



**1. Amendments should
be freely allowed**

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

LAND CASE NO. 176 OF 2012

NAWAL ABDULRAHMAN ABDALLA.....PLAINTIFF

=VERSUS=

EVA KIMEA.....DEFENDANT

RULING

1. What is before me in the 1st Defendant's Notice of Motion dated 10th July 2013 which has been filed pursuant to Order 8 Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
2. The Application is seeking for one substantive prayer, that the 1st Defendant be allowed to amend her defence in terms of the draft defence.
3. The Application is supported by the 1st Defendant's Affidavit in which the 1st Defendant deponed that her, together with the 2nd Defendant bought plot number 9339 measuring 2 ½ acres from one Eric Edward Barallon; that the sale agreement did not indicate sale number 9339 because by the time of the sale, the seller had lost the deed plan in respect to the said portion and that plot number 244/82 Kijiwe Tanga was a big parcel of land measuring 1,500 acres and it gave raise to several subdivisions including plot number 9339.
4. The 1st Defendant/Applicant finally deponed that while drafting the defence, his former advocate indicated that the plot number she purchased was plot number 244/82 notwithstanding the fact that he had informed the said advocate that the plot she was claiming was plot number 9339 which is a portion of plot number 244/82, thus the Application for amendment.
5. The Plaintiff opposed the Application by filing a Replying Affidavit on 31st July 2013. The Plaintiff deponed that from the 1st Defendant's documents, and specifically the agreement of sale, the 1st Defendant bought a property known as subdivision scheme plot number 244/82 measuring approximately one acre in Kijiwe Tanga, Malindi and not 9339 as alleged in the Application.
6. The Plaintiff finally deponed that from the various acknowledgements of payments the Defendant alleges to have paid, none of them referes to plot number 9339 and therefore the amendment is just aimed at creating a case which she does not have; that the deed plan for plot number 9339 is 189054 and not 199050 as claimed by the 1st Defendant in her affidavit and that the affidavit of

- loss of the deed plan was sworn on 14th June 2002 and yet the agreement of sale shows that the 1st Defendant purchased the suit property in July 1997.
7. I have perused the Plaintiff in which the Plaintiff has averred that she is the lawful registered owner of a plot known as plot number 9339, Title number L.T.40 Folio 199 File 10977 situated at Malindi, whose deed plan number has been given as 189054. The Plaintiff does not make reference to the original number of portion number 9339.
 8. The Defendant filed her defence and counter-claim on 18th December 2012. In the defence, she states that she bought land referenced number 244/82 and seeks for a declaration that portion number 244/82 Kijiwetanga, Malindi belongs to her.
 9. The Defendant did not make any reference to portion number 9339 which the Plaintiff claims to be hers or to the fact that the portion she bought was a portion of plot number 244/82 and not the whole of it.
 10. It would appear from the Defence and Counter-claim that was filed by the Defendant on 18th December 2012 that she did not traverse the Plaintiff's assertion at paragraph 3 that she (the Plaintiff) is lawfully the registered proprietor and owner of plot known as plot number 9339 Title No. L.T.40 Folio 199 File 10977.
 11. The Defendant now wants to substitute in her Defence the phrase "lawful and rightful registered owner of land reference as plot number 244/82" with "lawful and rightful registered owner of land referenced as plot number 9339 which is part of plot number 244/82"
 12. It is not in dispute that this court has unfettered judicial discretion to grant or refuse leave to amend pleadings. The unfettered discretion to allow amendment is necessary to enable the court determine the real issues in controversy between the parties and to enable the court adjudicate upon the rights of the parties fully and conclusively.
 13. In the case of **Eastern Bakery vs Castelino (1958) EA 461**, it was held as follow:

"Amendment to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated".

14. In **British India General Insurance Co. Ltd VS G.M.Parmer and Co. (1966) EA 172**, it was held as follow:

"The amendment sought to add a new ground for denying liability which could have been pleaded in the beginning as an alternative of defence and as the judge was satisfied that the Application was made bona fide and could cause no injustice to the other side there was no good reason to refuse the respondents leave to amend their defence"

15. The Defendant has deponed that she purchased a portion of land known as plot number 244/82 and not the whole of plot number 244/82. It is possible that the portion of the land she was purchasing was not known to her as at the time of purchase or even as at the time the Defence was drafted.
16. It is also possible, as she has deponed, that her former advocate mistakenly indicated that she purchased the whole of plot number 244/82 and not a portion thereof.
17. The amendments, as proposed in the draft amended defence, are necessary for the determination of the real issues and no prejudice would be caused to the Plaintiff.
18. In allowing the 1st Defendant's Application to amend her Defence, I adopt the citation in **Bullen & Leake, Chapter 11** derived from the case of **Gropper VS Smith (1884) 26 CD** where **Bower L J** said:

"I think it is a well-established principle that the object of courts is to decide rights of the parties and not to punish them for their mistakes.

An amendment ought to therefore as a rule to be allowed if thereby the real substantial question in controversy can be raised between the parties and to avoid multiplicity of legal proceedings.

The purpose of the rules on amendments as is clear from some of the authorities on the points is to administer justice. The powers to grant amendment of the pleadings is intended to serve the end of justice and such power ought not to be limited by narrow considerations such as expense, compensable delay or the inconvenience of the respondent.”

19. For the above reasons, I allow the 1st Defendant's Application dated 10th July 2013 in terms of prayer (a). Each party shall bear her own costs.

Dated and Delivered in Malindi this **20th** day of **September**, 2013

O. A. Angote

Judge