



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT

ELC. CASE NO. 708 OF 2014

PETER NDUKUTHYO1ST PLAINTIFF
PATRICK MANGA KAMUNYU2ND PLAINTIFF
ADAN EIDN MAHAMUD.....3RD PLAINTIFF
(SUIING AS THE OFFICIALS OF
MAASAI VILLAGE SELF HELP WOMEN GROUP)

VERSUS

LYDIA WANG'ONDU.....1ST DEFENDANT
MOHAN SHAH.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 12th May 2014 in which the Plaintiff/Applicant seeks for the following orders:

Spent.

That this Honourable Court be pleased to grant leave to the Plaintiff to file an Amended Plaint.

That pending the hearing and determination of this Application inter-partes, the Defendants/Respondents, their servants, agents, employees and any other third parties howsoever be restrained from entering, remaining, carrying out excavation or construction work or in any other way whatsoever dealing in/with that piece of property situate in Thika known as UNS. INDUSTRIAL PLOT NO. B THIKA MUNICIPALITY.

That pending the hearing and determination of this suit, the Defendants/Respondents, their servants,

agents, employees and any other third parties howsoever be restrained from entering, remaining, carrying out excavation or construction work or in any other way whatsoever dealing in/with that piece of property situate in Thika known as UNS. INDUSTRIAL PLOT NO. B THIKA MUNICIPALITY.

Costs of this Application be in the cause.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Peter Ndukuthyo sworn on 12th May 2014 in which he averred that he is the Chairman of the Plaintiff/Applicant. He further averred that in the Complaint filed herein, the Plaintiff pleaded that it is the registered owner of the parcel of land known as Thika Municipality Block 6/1065 formerly known as Unsurveyed Industrial Plot No. A Thika. He then averred that it has now emerged that the said parcel of land is actually not the subject matter of this dispute and was erroneously pleaded in the Complaint. He then averred that the correct description of the suit property which is in dispute is the parcel of land known as Unsurveyed Industrial Plot No. B Thika. He added that the Plaintiff is the legitimate owner of the parcel of land known as Unsurveyed Industrial Plot No. B Thika. As evidence of this, the Plaintiff annexed a copy of the Letter of Allotment dated 22nd April 1996. He averred further that the Plaintiff's members have been and continue to be in occupation of this parcel of land from 1996 to date having built residential houses thereon in which they live and attend the church therein while their children attend the schools nearby. He then stated that the 1st Defendant does not have any proprietary rights over this parcel of land yet she has been engaging in destructive activities on the land with sheer impunity and reckless abandon. He then stated that the proposed amendment to the Complaint would not prejudice the Respondents in any way and is in the interest of justice and fairness.

The Application is contested. The 2nd Defendant, Mohan Shah, filed his Replying Affidavit sworn on 4th June 2014 in which he averred that it is apparently clear that the proposed amended Complaint seeks to introduce a completely new suit property being Unsurveyed Industrial Plot No. B Thika. He further averred that in the premises, the Plaintiff/Applicant ought to file a fresh suit as opposed to seeking to amend the Complaint.

The Application is further contested by the 1st Defendant/Respondent who filed her Replying Affidavit sworn on 21st July 2014 in which she averred that the documents of ownership produced by the Plaintiff/Applicant are suspect. She further averred that the parcel of land in respect of which the Plaintiff/Applicant lays claim being L.R. NO. 28381 was sold by her husband Samuel Wang'ondou to the 2nd Defendant/Respondent.

The first issue which I am called upon to determine is whether to allow the Plaintiff/Applicant to amend its Complaint. The guiding law on the issue of amendment of pleadings is to be found in **Order 8 rule 5(1)** of the **Civil Procedure Rules, 2010** which provides as follows:

“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.”

This legal provision gives power to this court to allow amendment of pleadings on such terms as are just on all parties concerned. To my mind, it is necessary to consider the purport of the amendment requested for the court to consider whether or not it is just to allow it. In this particular Application, the Plaintiff is requesting this court to allow it to amend its Complaint by changing the subject matter of this suit from the parcel of land known as Thika Municipality Block 6/1065 formerly known as Unsurveyed Industrial Plot No. A Thika to Unsurveyed Industrial Plot No. B Thika.

There are some practical difficulties that I will encounter should I allow the Plaintiff to amend its Complaint as proposed. The first difficulty I can see is that while relying on the fact that the suit property in this suit being Thika Municipality Block 6/1065 formerly known as Unsurveyed Industrial Plot No. A Thika was the same as the suit property in ELC No. 116 of 2012, I proceeded to consolidate the two files into one.

Further, Justice Olao, while relying on the same assumption proceeded to deliver a ruling in this matter. Allowing the proposed amendment will no doubt make it difficult to continue the two consolidated suits as such. It is the Plaintiff's responsibility to ensure that its case is properly laid out in its Plaint to facilitate expeditious disposal by the court. If the Plaintiff fails in this responsibility, it is bound to suffer the consequences. In this particular suit, I find that it is not just to allow the proposed amendment sought after by the Plaintiff. The Plaintiff has the option of withdrawing the consolidated suit and filing a fresh suit citing the correct subject matter.

For that reason, the other prayers in this Application cannot also be granted.

On that count therefore, I hereby dismiss this Application with costs to the Defendants.

DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF MARCH 2015.

MARY M. GITUMBI

JUDGE