



**REPUBLIC OF KENYA**

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

**E&L 441 OF 2012**

*Formerly HCC 85 of 2008*

**JOSEPH TIREITI.....PLAINTIFF**

**VS**

**JACOB KIPSUGOT ARAP LAGATE & ANOTHER.....DEFENDANT**

***(Application for amendment of plaint; application being filed after close of hearing; new cause of action being introduced; whether amendment ought to be allowed in the circumstances)***

**RULING**

1. The plaintiff has filed an application seeking leave to amend the plaint. The application is filed pursuant to the provisions of Sections 3A, and 100 of the Civil Procedure Act, and Order 8 Rule 3 and 5 of the Civil Procedure Rules, 2010 and Article 159 of the Constitution.
2. This suit was commenced by way of plaint on the 3rd June 1999. The original plaint had only one defendant, that is Jacob Kipsugot arap Lagat. In the plaint, it was pleaded that sometimes in the year 1971, the plaintiff purchased the defendant's share in L.R No. 779/359 for consideration, which then entitled him to a quarter, undivided share of the said land, equivalent to 26 1/2 acres. It is pleaded that consent of the land control board was issued and that the plaintiff then moved into possession. It is alleged that in May 1999 the defendant trespassed into the land with the intention of reclaiming 2 1/2 acres of the land. The plaintiff thus sought a permanent injunction to restrain the defendant from interfering with the plaintiff's possession of the suit land.
3. The sole defendant (now 1st defendant) filed defence. He admitted having entered into an agreement with the plaintiff for sale of 24 acres of the land for a sum of Kshs. 12,000/=. He however contended that he was only paid Kshs. 6,000/= leaving a balance of Kshs. 6,000/= which has never been paid. He denied that the plaintiff is entitled to 24 acres but only to 12 acres.
4. On 27 October 2000, the plaintiff filed an application to amend the original plaint to include Anne Ngeny as the 2nd defendant. Leave was granted and the amended plaint was filed on 9th February 2001. The original plaint remained intact only that the plaintiff claimed a permanent injunction against both defendants as he alleged that the 1st and 2nd defendants both sought to dispossess him of 2 1/2 acres of the suit land. The 2nd defendant entered appearance and filed a defence in which she denied the plaintiff's claims.
5. On 14th February 2002, the plaintiff filed an application for injunction to restrain the defendants from sub-dividing the land parcel L. R No. 779/359 till final determination of the suit. An interim injunction was granted on 15th February 2002, pending inter partes hearing of the application. On 13th June 2002,

the parties entered a consent in which an injunction was issued, but only limited to the portion of 26 1/2 acres, claimed by the plaintiff.

6. Later, an application dated 4th April 2003 was filed, in which the plaintiff sought to have the defendants held in contempt of court and committed to civil jail. The allegation by the plaintiff was that in violation of the stay order of 13th June 2002, the defendants had gone ahead to sub-divide the parcel of land measuring 26 1/2 acres. That application was heard and dismissed, though strictly not on merit, but because the court felt that the defendants had not been served with the stay order.

7. Another application dated 17th November 2008 was filed, again seeking to have the defendants committed to civil jail for contempt. The grounds upon which the application was based were that the defendants were sub-dividing the land contrary to the consent order of 13th June 2002. That application was withdrawn on 6th November 2009.

8. The parties complied with pre-trials and the matter then proceeded for hearing on 5th February 2013, and on several other days thereafter. The plaintiff gave evidence and closed his case on 5th February 2013. The defendants on the other hand testified and closed their respective cases on 9th July 2013. The hearing of the matter having closed, the counsels agreed to put in written submissions and the matter was fixed for mention on 17th September 2013 for submissions. It is thereafter that the plaintiff filed this application on 11th July 2013 seeking to amend the plaint. He also sought a stay of the proceedings pending the hearing inter partes of the application.

9. In the application, the plaintiff seeks to amend the plaint to add six new paragraphs and two new prayers. The gist of the six new paragraphs will be to add a claim for adverse possession.

The grounds upon which the application is founded are that :-

*(a) That the plaintiff has been in occupation of the suit land since 1971 without interruption.*

*(b) That at the time of his possession, the defendants had not acquired the certificates of lease.*

*(c) That it is necessary for the real issue in controversy to be determined that the plaint be amended (sic).*

*(d) That the amendment sought is necessary to enable the court determine the suit once and for all.*

*(e) That the titles herein were obtained during the pendency of this suit, making it necessary to raise the issue of adverse possession.*

*(f) That the law allows for a new cause of action to be raised at any stage of the proceedings.*

*(g) That the new cause of action will not call for additional evidence.*

10. The application is supported by the affidavit of the plaintiff. He has stated that he purchased the land in 1971 from the first defendant and that he has been residing on the same to date. He has averred that in the year 2005, the defendants sub-divided the land and obtained title despite there being a court order. It is his view that no prejudice will be suffered by the defendants.

11. As expected, the defendants have opposed the application. The replying affidavit has been sworn by the 2nd defendant on her own behalf and on behalf of the 1st defendant. She has noted that this application was filed ten days after the close of the defence case. She has also deponed that the amendment alters the whole character of the suit and that the amendment is being sought in bad faith. She has stated that it is unacceptable and unfair for the plaintiff to wait until the case is concluded so as to fill in the gaps which were exposed after the conclusion of the case. She has further deponed that a claim of adverse possession ought to be filed by way of Originating Summons.

12. At the hearing of the application, Mr. J.K. Chebii for the plaintiff, confirmed that the plaintiff wishes

to introduce a new cause of action based on adverse possession. He stated that among the issues raised in evidence, some go towards proving a claim of adverse possession. He pointed out that Order 8 Rule 3 and 5, allow an amendment at any stage of the proceedings. He admitted that the application was filed late in the proceedings, but contended that no prejudice would be caused to the defendants. He averred that part of the reason for the amendment was because the defendants violated the order of injunction and obtained titles, despite the stay order. He stated that the new case of adverse possession has arisen because the defendants went against the order of injunction and that the defendants obtained title in the year 2005.

13. Mr. C.K. Mitei for the defendants opposed the application. He relied on the replying affidavit and emphasized that this application has come after close of the hearing. It was his view that the amendment sought would be unjust to the defendant. He relied on two authorities, being ***Bwana v Said (1991) KLR 454***, and ***Kassam v Bank of Baroda (2002) KLR 294***.

14. I have considered the application and the submissions of counsel. The application is primarily premised upon the provisions of Order 8 Rules 3 and 5, and in my view, the provisions of Rule 3 and 5 are important. They provide as follows :-

*Rule 3 (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.*

*Rule 5 (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.*

15. It will be seen from the above clauses, that the court has discretion to allow a party to amend his pleadings. This discretion is meant to enable the court determine the real question in controversy between the parties. However, as will all other discretions, such discretion to allow a party to amend, must be made with the aim of ensuring that justice will prevail and that no prejudice will be caused to any party. When amendments are sought before the matter has commenced, such amendments are in most cases liberally granted. However, as the matter progresses, so does it become more difficult to obtain leave to amend. In other words, the chances of being granted leave to amend, diminish with the progress of the matter and also with the effluxion of time.

16. The oft quoted case with regard to amendments is ***Eastern Bakery v Castelino (1959) EA 461***, where the court held that :-

*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.*

However, in the same decision, it was stated as follows :-

*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.*

17. The court in most cases will frown upon an amendment that seeks to introduce a completely new cause of action especially where the matter has commenced. In ***Kyalo v Bayusuf Brothers Limited (1983) KLR 229***, 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.A 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).

18. In ***Mukibi v Bhavsar (1967) EA 473***, the plaintiff filed suit for damages for the wrongful removal from the possession of a third party of certain chattels. The plaintiff did not however aver that the alleged wrongful removal had resulted in damage to the goods, nor that the appellant was deprived of his reversionary interest. An application was made to strike out the plaintiff's claim as disclosing no cause of action, which application was allowed. The appellant contested this dismissal on appeal and in the alternative sought to be granted leave to amend the plaintiff's claim. This was dismissed as the amendment sought was to substitute a completely new cause of action.

19. In ***Bwana v Said***, the court was categorical that a claim commenced by way of plaintiff's claim, cannot be reversed to be a claim initiated by Originating Summons which is precisely what the plaintiff now intends to do.

20. 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, especially if such amendments come very late in the litigation. The effect of such amendments would ordinarily prejudice the other party as they are now forced to face litigation that is completely different from that which they have been defending. There is indeed danger that if such amendments are liberally granted, then a litigant would wait till the end of the suit to attempt to fill in the holes created by the other party during the conduct of the litigation. They are not amendments that should be encouraged except in very exceptional circumstances.

21. In this case, it is clear that what the plaintiff wants to do is to add a new cause of action, a claim by way of adverse possession, after the close of hearing of a suit that was seeking completely different prayers. The plaintiff was always at liberty to file suit to agitate a claim of adverse possession if he so wished. But he did not, and instead opted to file this suit, seeking declarations that he is entitled to 26 1/2 acres of the suit land. That was the choice he made, and it is on the basis of those pleadings, that the defendants filed defence and called evidence. They were never facing a claim by way of adverse possession. The plaintiff's argument for the delay is that the defendants got title in contravention of an order of injunction. But then, if that is the case, this happened in the year 2005 and no explanation has been forthcoming as to why the plaintiff has waited for 8 years before seeking to enforce any such claim.

23. Amendments ought not to be granted if they will prejudice the other party. In our instance, it is apparent that the defendants will be greatly prejudiced. They have been litigating this matter for about 14 years now. They have heard the plaintiff's case and have called evidence in rebuttal. All parties have closed their cases. What is pending is only submissions of counsel, then judgment. What the applicant actually wants is to introduce a completely new case with completely different legal principles. This is being introduced at the end of the proceedings of his original cause of action. To ask the defendants to answer to a completely different cause of action, when they have finalized the case that the plaintiff originally brought to court against them, would be grossly unfair. That will indeed mean taking this matter back to the position that it was in the year 1999 when it was started and I cannot see how it can be claimed that the defendants will not be unfairly and grossly prejudiced.

24. In the circumstances of this case, I think, it will be fair that I decline to give leave to amend. I therefore dismiss this application with costs to the defendants.

It is so ordered.

DATED, SIGNED AND DELIVERED THIS 3RD DAY OF OCTOBER 2013

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

***Read in open Court***

***In the Presence of:-***

***Miss J.C. Tarus holding brief for Mr. Chebii for Plaintiff/applicant.***

***Mr. C.K. Mitei present for defendants/respondents***