



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC NO. 329 OF 2013 (OS)**

**CHAIRMAN, SECRETARY/HEADTEACHER,  
TREASURER, COMMITTEE ST. PATRICKS EBUBERE**

**PRIMARY SCHOOL.....1<sup>ST</sup> APPLICANT**

**EBUBERE PRIMARY SCHOOL.....2<sup>ND</sup> APPLICANT**

**VERSUS**

**ISAYA MUSUNGU NAMBIKHW.....RESPONDENT**

**RULING**

This application is dated 28<sup>th</sup> May 2015 and is brought under Section 3A, and 63 (e) of the Civil Procedure Act) Order 8 rules 3, 4, 5 and Order 51 rule 1 of the Civil Procedure Rules seeking the following orders:

1. That a restriction be placed on the title LR. East Wanga/Mung'ang'a/943 pending the hearing and determination of this suit or further orders herein.
2. That the status quo – the applicants use/occupation of LR. East Wanga/Mung'ang'a/943 be maintained pending the hearing and determination of this suit.
3. That leave be granted to the applicants to amend the originating summons and file further supporting affidavit.
4. That the amended originating and the supporting affidavit thereto be deemed duly filed and served.
5. That the orders of 25<sup>th</sup> February 2015 on compliance be extended.
6. That costs be provided for.

The applicant submitted that, this suit was commenced on 13<sup>th</sup> November 2013 or thereabout and is pending. That the subject matter is E. Wanga/Munganga/943, which was created as a result of subdivision of LR. E. Wanga/Munganga/921, which was also created from E. Wanga/Munganga/152. That the applicant was by 1980 occupying and using what is currently L.R. E. Wanga/Munganga/943. That the school purchased a portion of E. Wanga/Munganga/152 from Barnabas Mango Okola in 1980. That the respondent – Isaya Musungu Nambikhwa has never occupied or used the land – East

Wanga/Munganga/943. The respondent has never interfered with the applicants' peaceful/quiet use/occupation of the subject matter. That the former head teacher Mr. Moses Esilaba Akhwale indicated that the original land LR. No. as E. Wanga/Munganga/943 instead of No. 152, the original number before subdivision. That the former headteacher attached an acknowledgement and excluded the sale agreement of 1980, to which he was a witness to. That he has also noted the names of the vendor was described as Moses Mango Okula instead of Barnabas Mango Okola. That it is therefore imperative to amend the pleadings so as to place before the court all matters in controversy for the determination of the court.

The respondent filed his grounds of opposition dated 30<sup>th</sup> November 2015 to the said application on four grounds, on which he submitted that the amendments sought have not been disclosed. The applicants have failed to adhere to order 8 of the Civil Procedure Rules, particularly order 8 rules 7 on mode of amendments, in particular order 7 (2): All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words. The purported amended draft of originating summons does not indicate what amendments are sought in particular.

The respondent submitted that, the deponent of the affidavit supporting the application one Patrick Otoro Makina is a stranger to this suit. He alleges to have authority to swear the same, yet none has been filed. He swears on facts whose sources he does not disclose, and yet does not state whether he is bestowed with records of the 2<sup>nd</sup> applicant. That the application if allowed will amount to changing the subject matter and the same shall form a separate cause of action. The court is bestowed with discretion to allow amendments in order to proceed on a notion of true facts in determining a case, allowing this substantial amendment will not only introduce new facts but will also introduce varying facts with no backing, since the supporting affidavit of Patrick Otoro Makina dated 27<sup>th</sup> May, 2015 has no annexed documents in support of the allegations deponed, making it unreliable in seeking the orders in the application. The court should dismiss the application since the leave for amendment and orders in accompaniment sought seeks to prejudice the respondent who is the registered owner of the suit herein.

This court has considered the applicants' and the respondent's submissions. In the case of **CLARAPEDE –Vs- COMMERCIAL UNION ASSOCIATION (883) WLR 262** it was stated that;

**“However negligent or careless may have been the first omission and however late the proposed amendment the amendment should be allowed if it can be done without injustice to the other side. There is no injustice if the other side can be compensated by costs.”**

The principle set out in the above case is what has guided the Courts in its consideration of the applications of amendment of pleadings. Courts have frequently stated that amendments to pleadings ought to be freely allowed if they can be made without injustice to the opposite side. In this regard see **EAST BAKERY –Vs- CASTELINO (1958) E.A. 461**. Order 8 Rule 3 grants the Court that discretion to permit amendment. The power to amend pleadings is provided in the Rules for the following purpose-

**“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. Order 8 Rule 5(1) of the Civil Procedure Rules.”**

The facts in this case are that, the originating summons was filed on 13<sup>th</sup> November 2013 and the matter is pending taking of directions. The hearing has not commenced. It is the applicants' submission that the current parcel L.R. E. Wanga/Mung'ang'a/943 was created as a result of subdivision of E. Wanga/Mung'ang'a/921 which was also created as a result of sub division of E. Wanga/Mung'ang'a/152. The applicant school purchased the subject matter in 1980, took vacant possession and has been since 1980 in quiet, peaceful occupation use of the subject matter. That the respondent, his family, servants or any other person claiming on his behalf has never used in any manner or interfered with the applicants use/occupation use of the subject matter since 1980 to date. I find that the application if allowed will not amount to changing the subject matter and it does not form a separate cause of action as it is only the

description of the land that has change after subdivision.

On perusal of the application I find that, the applicant has annexed the amended originating summons. It is together with the supporting affidavit, the amendments sought have been disclosed. The overriding objective principle insists on justice delivery and not on technicality or form. It is the applicant's submission that the applicant is an education institution. The defendant is the chairman of the school committee – who has authority from the members to swear the affidavit. Legally he is the authorized person to sue or be sued hence he is not a stranger to this suit.

The court has unfettered discretion to allow an amendment for purposes of determining the real question in controversy between the parties or correcting any defect or error in any proceedings. I find this application has merit and grant the following orders;

1. That the status quo – the applicants use/occupation of LR. East Wanga/Mung'ang'a/943 be maintained pending the hearing and determination of this suit.
2. That leave be granted to the applicants to amend the originating summons and file further supporting affidavit.
3. That the amended originating and the supporting affidavit thereto be deemed duly filed and served.
4. That the orders of 25<sup>th</sup> February 2015 on compliance be extended.
5. That costs be to the respondents.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 15<sup>TH</sup> DAY OF NOVEMBER 2017.**

**N.A. MATHEKA**

**JUDGE**