



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 65 OF 2011

JAMES PETER KINYUNGU MBANDI.....PLAINTIFF/RESPONDENT

=VERSUS=

**NGUMBAO GODA DZOMBO & 72 OTHERS.....DEFENDANTS/
APPLICANTS**

R U L I N G

Introduction:

1. What is before me in Defendants' Application dated 17th February, 2014. The Application is filed pursuant to the provisions of Order 8 Rule 3 and order 51 rule 1 of the Civil Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act. The Application is seeking for the following reliefs:
 - a. **That leave be granted to the Defendants to amend their defence in the manner shown in the draft amended defence.**
 - b. **That the amended defence be filed and served upon the Plaintiff within such time as may be determined by this Honourable court.**
 - c. **That the Plaintiff be at liberty to amend his Plaintiff within 14 days of service by the Defendants of the amended defence.**
 - d. **That the costs of this application be provided for**

The Defendant'/Applicant's case:

2. According to the Defendant's deposition, the Defendants instructed the firm of Ombachi Moriasi and Co. Advocates to defend their interests herein having been sued by the Plaintiff for vacant possession, damage for loss of use and mesne profits with regard to a parcel of land known as Kilifi/Kijipwa /96.
3. It is the Defendants' deposition that due to an oversight by the advocates, they did not specifically plead as against the Plaintiff and other land officials the manner in which the Plaintiff acquired the suit property.
4. The Defendants have in great detail explained in the affidavit how they acquired the suit property and why they should be allowed to file a counter-claim at this stage.
5. The Defendants finally deponed that the introduction of the counter-claim and the proposed amendments to the Defence will not in any way prejudice the Plaintiff but will enable the court to clearly know the issues in dispute for a proper determination.

The Plaintiff's /Respondent's case:

6. The Plaintiff's/ Respondent's Advocate filed Grounds of Opposition and averred that the proposed amendments can conveniently be raised and canvassed during the hearing of the main suit without necessarily being raised by way of a counter claim; that the proposed amendments will introduce a new cause of action which is statute barred and that the proposed amendments will alter the nature and character of the suit.
7. The parties' advocates appeared before me on 25th March 2014 and made oral submissions. I have considered the said submissions together with the affidavits and the annexures on record.

Analysis and findings:

8. I have perused the proposed amendments to the Defence. The Defendants are principally introducing in their Defence a counter claim. Other than the Plaintiff, the Defendants have included as new parties in the proposed counter-claim officials from the Ministry of Lands.
9. In the counter-claim, the Defendants have stated in detail how they came to be in possession of the suit property, which fact was not pleaded in the Defence. The Defence have particularised the fraud that was allegedly committed by the proposed Defendants in the counter-claim. The Defendants have prayed in the proposed counter claim for a declaration that the suit property belongs to them and for a mandatory injunction to issue as against the proposed Defendants in the counter-claim.
10. I reinstated the law regarding amendment of pleadings in **Malindi H.C.C.C. No. 65 of 2012** which I will reproduce herein.
11. The law relating to the amendments of pleadings and joinder of parties is provided for under Order 8 Rule 3 and Order 1 Rule 10 of the Civil Procedure Rules respectively.
12. The Civil Procedure Rules provides that the court may at any stage of the proceedings, in such terms as to costs as may be just allow any party to amend its pleading
13. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:

“The Court may at any stage of the proceedings order that the name of any person who ought to have been joined and whose presence may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit be added.”

14. The Plaintiff in this matter has not shown that the proposed amendments will occasion him injustice or injury which cannot be compensated by an award of costs. Indeed, the inclusion of the proposed Defendants in the counter claim is necessary to enable the court determine the issues of fraud that have been pleaded by the Defendants. This in effect will avoid a multiplicity of suits and will allow this court to effectively and effectually determine the issues in the suit. As was held by the Supreme Court of Uganda in *Gasu Transport Services (Bus) Ltd. -Vs- Obene (1990-1994) E.A 88*, courts should generally give leave to amend pleadings rather than give judgments in ignorance of the facts which ought to be known before rights are definitely decided.
15. The reasons as to why the courts should generally allow amendments were set out by *Bowden L.J. In Cooper -Vs- (1883) 26 Ch D 700 at 711* in the following words:-

“It is a well-established principle that the object of the court is to decide the rights of the parties and not to punish them for the mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. I know of no kind of error or mistake, which, if not fraudulent or intended to overreach, the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I don't regard such amendments as a matter of favour or grace....”

16. The Plaintiff has averred that the amendments are seeking to introduce a new cause of action which is statute barred. The proposed amendments do not introduced a new cause action. All the

- Defendants are saying in their counter claim is that that they are the ones who are entitled to the suit property having been in possession for over 50 years and that the Plaintiff colluded with the officials at the Ministry of lands to have the suit property registered in his name.
17. Order 7 Rule 5 of the Civil Procedure Rules provides that the court may allow an amendment notwithstanding that its effect will be to add or substitute a new cause of action of the new cause of action arises out of the same facts or substantially the same fact as a cause of action in respect of which relief has already been claimed in the suit. That is the position in this matter.
18. The proposed cause of action by the Defendants is neither new nor inconsistent with the Plaintiff's cause of action, and even if it was, the same arises out of the same facts or substantially the same fact as a cause of action in respect of the Plaintiff's claim. If the Defendants' claim is time barred as alleged, then the Plaintiff is entitled to raise that issue at trial.
19. In the circumstances, and for the reasons I have given above, I shall, which I hereby do, allow the Defendants' Application dated 17th February 2014 in the following terms:
- a. **That leave be and is hereby granted to the Defendants to amend their Defence in the manner shown in the draft amended Defence.**
 - b. **The amendment Defence and counter claim be filed and served upon the Plaintiff within 14 days from the date hereof.**
 - c. **The Plaintiff be at liberty to amend his Plaint within 14 days from the date of service of the amendment Defence and counter claim.**
 - d. **Each party to pay for his or her own costs.**

Dated and Delivered in Malindi this 16th day of May, 2014

O. A. Angote

Judge