



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

**AT MALINDI**

**ELC CIVIL CASE NO.30 OF 2013**

**ABDUL WAHID AL ABUBAKAR.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**1. OSMAN ABUBAKAR T/A OSMAN WOODWORKS**

**2. ISSA ABUBAKAR**

**3. MOHAMED ABUBAKAR.....DEFENDANTS/APPLICANTS**

**R U L I N G**

1. The Application dated 13<sup>th</sup> April 2015, by the Defendant is seeking for the following orders:-
  - (a) **That leave be granted to the 3<sup>rd</sup> Defendant to amend his Statement of Defence filed herein to include a counterclaim.**
  - (b) **That costs of this application be in the cause.**
2. The Application is premised on the grounds that the Defendant inadvertently omitted to include a counterclaim in his statement of Defence; that the Defence was filed by the Defendant in person; that the counterclaim arose out of the same facts and cause of action and that the amendment will enable the court to determine with finality the real issues in controversy between the parties.
3. In his response, the Plaintiff deponed that the issue of compensation as claimed in the proposed counterclaim cannot arise for a party who has erected structures without permission of the landlord; that the amendments being sought have been introduced too late in the day and that the Defendant does not have a locus standi to file the proposed counterclaim.
4. The Defendant/Applicant's advocate filed his submissions which I have considered. The Plaintiff/Respondent did not file submissions.
5. In the Plaint, the Plaintiff averred that the 1<sup>st</sup> Defendant is a licensee on the parcel of land number 10061 where he operates a workshop; that the Plaintiff is desirous of developing the land and that the Defendants have refused to give the Plaintiff vacant possession.
6. The 3<sup>rd</sup> Defendant filed a Defence in person in which he averred that the business premises in dispute was built in the year 1940's by his late father and that they have occupied it since then.
7. In the proposed counterclaim, the 3<sup>rd</sup> Defendant contends that having invested on the suit property, they are entitled to compensation at the current market value of the building and fixtures erected on the suit property.
8. Indeed, the law allows a party to amend his pleadings at any stage of the proceedings.

9. However, where a matter has been partly heard, the court ought to be slow in allowing an amendment to a pleading considering that such an amendment is likely to be prejudicial, especially where the opposite party has already tendered evidence.
10. Indeed, one of the issues that the court considers when the matter comes up for pre-trial directions is whether any of the parties would wish to amend his pleadings before the matter can be confirmed for hearing.
11. In this matter, PW1 testified on 16<sup>th</sup> March 2015. The said witness informed the court that he is based in the United Kingdom and had travelled to Kenya for the purpose of tendering his evidence.
12. After the testimony of PW1, the Plaintiff closed his case and on the same day, the 3<sup>rd</sup> Defendant gave his evidence as DW1. The Defendant also produced exhibits in support of his case.
13. The Defendant now wants to introduce a counterclaim, which is a cross suit after the Plaintiff has already closed his case.
14. Indeed, the claim by the 3<sup>rd</sup> Defendant, who has also testified, is a new cause of action which was never raised in the Defence.
15. Allowing the amendment at this stage will be prejudicial to the Plaintiff because what is being sought to be introduced is a new cause of action, which has been brought after the Plaintiff has testified.
16. It will not be in the interest of justice to allow the proposed amendments at this stage because the process of filing pleadings by parties will have to be re-opened up with the concomitant result that the trial of those proceedings will be delayed. Indeed, PW1 had to travel from the UK to testify and recalling him will be unjust. Secondly, if the Defendant intention was to seek for an order of compensation for the structures(s) that are standing on the suit property, nothing would have been easier than pleading that fact while filing the statement of Defence or before the hearing commenced. The current application in my view was filed as an after thought and with a view of defeating the Plaintiff's evidence on record.
17. For those reasons, I disallow the Application dated 13<sup>th</sup> April 2015 and direct that the matter be fixed in the registry for further Defence hearing.

Dated and delivered in Malindi this **20<sup>th</sup>** day of **November** 2015.

**O. A. Angote**

**Judge**