



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO.244 OF 2016
JABESS ODUOR MDHAI.....PLANTIFF
VERSUS
THE COUNTY SECRETARY COUNTY
GOVERNMENT OF MOMBASA.....DEFENDANT
RULING

1. The Plaintiff herein, Jabess Oduor Mdhai, vide a Plaint dated 30th August 2016 and filed in Court on the same day sued the Defendant, the County Secretary, County Government of Mombasa seeking a permanent injunction to restrain the Defendant from trespassing, alienating, disposing off or interfering or in any manner dealing with the suit land known as **Plot No.3 Mombasa** and damages for trespass. In paragraph 3 of the statement of Defendant dated 23rd November, 2016 and filed in Court on 24th November 2016, the Defendant pleaded that the suit is incompetent as against the County Secretary as the County Government of Mombasa is a body corporate capable of suing and being sued in its own name.

2. By a Notice of Motion dated 6th March 2017 and brought under the provisions of **Sections 1A, 1B, 3A and 100 of Civil Procedure Act** and **Order 8 Rule 3** and **Order 51 of the Civil Procedure Rules**, the Plaintiff is seeking leave to amend the Plaint. In the draft amended Plaint, the Plaintiff seeks to amend the Defendant's name by deleting "**The County Secretary**". The application is supported by the affidavit of Jabess Oduor Mdhai sworn on 6th March 2017 and the grounds on the face of the motion namely:

- a. That the proposed amendment will assist the Court to determine the real issue in controversy.**
- b. That it is only fair and in the interest of justice to grant the orders sought.**
- c. That the Defendant will not be prejudiced in any way by the amendment.**

3. The Defendant opposed the Plaintiff's application for amendment by filing a Replying Affidavit sworn by Francis Thoya on 19th May 2017. The Defendant contends that the suit was filed after the promulgation of the Constitution of Kenya, 2010 pursuant to which the County Government of Mombasa was established and all legal proceedings against it ought to have been directed to it in its corporate name. The Defendant further contends that the Plaintiff being a member of the County Assembly representing Kongowea Ward ought to have known that the County Government of Mombasa can sue and be sued in its own name. The Defendant avers that the Plaintiff has not satisfied the Court that the

mistake sought to be corrected is a genuine mistake and that the application is an afterthought, mala fides, unmeritorious and ought to be dismissed with costs.

4. The Courts will normally allow amendments of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and on such terms as to costs or otherwise as may be just. Order 8 Rule 3 of the Civil Procedure Rules provides as follows:

“ 3 (1) Subject to Order 1, Rules 9 and 10 Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleading.

(2) where an application to the Court for leave to make an amendment such as mentioned in sub-rule (3) (4) or (5) is made after any relevant period of limitation current at the date of filing the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of other person intending to sue or intended to be sued.”

5. The general power to amend pleadings is donated by **Section 100** of the **Civil Procedure Act** and is provided for under **Order 8 Rule 5** of the **Civil Procedure Rules** which reads as follows:

“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order”

It is clear from the above provisions of the law that the Court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue between the parties. That discretionally power must however be exercised judiciously and not whimsically. It is also clear that the Court may, in its discretion allow the amendment to correct the name of a party notwithstanding that the effect of such an amendment will be to substitute a new party.

6. In the instant case, the Plaintiff seeks to amend the Defendant’s name by having the words “**The County Secretary**” deleted so that what is left as the Defendant is the County Government of Mombasa.

I have perused the pleadings filed and it is apparent that the dispute is between the Plaintiff and the County Government of Mombasa.

In my view, it was not necessary to add the words “**The County Secretary**” in the initial pleadings and that mistake is excusable. The respondent has not demonstrated what prejudice, if any, it will suffer if the application for amendment is allowed. On the contrary, if such leave to amend is granted, it would allow the proper name of the Defendant to be named in the suit. The Defendant can adequately be compensated by costs.

7. Accordingly, and for the reasons herein above, I exercise my discretion and allow the Plaintiff’s motion dated 6th March 2017 and grant him leave to amend the Plaintiff and file an amended Plaintiff within 14 days of this ruling. The costs of the application are awarded to the Defendant.

Delivered, dated and signed at Mombasa this 28th day of June, 2017.

C. YANO

JUDGE