



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO.16 OF 2010

RAPHAEL MKARE & 515 OTHERS.....PLAINTIFFS/APPLICANTS

=VERSUS=

AGRICULTURAL DEV. CORPORATION.....DEFENDANT/RESPONDENT

R U L I N G

1. This matter was filed five (5) years ago. It did not proceed for hearing due to the numerous Applications filed by both parties until 4th March 2015 when PW1 testified. The Defendant closed its case on 16th April 2015 after calling four witnesses.
2. On 16th April 2015, the court directed the parties to exchange written submissions.
3. On 15th May 2015, the Plaintiffs filed an Application seeking for the following orders:
 - (a) **THAT the Plaintiffs be granted leave to amend the Plaintiff dated 1st March, 2010 as per the draft annexed hereto.**
 - (b) **THAT the amended draft Plaintiff annexed hereto be deemed as having been duly filed and served upon payment of the requisite fees.**
 - (c) **THAT the Defendant be at liberty to file a reply to the amended Plaintiff if it so disires.**
 - (d) **THAT the cost of this Application be in the cause.**
4. The Application is supported by the Affidavit of the Plaintiffs' advocate who has deponed that for the sake of clarity and in order to enable the court to effectively address the real issue in question, it is necessary to amend the Plaintiff as proposed.
5. According to the Plaintiffs' counsel, the proposed amendments stems from the same facts in respect of which relief is claimed by the Plaintiffs; that the amendment only introduces the relief of declaration as a basis for the prayer of injunction and that the proposed amendment will not occasion any prejudice to the Defendant.
6. According to counsel, it is not too late to bring the amendments since there will be no need to call additional evidence.
7. In response, the Defendant's advocate deponed that the full hearing of this case has been conducted and the matter is awaiting submissions and Judgment and that the amendment is based on facts which emerged from the proceedings.
8. The Defendant's counsel deponed that the amendment intends to introduce new facts to the suit

- and that the court ought to consider the time that has been taken to prosecute the suit.
9. The advocates filed their respective submissions and authorities which I have considered.
 10. As I have already stated, the Plaintiffs and the Defendant have closed their respective cases. The matter is awaiting the filing of submissions and the delivery of Judgment.
 11. The Plaintiffs have proposed to amend their Complaint and include the following paragraph:

“The Plaintiffs’ claim against the Defendant is for a declaration that being their ancestral land and in their possession since time immemorial, the Plaintiffs’ rights over the suit land are recognised and protected under the law and the Constitution.”

12. The Plaintiffs have not told this court why this proposed amendment was not made before the parties testified in this matter.
13. Considering that all the witnesses have testified, it will not be far fetched for this court to conclude that the proposed amendment is meant to align the Plaintiffs evidence with the draft Amended Complaint.
14. Indeed, the issue of the land being the Plaintiffs ancestral land came out during trial. Such an amendment, after the testimony of all the witnesses, in my view, will be prejudicial to the Defence case considering that the matter proceeded for full hearing on the basis of the pleadings that are on record.
15. In the case of **Stephen Boru Githua Vs Family Finance Building Society (2015) e KLR**, the Court of Appeal held as follows:

“To determine this appeal we must begin by reiterating that amendments to pleadings which contradicts previous pleadings in the same suit or are intended to delay a fair trial or are likely to prejudice the other party to an extent that damages cannot compensate that party, should not be allowed. There are cases where amendments to pleadings have been rejected because they came at a very late stage of the proceedings, or made in bad faith. All the above is intended to keep litigants on an even footing, so that prejudicial ambushes or other skirmishes do not spring up thereby delaying a fair and quick disposal of a trial, or cause prejudice to other party....On the other hand, we reiterate that where intended amendments are geared to place a full and clear case before the court so that it is effectually and finally determined on its merits, ought to be allowed for that is the way to do justice.”

16. In the case of **Malindi ELC No. 76 of 2007 Kassim Sharif Mohamed Vs Four Island Bay Limited**, this court held as follows:

“The overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Consequently, when the court is called upon to invoke the provisions of Order 8 of the Civil Procedure Rules which gives the court the discretion to allow amendment of pleadings before Judgment, the court should be alive to the above overriding objectives. In this matter, by allowing the Plaintiff’s to enjoin other parties to the suit, eight years down the line, and in a matter which is part heard, is contrary to the provisions of Section 1A and 1B of the Civil Procedure Act.”

17. The above holdings are applicable in this matter. The re-opening of pleadings by the Plaintiffs in a matter which has been finalised and is only awaiting the delivery of Judgment is meant to delay the trial of this suit and is prejudicial to the Defendant.
18. It is trite law that when an amendment is allowed, the other party has to be given an opportunity to amend his pleadings and the matter to begin *de novo*.
19. I do not see why this court should re-open the pleadings when the Plaintiffs knew or ought to have known the cause of action they were pursuing before PW1 testified. No reason has been given to

me why the proposed amendment was not made before trial.
20. For those reasons, I dismiss the Application by the Plaintiff dated 18th May, 2015 with costs.

Dated and delivered in Malindi this **9th** day of **October** 2015.

O. A. Angote

Judge