



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ELC CASE NO. 243 OF 2014

TSANGWA NGALA CHOME.....PLAINTIFF

VERSUS

TOWN COUNCIL OF MARIAKANI.....1ST DEFENDANT

KETRACO COMPANY LIMITED.....2ND DEFENDANT

MWABEJA, MWAMUNDU & OTHERS.....OBJECTORS

AND

KATEMBE NZEMBE LEWA & 13 OTHERS...INTERESTED PARTIES

RULING

1. In the Application dated 30th May, 2017, the Interested Parties are seeking for the following orders:

a. That the Interested Parties be granted leave to amend the Statement of Claim herein in terms of the annexed draft of the Amended Statement of Claim marked "A1".

b. That the costs of this Application be provided for.

2. In support of the Application, the 1st Interested Party deponed that the Interested Parties became aware of the consent that had been filed between the Attorney General and the Plaintiff on 29th May, 2017 in which the Attorney General withdrew his Counter-claim; that at all times, the Interested Parties and the Attorney General have supported each other's case and that having not been involved in the negotiations that led to the consent, the Interested Parties are likely to be left without a remedy other than to be allowed to file their own Counter-claim.

3. The Interested Parties have deponed that the Attorney General protects the rights of the citizens of Kenya and that it is against public policy and that wider interests of justice for the Attorney General to have withdrawn his Counter-claim without consultations and involvement of the affected parties.

4. The Interested Parties finally deponed that the amendments sought are meant to ensure that all the relevant issues are raised and resolved in this suit conclusively; that the amendments will not cause any prejudice to the parties herein and that the Plaintiff may be granted leave to amend his Plaintiff.

5. In response, the Plaintiff deponed that the Attorney General was not representing the Applicants; that the Applicants had their own case and that because he has testified and closed his case, he will be

prejudiced if the Application is allowed.

6. The Plaintiff finally deponed that the Applicants' case was as against the 2nd Defendant and that they were all along interested in compensation and not the suit land.

7. The Applicants' counsel submitted that the amendments sought are necessary to ensure that there is a just determination of the dispute.

8. Counsel submitted that in determining whether or not the Applicants' claim to compensation is valid or not, ownership and legitimacy of the Plaintiff's claim of title will have to be considered.

9. The Applicants' counsel submitted that the fact that the Plaintiff has closed his case is not a bar to amendments provided that final Judgment has not been delivered.

10. The Applicants' counsel relied on several authorities which I have considered.

11. The Plaintiff's counsel submitted that the Plaintiff has already closed his case; that the allegation that the Attorney General supported the Interested Parties' case does not arise and that the participation of the Attorney General in the consent does not extinguish the Interested Parties' case.

12. The Plaintiff's counsel finally submitted that if the amendments are allowed, the Plaintiff will be highly prejudiced because the Applicants have all along participated in the proceedings.

13. This suit was commenced by way of a Plaint dated 14th April, 2011.

14. Initially, the matter was filed in Mombasa and allocated file reference number 95 of 2011. The file was then transferred to this court by the Environment and Land Court, Mombasa, *suo moto* on 11th December, 2014.

15. In the Plaint, the Plaintiff only sued the 1st and 2nd Defendants in which he sought for a permanent injunction restraining the Defendants from laying any claim on the land.

16. On 26th May, 2015, the Applicants herein filed an Application in which they sought to be enjoined in the suit.

17. According to the Applicants' Application, they were entitled to a portion of the suit property which had been acquired by the 2nd Defendant. The Applicants' Application to be enjoined in the suit as Interested Parties was allowed by this court on 4th June, 2015.

18. Having being joined in the suit on 4th June, 2015, the Applicants filed their joint Defence on 23rd June, 2015 in which they sought for the following orders:

“a. An order be made to compel Ketraco (the 2nd Defendant) and the relevant government agencies to undertake an adjudication of the various portions of the Interested Parties land affected and or incorporated into Ketraco's aforesaid project.

b. an order for valuation and compensation be made by Ketraco and or the other relevant government agencies to the Interested Parties in respect of the various parcels of land.

c....

d....”

19. After filing their Defence, the Applicants filed their bundle of documents and witness statements.

20. All along, the 1st Defendant, the 2nd Defendant and the Attorney General had not filed their respective Defences.
21. Indeed, the record shows that it was not until 27th June, 2016 and 22nd June, 2016 that the 1st and 2nd Defendants filed their respective Defences. The Attorney General on the other hand filed his Defence on 4th May, 2016.
22. After hearing numerous Applications, the matter was slated for hearing on 30th November, 2016 when the Plaintiff, PW1, testified.
23. The Plaintiff testified further on 1st December, 2016 and was cross-examined by the advocates for all the parties, including the Applicants' advocate.
24. The Plaintiff's witnesses, PW2 and PW3 gave their evidence on 2nd February, 2017 and 3rd February, 2017 respectively while the 1st Defendant's witnesses testified on 2nd February, 2017.
25. The evidence of the Attorney General's witness was taken by the court on 3rd February, 2017, while the evidence of the Objector's witnesses, DW4, DW5 and DW6 was taken on 29th May, 2017 and 30th May, 2017.
26. It is therefore obvious that the evidence of eight (8) witnesses has been taken by this court.
27. The only party who has not testified and called witnesses is the 1st Defendant and the Applicants.
28. The law relating to the amendment of pleading is well settled. In the case of *Central Kenya Limited vs. Trust Bank Limited, (2002) 2 EA 365*, the Court of Appeal held as follows:
- “The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could only be allowed without injustice to the other side... The overriding consideration in Applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot be compensated in costs.”***
29. The Applicants' sole ground for filing the current Application is that they are likely to be left without a remedy after the Attorney General withdrew his Defence and Counter-claim on 29th May, 2017.
30. As I have already enumerated above, the Applicants herein filed their Defence after the Attorney General had filed his Defence and Counter-claim.
31. It cannot therefore be said that the Applicants' Defence, which was filed on their behalf by an advocate was predicated on the Attorney General's Defence.
32. In any event, the Attorney General was enjoined in the suit as an independent party. The Applicants, who are represented by an advocate filed their Defence, not in response to the claim of the Attorney General, but in response to the Plaintiff's claim.
33. It is therefore not legally sound for the Applicants to claim that the withdrawal of the Attorney

General's Defence and Counter-claim would leave them without a remedy if the Application for amendment is not allowed.

34. The Applicants, through their advocate, have participated in these proceedings from the date the Plaintiff testified.

35. Indeed, the Applicants' advocates cross-examined the Plaintiff, PW2 and PW3 at length. All along, the Applicants were aware about the Plaintiff's case on whose basis their advocates did cross-examine the Plaintiff and his witnesses.

36. When the Applicants filed their Defence on 23rd June, 2015, they were aware of the existence of the impugned title. Consequently, the proposed amendments should have been done promptly.

37. Considering that the Plaintiff and his witnesses have testified in this matter, it will be prejudicial to the Plaintiff to allow the Applicants to file a Counter-claim at this stage.

38. I say so because if the Application is allowed, the Plaintiff will have the right to file an amended Plaintiff with the concomitant result that the case will have to start *de novo*. That, in my view, is contrary to the provisions of Section 1A and 1B of the Civil Procedure Rules which provides that for the purpose of furthering the overriding objectives specified in Section 1A, the court should handle all matters before it in a just and efficient manner using the available judicial and administrative resources.

39. This court cannot therefore allow a party, who has all along participated in a matter which is almost coming to a conclusion, to scuttle it on the ground that a co-Defendant has withdrawn his Defence, more so where his Defence was not predicated on the withdrawn Defence.

40. Indeed, the circumstances of this case are different from the case of ***Samuel Kipsang Cheboi vs. Elisha Kiplating Murei & others (2016) eKLR*** in which the Court of Appeal allowed the Plaintiff to re-open its case after the Defendant served the Plaintiff witness statements and documents after the Plaintiff had closed its case.

41. Considering that the Applicants have not shown a plausible reason as to why the court should exercise its discretion in its favour, and in view of the fact that all the parties, except the Applicants and the 1st Defendant, have testified and closed their cases, I dismiss the Applicants' Application dated 30th May, 2017 with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 22ND DAY OF SEPTEMBER, 2017.

O.A. ANGOTE

JUDGE