



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 171 OF 2011

EVALINE ROSA PLAINTIFF/RESPONDENT

VERSUS

CATHERINE KORIKO 1ST DEFENDANT/APPLICANT

BENJA KORIKO 2ND DEFENDANT/APPLICANT

DANIEL KORIKO 3RD DEFENDANT/APPLICANT

FELIZ KORIKO 4TH DEFENDANT/APPLICANT

RULING

1. The defendants/applicants application dated 24th November 2015 seeks leave to amend their statement of defence and counterclaim filed herein dated 13th October 2011. The application is brought under Order 8 Rules 3 and 5 of the Civil Procedure Rules. The grounds upon which the application is founded are set out on the body of the application as hereunder:

(i) When this suit was brought by plaintiff against the defendants on 2nd September 2011, there were pending objection proceedings vide Kisii HC Succ Cause No. 105 of 2010 which were challenging grant of Letters of Administration Intestate to the plaintiff in respect of the estate of Kimaiyo Ole Ntiira that owned LR No. Transmara Oloibosoito/12 which is the subject matter in the instant suit.

(ii) That defendants anchored their defence and counterclaim on the said objection whose outcome they could not know at the time.

(iii) That in view of the succession court's finding on the objection that has confirmed plaintiff as administrator of the said estate, it is necessary to amend the defendants' statement of defence and counterclaim to plead and include a claim for adverse possession on the property.

(iv) That at the time the defendants filed their defence and counterclaim herein they were not certain that plaintiff would be confirmed as administrator of the estate that owned the suit property so as to plead adverse possession.

(v) If defendants are not granted leave to amend their statement of defence and counter claim they stand to lose their entire claim and interest on the suit property.

(vi) The application is brought in good faith and for the purpose of determining the real question in controversy between plaintiff and defendants over the suit property.

The 1st defendant has also sworn an affidavit in support of the application basically reiterating the grounds and has annexed a draft of the intended amended statement of defence and counter claim as “K02”.

2. The plaintiff/respondent filed a statement of grounds of opposition dated 2nd February 2016 and among the grounds the plaintiff/respondent states:-

1. The plaintiff's/respondent's suit having been heard and closed on the 12th day of March 2014, the instant application seeking to amend the statement of defence and thereby introduce a counterclaim has been mounted too late in the day and hence same is disposed to cause and/or occasion extreme prejudice to the plaintiff/respondent.

The instant application is barred and/or prohibited by dint of order 8 Rule 3 of the civil Procedure Rules 2010. Consequently, the entire application is invalid and hence void ab initio.

3. 2. The instant application amounts to and/or constitutes a fishing expedition and/or excursion, which is frowned upon by the due process of the law. Consequently, the instant application amounts to playing lottery with the court.

4. The intended amendment is statutory barred and contrary to the provisions of Order 37 Rule 3 of the Civil Procedure Rules, 2010.

5. The defendants/applicants having hitherto contended to be heirs and/or beneficiaries of one Kimayio Ole Ntira, deceased vide Kisii HC Succession Cause No. 105 of 2010, now determined, same cannot now be heard to contend and/or profess a claim vide adverse possession whatsoever.

6. The application does not disclose any sufficient and/or reasonable cause and that the same has not been brought without unreasonable delay and the orders sought are not warranted.

3. The parties argued the application by way of written submissions. The defendants/applicants submissions were filed on 17th March 2016 while the plaintiff/respondent filed his submissions on 27th May 2016. The gist of the defendants/applicants submission is that the court has unfettered discretion to grant leave to amend pleadings at any stage in the proceedings under the provisions of Order 8 Rules; 3 and 5 of the Civil Procedure rules. In support of their submissions the applicants have referred the court to various court decisions where the court has considered the factors to take into account before leave to amend pleadings is granted.

4. In the case of **David Jonathan Grantham & Another –vs- National Social Security Fund [2007] eKLR, Lady Justice Lessit** allowed an application for leave to amend notwithstanding the application had been made just before the date scheduled for hearing. In allowing the application the judge stated that she was guided by the principles applicable on amendments as enumerated by **Shah J. A** in the case of **Joseph Ochieng & 2 Others t/a Aquiline Agencies –vs- First National Bank of Chicago C. A No. 149 of 1991** where the judge stated as follows:-

“...amendments should be timeously applied for. Power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule however late amendment sought to be made should be allowed if made in good faith provided costs can compensate the other side; that exact nature of the proposed amendment sought ought to be formulated and submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied

as to the truth and substantially of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical...”.

5. **Lessit, J.** in the **David Jonathan Grantham & Another –vs- NSSF** case (Supra) stated that:-

“The court’s power to allow amendments is donated under Order VIA Rules 3, 5 and 8 (now Order 8 under the 2010 Civil Procedure Rules). The court can allow amendments at any stage of the proceedings. The only test being whether it was timeously made; whether it is in good faith; and whether costs can compensate the defendant/respondent and whether the amendment is material and not merely technical.”

Order 8 (3)(1) of the Civil Procedure Rules provides that **“...the court may at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such terms as it may direct, allow any party to amend his pleadings”**.

8 (3)(2) provides:-

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

8 (3)(5):

“An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

6. The Court of Appeal for Eastern Africa in the case of **Eastern Bakery –vs- Castelino [1958] E. A 461** had occasion to consider what the guiding principles are in determining whether or not to allow an application for amendment. In the case their Lordships stated as follows:-

(a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be compensated by costs.

(b) The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.

7. The running thread in the line of cases referred to by both the defendants/ applicants and the plaintiff is that applications to amend pleadings ought to be liberally and freely granted, unless prejudice and injustice will be occasioned to the opposite party. Where costs can appropriately compensate, the opposing party leave to amend should be granted as a matter of course subject to payment of costs. The main consideration in my view is that the application is made in good faith in the interest of doing justice as between the parties and that no party is unduly prejudiced if leave to amend is granted. In the case of **Central Kenya Limited –vs- Trust Bank Limited [2000] EALR 365** the Court of Appeal observed as follows:-

“The amendment of pleadings ... (is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided, (i) there has been no undue delay, (ii) no new or inconsistent cause of action is introduced, (iii) no vested or accrued legal right is affected, and (iv) the amendment can be allowed without injustice on the other side.

Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment does not result in prejudice or injustice to the other party that cannot be properly compensated for in costs. Neither the length of proposed amendments nor mere delay are sufficient grounds for declining leave to amend. The overriding considerations are whether the amendments are necessary for the determination of the suit and whether the delay is likely to prejudice the opposing party beyond compensation in costs.”

8. The plaintiff/respondent has submitted that the defendants application for leave to amend their defence and counterclaim has not been brought without unreasonable delay as the same is being brought after the plaintiff has testified and closed her case. The defendants predicated their defence on the basis that they were the rightful beneficiaries of the estate of Kimaiyo Ole Ntiira. The defendants applied for the revocation of grant that had been issued to the plaintiff vide Kisii HC Succession Cause No. 105 of 2010 and pursuant to which the plaintiff had processed and was issued with a title to land parcel **Transamara/Oloiborsoito/12** as the sole beneficiary. Judgment in the succession cause was delivered on 30th January 2015 with the court finding and holding specifically that Catherine Koriko, the 1st defendant, through whom the 1st to 4th defendants claim was not a beneficiary of the late Kimaiyo Ole Ntiira’s estate. The court declined to revoke the grant issued to the plaintiff in the succession cause.

9. Despite becoming aware of the court’s ruling on 30th January 2015, the applicants did not file the present application until 30th November 2015. In the initial defence and counterclaim filed by the defendants, the defendants were claiming to be entitled to the suit land as beneficiaries of the late Kimaiyo Ole Ntiira. Following the determination by the court in the Succession Cause that the defendants were not beneficiaries, the defendants in the draft amended defence and counterclaim have changed tact and now claim that the late Kimaiyo Ole Ntiira had sold a portion of 2 ½ acres to the defendants family through their kin one Joseph Kipkoech Cheruiyot (now deceased) vide an agreement dated 6th April 1985 and claim that they took possession and occupied the land and have been in occupation since then. The defendants claim that they have acquired title by adverse possession of the suit land and seek a declaration to that effect. The proposed amendment quite clearly alters the character of the suit. In the earlier statement of defence and counter claim there was no mention of the fact that the defendant’s claim arose out of a purchase agreement and/or that the defendants were setting up a claim of entitlement by virtue of having been in adverse possession.

10. The plaintiff has testified, has been cross examined and re-examined and has closed his case on the basis of the original pleadings. The plaintiff testified and closed his case on 12th March 2014. The record shows that the matter was fixed for further hearing on 21st May 2015 when the hearing did not proceed. The matter was again fixed for hearing before me on 9th November 2015 when the defendants advocate indicated that he wished to make an application to amend the defence and counterclaim and the court directed that the defendants file a formal application for leave to amend. This is the application, the subject of this ruling. The defendants having failed to establish they were infact beneficiaries of the estate of the late Kimaiyo Ole Ntiira as they had claimed now seek to contest ownership of the suit land on the basis that they are adverse possessors. They nonetheless predicate their entry into the suit property on some alleged agreement for sale entered into between the husband of the 1st defendant and the late Kimaiyo Ole Ntiira suggesting the entry was with the consent of the owner. Both contracting parties are deceased and the alleged agreement of sale was apparently not completed by the time the parties to the agreement passed on.

11. The defendants have no doubt come to the realization that their case stands on shaky ground following the determination by the court that the defendants were not beneficiaries of the late Kimaiyo Ole Ntiira. The amendment of the defence and counterclaim proposed by the defendants quite evidently introduces a new cause of action and for all intent and purposes constitutes a new action. If the amendments were to be admitted, the plaintiff would be faced with a fresh action arising from the counter claim. The defendants as it were, wish to make **360°** turn and abandon their claim as beneficiaries entitled to the estate of the late Kimaiyo Ole Ntiira to one of being entitled as adverse possessors. The proposed amendment would totally change the character of the suit and in my view that would not be

without prejudice to the plaintiff who has had to battle claims in the Succession Cause (Kisii HCC Succession Cause No. 105 of 2010) and now in the instant suit. In the present suit the plaintiff has testified and closed her case and to admit the proposed amendments would inevitably mean reopening the pleadings where the plaintiff would of necessity require to answer to the fresh action. The plaintiff in those circumstances would be required to testify afresh and consider whether or not to call any witnesses.

12. I have anxiously considered this matter and whereas I am aware, I am called upon to exercise my discretion to grant or not to grant the application, the exercise of such discretion has to be judicious and should not be whimsical. Having considered the facts and circumstances of this matter, I get the sense that the defendants are engaging in a fishing expedition in the hope that they could stumble onto something otherwise it is inexplicable why in the original defence and counterclaim there was no suggestion they are infact adverse possessors. While the defendants would nonetheless be entitled to seek to amend their pleadings at any stage of the proceedings, my view is that to allow amendment at this stage in these proceedings would occasion prejudice and injustice to the plaintiff.

13. In the case of **Harrison C. Kariuki –vs- Blue Shield Insurance Co. Ltd [2006] eKLR** the plaintiff sought to amend his plaint after both parties had testified and closed their respective cases. In the case **Waweru, J.** in refusing to grant the application interalia stated:-

“...This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admission made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted. Having considered all matters placed before me, in exercise of my discretion I will refuse the application...”.

14. In the instant suit it is apparent the decision that the defendants are not beneficiaries of the late Kimaiyo Ole Ntiira precipitated the filing of the instant application for amendment. However having considered all the circumstances, I am not inclined to exercise my discretion in favour of granting the application. I accordingly decline to grant the application. I dismiss the same with costs to the plaintiff.

15. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 28th day of October, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

..... for the plaintiff

..... for the defendants

..... Court Assistant

J. M. MUTUNGI

JUDGE