



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L 228 OF 2012

ELIZABETH SARANGE B. ABENGA.....PLAINTIFF

VS

**MILIKA MUSIMBI MAVIA & 8
OTHERS.....DEFENDANTS**

RULING

(Application for amendment of Defence; Application opposed by plaintiff; Principles to be applied; whether application for amendment ought to be allowed; application allowed)

The defendant filed a Chamber Summons application seeking to amend the original defence that was filed, and also, to include a counterclaim. This application is opposed by the plaintiff who has filed several Grounds of Opposition.

This suit was instituted on 26 January 2006. The case of the plaintiff is that, he is, and was, at all material times, registered as proprietor of the land parcel Uasin Gishu/Kimumu/1567. He has claimed that the defendants have trespassed into the said land and have taken possession of the same, and that despite demand for them to vacate, the defendants have adamantly refused to leave. The plaintiff inter alia sought orders for a declaration that the defendants are not entitled to occupy the suit land and for an order of eviction. The defendants filed a joint Statement of Defence. The gist of their defense, as outlaid in the statement of defense, is that the suit land is family land, and as far as they are concerned, is meant to be in the name of John Mabilia Wetira, who is husband to the 1st defendant, and is father to the 2nd- 9th defendants. They have averred that if at all the plaintiff has title then she holds it subject to their overriding interest. They also pleaded that if at all the defendant obtained title, then she got the same fraudulently. This application was then filed on 14 August 2006. I have seen the proposed amended defence and what the defendants want is to include additional particulars of fraud, and to introduce a counterclaim, seeking the cancellation of the title of the plaintiff, on the basis that it was obtained by fraud.

The grounds of opposition raised are to the effect that there is no privity of contract or privity of estate between the plaintiff and defendants; that the application seeks to claim a trust in the suit land which claim is scandalous, frivolous, vexatious and an abuse of the process of court; and that the defendants have no proprietary interest on the suit land.

These objections in my view, seek to raise a contest on the proposed pleadings and are issues to be canvassed at the hearing of the suit.

The former Order VIA Rule 3 upon which this application is based, and the current Order 8, do allow parties to amend their pleadings. The purpose of permitting a party leave to amend is so that such party

may be able to plead his case in full and not have an element of his suit shut out from being considered. Indeed, courts are liberal when it comes to allowing amendments to pleadings unless clear prejudice can be occasioned to the other party.

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.

The defendants are perfectly within their rights to seek to amend the defense, and on my part, I see no good reason why I should decline the proposed amendments. This matter has not commenced, and I do not see any prejudice which will be occasioned to the plaintiff, who is at liberty to file a reply to the amended defence and join issue with the defendant. I am aware that it has taken quite a while before this application was listed for hearing but this was not in any way due to the fault of the applicants.

For the above reasons, I allow the application for amendment. The plaintiff shall however have the costs of the application.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 24TH DAY OF SEPTEMBER 2013

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Read in open Court

In the Presence of:-

Mr. Y.M. Barasa of Ms Wambua Kigamwa & Co for the defendants/applicants

Mr. M.J. Omusundi of M/s Gicheru & Co Advocates for the plaintiff/respondent.