



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC CASE NO. 19 OF 2016**

**THE MANAGEMENT COMMITTEE OF AGC RIVERSIDE CHURCH.....PLAINTIFF**

**VERSUS**

**LILIAN MOSONIK.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KIPNGENO MOSONIK.....2<sup>ND</sup> DEFENDANT**

**RULING**

**Introduction**

1. What is coming up for determination is the application dated 17<sup>th</sup> October 2016. The application is brought by way of Notice of Motion pursuant to order 8 rules 3(1), 5 and 8 and order 1 rule 10 of the Civil procedure and sections 3 and 3A of the Civil Procedure Act. The Plaintiff seeks leave to amend the Plaintiff.

2. The application is premised on the grounds stated on the face of the Notice of Motion and the supporting affidavit of one Richard Arap Bett, an official of the plaintiff Church sworn on the 17<sup>th</sup> October 2017. In the said affidavit the applicant depones that they wish to amend the Plaintiff to sue as individuals instead of the church. A copy of the draft Amended Plaintiff in which the names of the said individuals are stated is attached.

3. The application is opposed by the 1st Respondent (on behalf of both respondents) through her Replying Affidavit sworn on the 12<sup>th</sup> July 2017. In the said affidavit the 1<sup>st</sup> Respondent depones that the application lacks merit and is bad in law as the orders sought cannot be granted by the court. She depones that through the proposed amendment, the applicant seeks to substitute the parties thereby introducing a new cause of action. She further depones that the proposed plaintiffs have no locus standi as they were not party to the purported transactions. She also depones that the intended amendment is aimed at defeating the defendant's Preliminary Objection.

**Applicant's Submissions**

4. In his submissions learned counsel for the applicant state that proposed amendment is intended to reflect the representatives who purchased the suit property and who should have been indicated as plaintiffs. It has been submitted that the substitution will not change the cause of action as the claim is still based on the sale agreement dated 24<sup>th</sup> November 2008.

**Respondent's Submissions**

5. On the other hand, learned counsel for the respondent has submitted that the proposed amendments introduce a new cause of action as the proposed plaintiffs are strangers to the agreement between the plaintiff and the late Pauline Chemalel Hensridge.

6. The main issue for determination is whether the applicant should be granted leave to amend its Plaintiff.

7. The principles that should guide the court in dealing with applications for amendments are elaborated in **Mulla, the Code of Civil Procedure, 18<sup>th</sup> Ed, Vol 2 pages 1751-1752** which has been cited in various authorities including the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR** where it is stated as follows:

**i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;**

**ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;**

**iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporated by means of amendments;**

**iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;**

**v. Amendments of a claim or relief barred by time should not be allowed;**

**vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time**

**vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties**

**viii. The delay in filing the petitions for amendment should be properly compensated by costs**

**ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”**

8. In the case of **Joseph Ochieng & 2 Others V Frist National Bank of Chicago Civil Appeal No. 149 of 1991** the Court of Appeal while citing with approval Bullen, Leake & Jacobs in Precedents of Pleadings, 12<sup>th</sup> Edition remarked regarding amendment of pleadings as follows:

*“The power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); that as a general rule however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side... that if the proposed amendment introduces a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which would more conveniently be made the subject of a fresh action..”*

9. From the foregoing it is clear that the court has a wide discretion in dealing with an application to amend pleadings unless the other side is able to demonstrate that they would seriously be prejudiced by the proposed amendment. The respondent has raised valid points with regard to the contract which I believe can be canvassed at the main hearing.

## **Conclusion**

10. Having carefully considered the application, affidavits, pleadings and submissions of counsel as well

as the law on amendment of pleadings, and also mindful of the overriding objective of the Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes, I am of the view that the application is merited and I grant it. The Plaintiff shall however bear the costs of the application to cushion the defendant from the inconvenience caused. I further direct that draft amended plaint be deemed as duly filed upon payment of the requisite court fees. In order to pave the way for an expeditious disposal of this suit, I direct that the parties comply with order 11 of the Civil Procedure Rules within 45 days from the date hereof.

**Dated, signed and delivered this 6<sup>th</sup> day of December 2017.**

**J.M ONYANGO**

**JUDGE**

In the presence of:

Miss Chelimo for the Plaintiff

Mr. Koko for the Defendant

Court assistant:Rotich