



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 181 OF 2014

ANN MUTHONI KARANU.....PLAINTIFF/APPLICANT

-VERSUS-

LA NYAVU GARDENS LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Multiple applications exist in this cause. The first application was filed by the Defendant on 4th April, 2014. The Defendant sought to stay the proceedings herein pursuant to the provisions of Section 6 of the Arbitration Act.
2. Then a Notice of Motion dated 10th November, 2014 was filed the Plaintiff herein seeking the courts orders to implead four additional individuals. The four individuals are Bishop Dr. Bonifas E. Adoyo, Haron G. Nyakundi, Harun O. Nyamboki and Dr. Joyce Gikunda. By the same Motion, the Plaintiff also seeks the court's leave to amend the Notice of Motion filed earlier on 14th October, 2014 to reflect the correct Land Reference number as LR No. 2259/783 and not LR No. 2259/66 or 2259/703. The foundation of the motion was the affidavit sworn by the Plaintiff on 10th November, 2014 as well as the grounds stated on the face of the application.
3. The application is opposed and a Replying Affidavit was sworn by Haron Gekonge Nyakundi on 25th November, 2014.
4. Briefly, the facts and history leading to the current application can be started as follows. The Plaintiff filed this suit on 19th February, 2014. The Plaintiff sought specific performance of a contract for the purchase of real property. From the Plaintiff's witness statement also filed in court on the same day the real property comprised of part of Land Reference Number 2259/703. The contract, the specific performance of which was sought, was constituted in a letter of offer dated 17th December, 2010. The Plaintiff alleged that the Defendant was in breach and or had failed to honour its part of the bargain. Upon service with summons to enter appearance the Defendant promptly filed an application under Section 6 of the Arbitration Act, 1995. That was on 4th April,

2014. The Defendant sought stay of further proceedings pending reference of the dispute to arbitration. The Defendant stated that the contract provided for an alternative dispute resolution process, arbitration.
5. The proceedings thereafter took a lull for a good six plus months as the Defendant's application for stay of proceedings was only fixed for hearing on 18th September, 2014. On that day though the application was not heard as the Plaintiff sought an adjournment to file a Replying affidavit to the application for stay of proceedings. Leave was duly granted and the Plaintiff directed to file and serve the Replying affidavit within 14 days. The Plaintiff did not file a Replying Affidavit. Instead the Plaintiff filed another application on 14th October, 2014 dated the same date. The new application filed a sought, what the Plaintiff's counsel during the court appearance on 22nd October, 2014 referred to as 'preservatory orders'. Then on 15th October, 2014 the Plaintiff filed an amended plaint. At an appearance in court on 22nd October, 2014 counsel was directed by the court that the court would first hear the application dated 14th October, 2014 which sought to preserve the subject matter of the dispute. The court then held the view that notwithstanding the provisions of Section 6 of the Arbitration Act, the court was not prohibited from entertaining an application for preservatory interlocutory orders as the same was not incompatible with an arbitration agreement. A new date for the application dated 14th October, 2014 was consequently fixed with the consent of the parties on 3rd November, 2014.
 6. Prior to the court appearance of 3rd November, 2014, the Plaintiff filed on 31st October, 2014 a Notice of Intention to move the court by oral application. The notification was twofold. The Plaintiff would be seeking to join an additional four Defendants. That meant the Plaintiff was going to be amended again. The Plaintiff also wanted to amend the Notice of Motion dated 14th October, 2014 to identify the current subject matter. The Plaintiff also on the same date 31st October, 2014, filed a supplementary affidavit in support of the motion dated 14th October, 2014. It is to be noted too that the Defendant also filed on 31st October, 2014 a Replying affidavit in opposition to the Plaintiff's application dated 14th October, 2014. Then on 3rd November, 2014 when the parties appeared in court for the hearing of the application dated 14th October, 2014 (for preservatory orders) the Plaintiff orally sought leave to amend both the pleadings as well as the motion of 14th October, 2014 but as the court deemed the proposed amendments quite substantive the court directed the filing of a formal application for leave to amend. The formal application was filed on 11th November, 2014 and a Reply thereto filed by the Defendant on 26th November, 2014. That application was finally urged before the court on 27th November, 2014.
 7. I have had to relay the entire litigation history of the suit. The simple reason is that ordinarily one would have expected that pursuant to the provisions of Section 6 of the Arbitration Act, the proceedings which include filing and any directions by the court were mandatorily and automatically stayed until the formal application for stay of proceedings was disposed of by the court or through a consent between the parties. Except with the leave of the court neither party is expected to act, proceed, file any other process or move the court in any way except with a view to having the Section 6 Application heard. That did not happen in this suit. It would therefore be appropriate that the court does introspect the proceedings thus far and where there has been a blatant transgression of the statute such action as deemed appropriate taken. First though I will deal with the application which the court directed the Plaintiff to file and which was urged on 27th November, 2014.
 8. As already indicated the application seeks leave to join four new defendants as well as leave to amend the application dated 14th October, 2014. The court expressly allowed the Plaintiff to file this application. That was on 3rd November, 2014. The court was cognizant of the fact that the long held tradition by the courts of law in the joinder of additional parties to proceedings are always necessitated by the need to avoid multiplicity of suits and unnecessary expenses where the same issues of fact or law arise between the claimant and the respondent as well as with intended

parties. The court was also conscious of the fact that at any time of the proceedings the court may under Order 1 Rule 10(2) of the Civil Procedure Rules, order the joinder of party to the proceedings if the presence of the party appears necessary to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit. Effectively a joinder of the parties if ordered, will always necessitate an amendment of the pleadings: see **Order 1 Rule 10(4) of the Civil Procedure Rules**.

9. The basic question currently is whether I should allow the amendments sought. The test for amendment of pleadings was perfectly put in **Cobbold vs. Greenwich LBC 9th August, 1999** (unreported decision): referred to in the notes to the **White Book (Civil Procedure 2003 Edn) Vol. 1. At paragraph 17.35**. Peter Gibson LJ is stated to have said:

“The overriding objective (of the Civil Procedure Rules) is that the court should deal with cases justly, that includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed” (emphasis)

10. Also referred to and applied in the case of **Maguire –v- Molin [2002] 4 All ER 325, 326**, the above truly ought to be the appropriate and composite test for amendments of pleadings. I shall say no more on the test save to add that locally the same test was adopted and approved in the case of **Central Kenya Ltd –v- Trust Bank Ltd [2002] 2 EA 365**. The Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided (i) there had been no undue delay, (ii) that no vested interest or accrued right was effected and (iii) no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.
11. Notwithstanding the Court of Appeal’s prolific holding and approach, it is apparent that the test is as was stated in **Cobbold** (supra) and the overriding consideration was whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs. Perhaps, I may also add that going by the **Cobbold test** as expounded in **Central Kenya Ltd –v- Trust Bank Ltd** (ibid) the powers to order or allow amendments or joinder of parties is discretionary and very wide.
12. I have been urged on behalf of the Plaintiff to allow the joinder as well as the amendment to the Motion. The intended additional defendants, the court heard, allegedly made representations to the Plaintiff and many others. Minutes of meetings were referred to by the Plaintiff’s Counsel to stress this point. The Plaintiff, like others relied on the representations and then it turned out, it is alleged, there was a breach of trust. Fraud is alleged. There are questions of fidelity to be asked of the new additional defendants, so submitted the Plaintiff. Mr. Tom Macharia counsel for the Plaintiff, wound up his submissions by stating that the intended defendants are estopped from denying representations made to the Plaintiff pursuant to **Section 120 of the Evidence Act (Cap 80)** which provides for general estoppel.
13. Ms. Wambui Kyama for the Defendant argued that it was unfair to even bring forth the application for joinder and amendment on the face of the Defendant’s application for stay of proceedings. She further contended that the sole purpose of joining the additional defendants was to simply embarrass them and not otherwise as the dispute herein concerned an agreement between the Plaintiff and the sole Defendant on record.
14. Applying the principles in **Cobbold** and **Central Kenya Ltd cases**, it appears to me that the intended amendments to the notice of motion dated 10th November, 2014 should not be a subject of contest. It ought to be allowed as a matter of course. The Land Reference number originally

noted as LR No. 2259/7866 became LR No. 2259/703 when the latter was excised from the former and transferred to the Defendant. Thereafter the Defendant obtained a change of user. The conditions for the approval of change of user dictated a surrender of the title for LR No. 2259/703 for re-issue of Grant. The new Grant meant a new land reference number following the mandatory re-survey process. The new number was LR No. 2259/783. That is the parcel the Plaintiff would wish to concentrate on in these proceedings. The issue in dispute including the Notice of Motion dated 14th October, 2014 would be best resolved if the correction was effected by way of amendment. I would consequently allow the amendment sought under prayer number 2 of the Notice of Motion dated 10th November, 2014.

15. With regard to the intended joinder, I note too that the application has been brought with reasonable promptitude. It appears to me that the Plaintiff may have an arguable cause of action against the individual directors of the Defendant Company. That though is subject to the evidence that the plaintiff may have to tender at any trial besides the various telling minutes some of which were actually not minutes of the Defendant's meetings but rather consultative meetings where individuals including consultants made very specific representations.

16. However for either one of two reasons I would disallow the intended joinder.

17. Firstly, the intended causes of action run completely parallel to the current cause of action. A cause of action for breach of trust or fiduciary duty and fraud are not related to the current cause of action, in my view, founded purely on an alleged breach of contract by the Defendant. The Plaintiff seeks recovery of immovable property by way of specific performance. There is even no talk or suggestion of inducement of breach of contract. I do not see how two such asymmetrical causes of action could be tried together. Besides, **Order 3 Rule 6** of the **Civil Procedure Rules** would bar such joinder of causes of action.

18. Secondly, I also hold the view that the intended joinder may interfere with a right perhaps already vested in the Defendant. If not already so vested the right may be prejudiced beyond compensation through costs. The Defendant has contended that the parties settled for a private dispute resolution forum. The forum is to be arbitration. An application for stay of proceedings and reference to arbitration is already pending. It is yet to be determined.

19. The intended additional defendants were not party to the contract which contains the arbitration agreement. Their addition will not only result in foot dragging but also prejudice the application for stay and reference to arbitration. The nuance of argument that they are non-parties to the arbitration agreement so these proceedings must go on contrary to the provision of Section 6 of the Arbitration Act is likely to be resurrected. The other shade of argument will be that the Plaintiff as well as the Defendant must abandon any right to arbitration. In my view, that would result in significant harm to the process of administering justice. There is a likelihood that prejudice may be occasioned to the Defendant which mere costs may not recompense. For that reason, I would consequently not allow the joinder of the four additional defendants.

20. I now revert to where I started. The effect of the application filed by the Defendant on 4th April, 2014 is clearly stated under Section 6(2) of the Arbitration Act, 1995. The subsection which is sub-titled "**stay of legal proceedings**" reads as follows:

"(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined".

Obviously, neither party is expected to file for processing of action any additional pleadings once an application is filed under Section 6 of the Arbitration Act, unless with the leave of the court.

21. That is not what has obtained in this suit. With abundant freedom court process has been unilaterally filed. It appears to me that there was contumacious abuse of the court process. Where such happens the court is enjoined to act if necessary *suo moto*. I would consequently exercise the

powers conferred under **Order 3 Rule 15** of the **Civil Procedure Rules** as may be read together with **Sections 1A, 1B and 3A** of the **Civil Procedure Act** and, *suo moto*, order the striking out of the process and pleadings filed after the 4th April, 2014 except such as was filed with the court's leave and permission. The process and pleadings being referred to are: the Amended plaint filed on 15th October, 2014, the Notice of intention to move court by oral application filed on 31st October, 2014 and the Supplementary Affidavit filed on 31st October, 2014. All were filed by the Plaintiff. They must be struck out for being an abuse of the court process and I so order.

22. In conclusion, I allow the application dated 10th November, 2014 in so far as it seeks to amend the Notice of Motion dated 14th October, 2014 as obtained in prayer 2 of the motion dated 10th November, 2014. I decline to allow or order the joinder of Bishop Dr. Bonifas E. Aduro, Haron G. Nyakundi, Harun O. Nyamboki and Dr. Joyce Gikunda to these proceedings. I also strike out the pleadings and process namely Amended Plaint filed on 15th October, 2014 Notice of Intention filed on 31st October, 2014 and the Supplementary Affidavit filed on 31st October, 2014.

23. As the application has partially succeeded and partially failed I order that each party do bear their own costs.

Dated, signed and delivered at Nairobi this 17th day of February, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant
..... for the Defendant/Respondent