Courts general powers to amend pleadings whether on its own motion or on an application of any party. The Court of Appeal in the case of **Coffee Board of Kenya vs Thika Coffee Mills Ltd & 2 others (2014) eKLR** cited the phrase in **Eastern Bakery vs Castelino** quoted above that amendments should be allowed freely and went further to say that *“Courts will not refuse leave to allow amendment simply because it introduces a new cause of action but refuse where the amendment will change the action into one of a substantially different character 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 accorded since the writ.”*

The Court of Appeal went further to quote the guidelines given in Mulla, code of civil procedure inter alia; ***all amendments should be allowed which are necessary for determination of the real controversies in the suit.***

8. In this instance, the 1st defendant will still have an opportunity to argue his application that is pending to strike out the suit and or amend its defence if need be. There is no prejudice that will be occasioned to it that cannot be compensated by costs or making appropriate orders. The argument that the hearing of this suit would be prolonged does not lie as the pre – trial directions had not been taken. In my view the plaintiffs filed this application in good time. Consequently I find no reason to refuse them leave to amend. The application is therefore allowed with costs to the 1st defendant. The applicants are directed to file and serve the amended plaint within 15 days of this date with leave to the defendants to file amended defence within 15 days of being served.

Dated, signed & delivered at Mombasa this 12th day of May 2017.

A.OMOLLO

JUDGE