



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L NO. 1'B' OF 2012**

**(Formerly HCC No. 55 of 1989)**

**ABRAHAM ARAP BOIT.....PLAINTIFF**

**VS**

**ZACHARIA ARAP KENY.....1ST DEFENDANT**

**PHILIMON ARAP SITIENEI.....2ND DEFENDANT**

**PHILIP ARAP SINGOEI.....3RD DEFENDANT**

*(Application for amendment; suit as filed seeks to have the court determine the acreages that each litigant is entitled to; plaintiff before that determination was made proceeding to sub-divide the land into 18 portions; plaintiff seeking to amend suit to reflect that suit land has been sub-divided; whether application for amendment ought to be allowed; determination that the proposed amendment is pre-judicial; court using its discretion to vacate the sub-divisions; matter to proceed on the basis of the original plaint).*

**RULING**

The application before me is an application dated 6 October 2008 filed by the plaintiff seeking to amend the plaint. It is an application brought under Order VIA Rules 3(1) and 8 of the former Civil Procedure Rules (which were amended in 2010). The plaintiff has annexed a draft amended plaint to the application and seeks leave to amend the plaint in line with the annexed draft. Principally, the plaintiff seeks to make two types of amendments. The first is to substitute some parties who are deceased. The second is to alter the description of the suit land. The grounds upon which the application is based are that :-

*(a) Both plaintiff and the second defendant have passed on.*

*(b) The personal representatives of both plaintiff and 2nd defendant have been granted leave to be substituted in place of the deceased hence plaintiff and the 2nd defendant need to amend the plaint to reflect this position.*

*(c) the plaint needs to be amended to reflect the fact that the character of the suit land has changed in that the original parcel L.R No. 10784/2 has been subdivided and converted and new titles issued for several parcels, under the Registered Land Act.*

*(d) It is in the interest of justice that the plaint be amended to facilitate effectual disposal of this matter.*

*(e) No prejudice will be suffered by the parties to this suit in case the instant application is allowed.*

The application is supported by the affidavit of Grace Jeel Boit who is the applicant and the personal representative of the plaintiff who is deceased.

The original court file got lost and what I have is a file that was reconstructed in the year 2001. I do not therefore have the benefit of the court proceedings prior to 2001. I also think that this reconstructed file is missing quite a number of applications filed and several critical documents.

Be as it may, I can see on record the original plaint filed by Abraham Boit (Deceased) on 17 May 1989. In the original plaint, it was pleaded that the plaintiff was the registered owner of the land parcel L.R No. 10784/2 within Uasin Gishu District measuring about 873 acres. He averred that he had invited the three defendants to partner in the purchase of the land with each making contribution. It was his case that at some point he bought out the share of the 3rd defendant's share but that the 3rd defendant had refused to move out. Against the 3rd defendant, the plaintiff sought the following orders :

*(i) that the 3rd defendant is not entitled to a share of the suit land.*

*(ii) an order of eviction.*

As against the 1st and 2nd defendants, the plaintiff sought the following orders :-

*(i) A determination of the amount paid/contributed by each person.*

*(ii) A determination of the acreage that each person was entitled to.*

*(iii) Sub-division of the land.*

The 2nd and 3rd defendants entered appearance through the firm of M/s Birech & Co Advocates and filed a common defence. In their defence, it was averred that the share of the 2nd defendant in the suit land is 248 acres and that of the third defendant is 105 acres. The third defendant denied that his share had been bought out. I cannot see any defence on record filed by the 1st defendant, and Mr. R.K. Kamau , for the plaintiff, stated from the bar that the suit against the 1st defendant was settled by consent.

I can see on record several consents sub-dividing the land between the parties, but I was informed by counsels that those consents were set aside. I have also seen an application filed in 1995 asking for the plaintiff to be stopped from sub-dividing the land pending the hearing of the suit but I am unable to see any final orders issued.

The 2nd and 3rd defendants have filed replying affidavits opposing this application for amendment. However a consent was entered into with respect to the part of the application that seeks to amend the parties to reflect that the plaintiff and the 2nd defendant are being substituted by their representatives. What was vehemently opposed was the application to have the plaint amended to reflect a change in the land parcel L.R No. 10784/2.

It is deponed in the supporting affidavit that the original suit parcel of land being L.R No. 10784/2, which was a title issued under the Registered Titles Act (CAP 281) (repealed), was sub-divided into several parcels and new titles for the sub-divided portions were issued under the regime of the Registered Land Act (CAP 300) (repealed). These titles are now 17 in number described as Soy/Kapsang Block 12 (Kapkatet) /2 -18.

This sub-division has of course brought in a fundamental change to the character of the suit. The proposed amendment to the plaint seeks to introduce the following key paragraphs as follows :-

*6A. After the subdivision referred to in paragraph 3A above, the former first defendant continued to occupy the parcel known as Soy/Kapsang Block 12 (Kapkatet)/4, while the late Philip Sitienei continued*

to occupy the portions known as Title Number Soy/ Kapsang Block 12 (Kapkatet)/2 and Soy/ Kapsang Block 12 (Kapkatet)/7 as the third defendant continued to occupy the parcel known as Soy/Kapsang Block 12 (Kapkatet)/3.

8A. The 3rd defendant has however refused to move out of the land parcel Title number Soy/Kapsang Block 12 (Kapkatet)/3 and continues to occupy the land illegally and also claims some other extra parcel of land that he is not entitled to.

8B. The plaintiff also avers that the late Philemon Sitienei continued to occupy the portion of the land now known as Title Number Soy/Kapsang Block 12 (Kapkatet)/7 illegally since his contribution aforesaid was only enough to cater for the purchase of Title Number Soy/Kapsang Block 12 (Kapkatet)/2 and no more.

9A. As between the plaintiff and the 3rd defendant the plaintiff prays the court to declare that the 3rd defendant's occupation any (sic) parcel of land other than of the portion of the land now known as Title number Soy/Kapsang Block 13 (Kapkatet)/3 is illegal and that the court do issue an eviction order against the 3rd defendant's continued illegal occupation of the said excess land.

10A. As between the plaintiff and the 2nd defendants the plaintiff prays the court do determine every person's payments, entitlement and order and declare that the 2nd defendants are only entitled to own and occupy Soy/Kapsang/Block 12 (Kapkatet)/2 and that they are trespassers on the Soy/Kapsang Block 13 (Kapkatet)/7 and should vacate or be evicted there from immediately in default.

The prayers are also sought to be amended so that as against the 3rd defendant is sought the following prayers :-

(i) An order that he is not entitled to a share or any of land (sic) other than the land now known as title number Soy/Kapsang Block 12 (Kapkatet)/3.

(ii) A declaration that his occupation of any portions other than the land now known as Title Number Soy/Kapsang Block 12 (Kapkatet)/ 3 is illegal.

(iii) An eviction order against the 3rd defendant's continued illegal occupation of the said extra portion of land.

The prayers against the 1st and 2nd defendant are also sought to be amended to inter alia have the court issue a declaration that the estate of the late Philemon Sitienei (2nd defendant) is only entitled to own and occupy Soy/Kapsang Block 12 (Kapkatet)/2 and that they are trespassers on the Soy/Kapsang Block 12 (Kapkatet)/7 and should vacate or be evicted therefrom immediately in default.

It will be seen from the above, that what the plaintiff proceeded to do was to sub-divide the land into several portions so that the original land parcel No. L.R 10784/2 ceased to exist. If I am to get the plaintiff right, on the new sub-divided parcels, the defendants occupy on the ground more than they are entitled to.

The gist of the opposition raised by the defendants, which was strongly put forth by Mr. T.K. Kwambai and Mr. R.M Wafula for the 2nd and 3rd defendants, is that the amendment sought should be rejected as it will validate the sub-division of the land, which sub-division was made without first the court determining the portions that each party was entitled to.

Mr. R.K. Kamau for the applicant however argued that the sub-division has already been effected and that the original land parcel no longer exists. He stated that the amendments were necessary to reflect the change of the character of the original suit land. To support his arguments, he relied on the cases of *Central Kenya Ltd vs Trust Bank Ltd & 4 Others (Court of Appeal, Nairobi Civil Appeal No. 222 of 1998)* and *Suleiman v Karasha (1989) KLR 201*.

Mr. Kwambai and Mr. Wafula on their part were of the view that the amendments seek to fundamentally

alter the nature of the suit. Mr. Kwambai stated that the nature of the original suit sought to have the court determine the acreages that each defendant was entitled to. He stated that with the sub-division the plaintiff has proceeded to make an award to the defendants which he now wants endorsed by court. To support his view that the amendment ought to be rejected, he relied on the case of *Kyalo v Bayusuf Brothers Limited (1983) KLR 229*.

Mr. Wafula reiterated the submissions of Mr. Kwambai and added that what the plaintiff has done is to usurp the powers of the court. He also stated that there was an order of injunction that preserved the status of the land.

I have considered the application and the arguments of the parties. The rules do allow a party to amend his pleadings with leave after close of pleadings. Whether or not to allow leave to amend is in the discretion of the court. Nevertheless, the practice has been to liberally allow parties to amend their pleadings under the cardinal principle that parties ought to be given opportunity to lay out their cases as they would wish. As was stated in the case of *Central Kenya v Trust Bank & 4 Others*, the guiding principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs (see page 4 of the decision). In the case of *Central Kenya v Trust Bank* the trial judge declined leave to the plaintiff to amend its plaint. The court of appeal overturned this decision on the principle that the policy of the law is to allow amendments unless the other party would be prejudiced or suffer injustice.

In *Eastern Bakery v Castelino (1959) EA 461*, the court held that :-

*(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.*

In *Kyalo v Bayusuf* an application to amend the statement of defence was denied. The said case involved a claim for damages arising out of a road traffic accident. In the original defence, the defendant had admitted ownership of the vehicle and that the driver of the vehicle was their employee. The matter partly proceeded on that basis. Years later, the defendant sought to amend its defence to deny ownership and or that the driver was their employee. This amendment was rejected by the trial judge which decision was upheld by the court of appeal. The basis for rejecting the amendment was that the same were completely inconsistent with the previous pleadings and was coming rather late in the day. Madan J. explained as follows :-

*"To grant leave to amend the defence which proposes to take a complete somersault from the original one would be both unfair and cause heavy prejudice to the respondent, who is entitled, nearly six years after the accident, to hold the appellants to the admissions made by them originally."* (at p232).

It will be seen from the above that the court may be inclined to reject amendments which seek to fundamentally alter the character or subject matter of the suit or which will cause prejudice to the other party.

In our case, it will be seen that the original plaint sought orders to have the court determine the portions of land that the plaintiff and the defendants ought to have in the suit land which was L.R No. 10784/2. As this suit was pending, the plaintiff went ahead to sub-divide the land into 17 parcels and what the plaintiff now wants is declarations based on the new parcel numbers. Counsels for the defendants stated that there were orders of injunction barring any interference with the character of the suit land. I have seen some interim orders but Mr. Kamau for the applicant stated that those interim orders were never confirmed and there was nothing to bar the plaintiff from proceeding to sub-divide the land.

I stated earlier that I am operating with a reconstructed file which is very sketchy and does not contain any proceedings prior to 2001. It is difficult for me to determine whether there was an order of injunction stopping interference with the character of the suit land. However, even if there was no order, I do not think that it was in the place of the plaintiff to proceed to sub-divide the land. The plaintiff came to court asking the court to determine the share of each of the partners in the land. The plaintiff knew and was aware that at least the 1st and 2nd defendants are entitled to a share in the suit land. I do not comprehend why, before such determination was made, the plaintiff then deemed it proper to proceed to sub-divide the land without the consent of the defendants. This process fundamentally and radically changed the character of the suit land and of the entire suit. It was improper in my view for the plaintiff to proceed to do so, since what he did, was to unilaterally determine the subject matter of the litigation.

Should I allow the amendment so that litigation may proceed on the basis of the new parcel numbers? I think, in the circumstances of this case, it will be improper for me to allow the amendment. As I have stated above, the plaintiff sought the determination of the acreage that himself and the defendants are entitled to out of the land L.R No. 10784/2. The court has not yet made that determination. It was to be after that determination that the land would have to be sub-divided into three or four portions depending on whether the court would hold that the 3rd defendant is entitled to any share.

I think the plaintiff proceeded to sub-divide the land to defeat the litigation and I am unable to allow that sub-division to stand. In the same vein I am unable to allow any changes to be effected to the original suit. This suit must proceed as if the suit land is one un-divided share so that the task of the court remains to determine the shares of each litigant.

I am unable to allow the amendment so as to have the litigation proceed on the basis of 17 parcels of land unilaterally demarcated by the plaintiff. My view is that the amendment will greatly prejudice the defendants. The amendments will also cause injustice to the defendants as it will be an endorsement of the plaintiff's view of the case before the same is determined by court.

I reject the application to amend, save for the part of substitution which was agreed by all parties, and order the suit to proceed on the basis of the original plaint and on the premise that the suit land has not been sub-divided. This application is dismissed with costs.

In the face of the original pleadings, I cannot allow those sub-divisions to stand as this would be permitting the plaintiff to pass judgement on his own case before the same is determined. I think the action by the plaintiff calls for me to use my powers and discretion, which I do, and I do proceed to cancel any purported sub-division of the original land parcel No. L.R No. 10784/2. Neither should any further sub-divisions, dispositions or dealings be entered into on the suit land by either party until this matter is determined. This matter will proceed henceforth on the basis that the land parcel L.R No. 10784/2 still exists as one whole undivided parcel.

It is so ordered.

**DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JUNE 2013**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Read in open Court*

*In the Presence of:-*

*Mr. R.K. Kamau present for the plaintiff/applicant.*

*Mr. T.K. Kwambai present for the 1st defendant/respondent and also holding brief for Mr. R.M. Wafula for the 2nd defendant/respondent*

***1st Defendant/respondent (unrepresented) absent***