



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 19 OF 2018**

**JULIUS NJIRAINI NYAMU.....PLAINTIFF/APPLICANT**

**VERSUS**

**HENRY MBURU MARUNGO.....DEFENDANT/RESPONDENT**

**MWANGI NDUMA GICHURU.....1<sup>ST</sup> INTENDED DEFENDANT**

**MURIUKI KOMBA.....2<sup>ND</sup> INTENDED DEFENDANT**

**BENSON GICHOBI MUTAHL.....3<sup>RD</sup> INTENDED DEFENDANT**

**BERNARD KATHANGA J NGUNGI.....4<sup>TH</sup> INTENDED DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion dated 24<sup>th</sup> June, 2021 and filed on 18<sup>th</sup> July, 2021 is he seeking the following orders: -
  - a. That the Honourable Court be pleased to order that the pleadings herein be re-opened and do grant leave to the Plaintiff/Applicant to amend the plaint.
  - b. That the Honourable Court be pleased to order that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> intended defendants be enjoined in this suit as defendants.
  - c. That the annexed draft amended plaint be deemed as duly filed upon payment of the requisite fees.
  - d. That the Honourable Court be pleased to order that this matter be heard de-novo.
  - e. That the costs of this application be provided for.
2. The application is supported by the affidavit of the plaintiff sworn on 24<sup>th</sup> June, 2021.
3. The defendant opposed the Application vide Grounds of Opposition and a Replying affidavit dated on 27<sup>th</sup> August, 2021 and filed in court on 31<sup>st</sup> August, 2021 respectively.

4. The application was agreed to be disposed of by way of written submissions.

**PLAINTIFF/APPLICANTS CASE AND SUBMISSIONS: -**

5. The Plaintiff's case is that land parcel registration number Inoi/Kamondo/1886 was subdivided and transferred to the Defendants herein without his knowledge and without succession proceedings of the original proprietor, the late Nyamu Kiura.

6. He stated that it was necessary to amend the plaint so as to correctly address the issue in dispute as the plaint was prepared and pertinent issues touching on the suit land were left out.

7. He stated that the matter is part heard and since the defence have not tendered their evidence, the defendant would suffer no prejudice if the application is allowed.

8. The plaintiff submitted that under *Section 100 of the Civil Procedure Act and Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010*, this Honourable Court has discretion to allow amendment of pleadings at any stage before judgment for purpose of determining the real question or issue in controversy between the parties.

9. She submitted that the draft amended plaint raises triable issues and it is necessary that the Court allows for the amendment of the plaint so as to ensure effective determination of the plaintiff's case. She relied on the case of **Institute for Social Accountability & Another v Parliament of Kenya and 3 Others (2014) KLR**.

10. She further submitted that under Order 1 Rule 10 of the Civil Procedure Rules, this Honourable Court has the discretion to order joinder of any party to a suit to enable the court to effectually and completely adjudicate upon and settle all issues in dispute.

11. She submitted that the intended defendants are registered owners of the subsequent land parcels that came from the illegal subdivision of the suit land and therefore are necessary parties to ensure effective and efficient determination of the case.

12. She submitted that the Defendant has not sufficiently demonstrated the prejudice he is likely to suffer if the application is allowed as they are yet to tender their evidence.

13. She prayed that this Honourable Court do allow her application with costs.

**DEFENDANT/RESPONDENT'S CASE AND SUBMISSIONS: -**

14. The Defendants submitted that the Plaintiff is seeking to introduce a new claim and that according to the plaint dated 20/03/2018 and filed in court on 28/03/2018, the suit land was Inoi/Kamondo/1943 but not Inoi/Kamondo/1886.

15. He stated that though the Plaintiff had obtained Letters of administration ad litem in respect to the estate of Nyamu Kiura, he has no legal capacity to amend or institute any legal matter as he didn't have any locus to institute this suit in the first place. Further that the cause of action arose in 1996 during the lifetime of the late Nyamu Kiura and thus he is time barred by the Limitation of Actions Act.

16. He stated that the Plaintiff was economical with the truth as he had failed to inform the Court that it was the deceased who subdivided the suit land and transferred the resultant portions to his family and the Defendant.

17. He stated that before the deceased died on 26<sup>th</sup> November, 1996, he had subdivided the suit land and transferred the resultant parcels to his family and third parties and thus was left with no estate.

18. His case is that the Defendants are holding good title after they purchased the suit land from the deceased and or third parties who had also bought them for value and occupied for a period exceeding 12 years from 1996.

19. He stated that the plaintiff did not indicate how the joinder of the intended interested parties will assist in determining the real

issues in controversy and that the proposed amendment is only aimed at introducing new causes of action different from the original claim.

20. He stated that the Plaintiff was dishonest as the information he intends to introduce is not new since he was privy to the same before instituting this suit.

21. In his submissions, he argued that while leave to amend pleadings may be granted at any stage of the proceedings, it is fettered by judicial discretion as was held in the case of **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited (2013) e KLR**.

22. He submitted that on keen scrutiny of the contents of the proposed amendments clearly shows that the intention to introduce new issues is aimed at altering the cause of action in the matter and not merely amending the plaint and that the same contravenes *Order 2 Rule 6 (1) of the Civil Procedure Rules*.

23. He submitted that the plaintiff did not have locus standi to file the instant application the same way he did not have locus standi to institute this suit in the first place.

24. He submitted that this application is an abuse of the court process as it was filed in bad faith so as to fill in the gaps that arose during his testimony in court.

25. He submitted that the applicant was merely on a fishing expedition for information from how the defendant's counsel cross examined him and after realizing his plaint has no real cause of action, he now wants to fill the gaps

26. In conclusion, he urged this Honourable Court to decline to exercise its discretion in favour of the applicant because the amendment will not bring the real issues in dispute but cause prejudice to the defence. He prayed that the application be dismissed with costs.

#### **ANALYSIS: -**

27. I have considered the instant application, the affidavits by the parties both in support and in opposition thereto as well as their submissions.

28. The instant application has been brought under the provisions of **Section 100 of the Civil Procedure Act, and Order 8 Rule 5 (1) of the Civil Procedure Rules**.

29. **Section 100 of the Civil Procedure Act** provides that: -

*The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.*

30. **Order 8 Rule 5 (1) of the Civil Procedure Rules** provides that: -

*“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on 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.”*

31. It is evident that from the above provisions of the law, an amendment of pleadings may be permitted at any stage for purposes of determining the real question in controversy between the parties.

32. The power of Courts to allow amendment is however discretionary and such discretion ought to be exercised judiciously.

33. In the case of **Lawrence Owino Omondi v Keneth Inea Muyera [2017] e KLR** the Honourable Court held that: -

“16. In the current case the plaintiff relies on **Order 8 Rule 3** above. The discretion of the court is made to be subject to satisfaction on the courts part that:-

(1) *The mistake sought to be corrected was a genuine mistake.*

(2) *The mistake was not misleading.*

(3) *The mistake was such as to cause any reasonable doubt as to be identity of the person intending to sue or intended to be sued.”*

34. *I have looked at the draft amended plaint and note that the Plaintiff intends to do an extensive overhaul of his original plaint. The effect of the proposed amendment would introduce a new cause of actions from Land Parcel Inoi/Kamondo/1943 to Inoi/Kamondo/1886 amongst others.*

35. *I have also looked at the green cards and certificates of official search annexed as JNN2, JNN3, JNN4 AND JNN5. I notice that they were issued to the Plaintiff in the years 2017 and 2018. This means that they were in his possession even before the institution of the suit and also in his possession during Pretrial conference and the hearing of the Plaintiff’s case.*

36. *This means that the issues the Plaintiff seeks to introduce through amendment were within his knowledge all along. The same has been admitted through out his supporting Affidavit. At Paragraph 12 of the said affidavit, he’s stated as follows: -*

**“12. That upon purchasing a copy of the green card register and certificate of official search I discovered that the subdivision done on paperwork had given following resultant parcels”.**

*The green card referred thereto is JNN4 which was issued on 9/9/2017.*

37. *The Plaintiff, who was represented by an advocate from the inception of the case, has not explained to this Honourable Court why the alleged pertinent issues were not included in his original plaint.*

38. *Further, if amendment was necessary, why the same was not done before hearing of the case which underwent a Pre-trial conference under **Order 11 of the Civil Procedure Rules, 2010.***

39. *I am therefore convinced that the failure to include the alleged pertinent issues at the time of filing this suit was deliberate and not done by mistake and thus the same is not a genuine mistake requiring the invoking of the discretion of this Honourable Court.*

40. *Further I am also of the view that the instant application has been made in bad faith in order to bridge gaps which were formed during cross examination.*

41. *In the case of **Joshua Kimani v. Kiso Enterprises Ltd & 3 others [2020] e KLR**, the Court held as follows: -*

6. *The Learned Authors of Halsbury’s Laws of England, 4<sup>th</sup> Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -*

*“.....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.*

*...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side....” (Emphasis added).*

7. In the matter before me, the Plaintiff avers that he has realized there is need to broaden the prayers sought from the Court in order to cover all eventualities and that the Defendants would not be prejudiced in any way by the amendments. I have looked at the draft amended Plaintiff. While the Plaintiff avers that he merely intends to broaden the prayers, a perusal thereof reveals that the Plaintiff intends to literally amend the entire Plaintiff and to introduce a completely new version of Paragraphs 8 to 13 as well as an additional paragraphs 16 to 19.

8. While it is true that the said amendments are based on facts arising from the same circumstances leading to the filing of this suit, the Plaintiff does not state why the said amendments were not brought earlier in the day. This suit was filed on 3<sup>rd</sup> June 2016, some three years before this application was filed. As it were, the parties went for pre-trial directions and thereafter the Plaintiff testified at the trial and closed his case a month before this application was filed.

9. Considering the record and the material placed before me, it is evident that by this application, the Plaintiff seeks to fill the gaps that were raised by the defence during the cross-examination of the Plaintiff.”

42. From the foregoing I am of the view that allowing this application will prejudice the Defendant as was held in the case of *Harrison C. Kariuki –vs- Blue Shield Insurance Co. Ltd 2006 e KLR* whereby the learned Judge held: -

“I hold that to allow the extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs. It will occasion injustice to the Defendant who will have to extensively amend its defence. The Defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30<sup>th</sup> January, 2001. It will have to meet a much more expanded case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted.

Having considered all matters placed before me, and in exercise of my discretion I will refuse the application. It is hereby dismissed with costs to the Defendant.”

**CONCLUSION: -**

43. In view of the foregoing, I find that the applicants application dated 24<sup>th</sup> June, 2021 is without merit and the same is hereby dismissed with costs to the Defendant/Respondent.

**RULING READ, DELIVERED AND SIGNED IN THE OPEN COURT AT KERUGOYA THIS 10TH DAY OF DECEMBER, 2021.**

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

**IN THE PRESENCE OF:-**

- 1. MR. MAGEE HOLDING BRIEF FOR MRS MAKWORO FOR THE APPLICANT**
- 2. MS WANJIRUWAWERU FOR THE RESPONDENT**
- 3. KABUTA – COURT CLERK.**



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