



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
CIVIL CASE NO. 65 OF 2012

JOHN GITAU MUNGAI.....PLAINTIFF/APPLICANT

=VERSUS=

STEPHEN THUKU KABEBE

THE DISTRICT LAND REGISTRAR LAMU

THE ATTORNEY GENERAL

THE LAMU CONTROL BOARD.....DEFENDANTS

R U L I N G

Introduction

1. The Application before me is the one dated 30th January, 2014. The Application has been filed pursuant to the provisions of Order 8 Rules 3(1), (2) and 5 and Orders 1 Rule 10 of the Civil Procedure Rules, 2010. The Application is seeking for the following orders:

a) That this Honourable Court be pleased to grant leave to the Plaintiffs to Re-amend their amended Plaint filed herein out of time in the manner set out in the Re-Draft Amended Plaint hereto annexed.

b) That costs of the Application be provided for

The Plaintiff's/Applicant's case:

2. According to the Plaintiff's Supporting Affidavit, subsequent to the filing of the Plaint and the Amended Plaint, he discovered that other fraudulent, illegal and unlawful actions were committed by the Defendants including the issuance of a consent by the in Lamu District Land Control Board; that the amendments sought are to enjoin the Lamu Control Board as the 8th Defendant.

The Defendant's/Respondent's case:

3. The 1st, 2nd and 3rd Defendant's advocate filed his Grounds of Opposition and Notice of Preliminary Objection on 19th February, 2014. The Defendants have averred that the intended amendments are meant to delay the hearing of the main suit; that the intended amendments are irregular having been based on a Reply to Defence filed out of time and without the leave of Court and that the Amended Plaintiff dated 18th July 2012 was filed out of time and without the leave of the court.
4. The Defendant's finally averred in their Notice of Preliminary Objection that the intended Re-Amended Plaintiff annexed on the Notice of Motion cannot be granted because it is premised on an Amended Plaintiff which was irregularly filed.

Submissions:

5. The Plaintiff's counsel submitted that the Application is filed under Order 8 Rules 3(1), (2) and 5 of the Civil Procedure Rules which provides that the court may at any stage of the proceedings allow any party to amend his pleadings so as to determine the real question in controversy between the parties. Counsel relied on the case of *Central Kenya Limited -Vs- Trust Bank Limited (2002) 2 EA 365* where the Court of Appeal held as follows:-

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

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

6. The Plaintiff counsel also relied on the cases of *Gasu Transporter Services (Bus) Vs Obene (1990-1994) EA 88*, *Kuloba -Vs- Oduor (2001) 1EA 101* and *Eastern Bakery -Vs- Castelino (1969) EA* to buttress his arguments.
7. Counsel finally submitted that since the hearing has not commenced, the Defendants will not be prejudiced with the proposed amendments because they will have an opportunity to amend their defence(s). It was the Plaintiff's submissions that the issues raised in the Grounds of Opposition and the Preliminary Objection are not relevant to the current Application.
8. The 1st, 2nd and 3rd Defendant's counsel submitted that the Amended Plaintiff was filed out of time and without the leave of the Court and consequently the same does not form part of the record and that the Amended Plaintiff should be expunged from the court record.
9. The Defendant's counsel further submitted that the Reply to Defence filed on 19th July 2012 was filed out of time. Counsel relied on the case of *Fidelity Security Ltd. -Vs- John Onyango Ogwang in which Aganyanya J*, as he then was, held as follows:

“In the ultimate result, my findings on this appeal are that the learned Senior Resident Magistrate had no authority to add one more day to the period within which the respondent should have filed its amended Plaintiff and that on that score, the application should have been allowed and the amended Plaintiff filed in court on 11.5.1999 struck out.”

10. Counsel also relied on High Court authorities in *Edwin Dickson Wasunna -Vs- Kenya Electricity*

Analysis and findings:

11. The law relating to the amendments of pleadings and joinder of parties is provided under Order 8 Rule 3 and Order 1 Rule 10 of the Civil Procedure Rules respectively.
12. The Civil Procedure Rules provide 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 pleadings.
13. The Plaintiff in this matter is seeking to enjoin the Lamu Land Control Board in the suit after discovering that the Board indeed granted consent to have the suit property transferred to the Defendants. The Plaintiff has denied that he ever applied for the said consent or appeared before the Board for the consent.
14. 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.”

15. The Defendants have not shown that the proposed amendments will occasion them injustice or injury which cannot be compensated by an award of costs. Indeed, the inclusion of the Lamu Land Control Board is necessary to determine the issues of fraud that have been pleaded by the Plaintiff viz-a-viz the transfer of the suit property to the Defendants. This in effect will avoid a multiplicity of suits and will allow this court to effectively and effectually determine the issues. 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
16. 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....”

17. Although the Defendants have averred that the proposed Re-amended Plaintiff is based on the Amended Plaintiff which was filed out of time, there is no Application before me to strike out the said Amended Plaintiff. Consequently, the said objection cannot be raised in opposition to the current Application. The Defendants have to file a formal Application to have any pleadings by the Plaintiff filed out of time to be struck out.
18. For the reasons I have given above, I allow the Applications dated 30th January 2014 filed in this matter and in Malindi HCCC No. 66 of 2012 as prayed. The Re-amended Plaintiffs should be filed and served within 14 days from the date of this Ruling upon payment of the requisite fees.

Dated and delivered in Malindi this 9th day of May, 2014.

O. A. Angote

Judge