



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 679 OF 2006

JULIE NYAWIRA MATHENGE.....PLAINTIFF

VERSUS

KENYA INSTITUTE OF ADMINISTRATIONDEFENDANT

ATTORNEY GENERAL.....THIRD PARTY

KENYA ANTI-CORRUPTION COMMISSION.....INTERESTED PARTY

CONSOLIDATED WITH

NAIROBI ELC NO. 324 OF 2010

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JULIE NYAWIRA MATHENGE.....1ST DEFENDANT

WILSON GACHANJA.....2ND DEFENDANT

AND

NAIROBI ELC NO. 325 OF 2010

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JULIE NYAWIRA MATHENGE.....1ST DEFENDANT

JAMES RAYMOND NJENGA.....2ND DEFENDANT

RULING

Coming up for determination is the Plaintiff's application dated **22nd October 2013**, seeking orders that she be granted leave to join the Chief Land Registrar sued through the Attorney General as the 2nd Defendant in the suit. Secondly, leave be granted to amend the Plaintiff as per the draft amendment. The application is premised on grounds outlined in the application and supported by an affidavit sworn by the Plaintiff. It is deposed that the original Plaintiff was filed in 2006 and was based on the indefeasibility of the Plaintiff's titles as supported by titles to parcels of land known as **L.R. No. 11509, L.R. 11510 and 11511**. The Chief Lands Registrar through the Kenya Gazette Notice dated **26th November 2010** arbitrarily and unconstitutionally cancelled the said titles. Consequently, in an application dated **12th July 2011**, the Plaintiff sought a declaratory order that the cancellations be declared null and void when after the Court on **18th March 2013**, ruled that the issues raised in the said application ought to be raised in the main suit for determination. Accordingly, that the Plaintiff will suffer a miscarriage of justice if she is not allowed to amend her Plaintiff to introduce these issues whilst at the same time, the Defendant will not be prejudiced by the said amendment.

The Defendant filed Grounds of Opposition to the application dated **22nd November 2013** wherein it was averred that the amendments proposed in the Plaintiff constitute a new cause of action which was non-existent at the time of filing suit and will therefore fundamentally change the cause of action and the claim in the suit. Secondly, that the amendments are contrary to **Order 8 Rule 3(5) of the Civil Procedure Rules**.

The Interested Party filed Grounds of Opposition dated **29th November 2013** wherein it was averred that the claim against the proposed 2nd Defendant is *res judicata*, as it was directly and substantially in issue in the Plaintiff's Constitutional application dated **17th July 2011** filed within the present suit between the same parties, which application was heard on merit and dismissed. It was further averred that the both the Defendant and the Interested Party would be immensely prejudiced if the Plaintiff were allowed to amend the claim at a late stage and to re-open matters that have been previously determined on merit.

The Plaintiff filed submissions dated **30th April 2014**, and submitted that the general rule is that a party should be freely allowed to amend their pleadings for purposes of determining the real question in controversy between the parties and/or correct any defect or error in proceedings. Counsel submitted that the application should be allowed in view of the fact that the matter had not proceeded to hearing and that no prejudice would be occasioned to the parties. As regards to amendment with the effect of adding a new cause of action, counsel submitted that the action sought to be introduced occurred during the pendency of the suit wherein the Registrar of Titles nullified the Plaintiff's titles. Consequently, that even though the amendment was introducing new facts, it revolved around the validity of titles.

On perusal of the Court record it is evident that the Plaintiff's application is as a result of the directions of the Court given in its ruling of **18th March 2013**. Contrary to the averments made by the Interested Party that the application is *res judicata*, the Court in determining the Plaintiff's application dated **12th July 2011**, directed that the Plaintiff considers joining the Registrar of Titles as a party to the suit and also is at liberty to institute Judicial Review Proceedings challenging the Registrar's action of cancelling her titles. Notably, however, the Plaintiff has instead amended her Plaintiff, seeking declaratory orders, inter-alia, that the cancellation of her titles by the Registrar of Titles was unconstitutional, null and void. It is this amendment that the Defendant and Interested Party contend, constitute a new cause of action which was non-existent at the time of filing suit and will therefore fundamentally change the cause of action and the claim in the suit.

The Defendant's and Interested Party's contention is addressed by **Order 8 Rule 3 (5) of the Civil Procedure Rules** which provides as follows:-

An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

The dispute between the Plaintiff and Defendant is in respect to ownership of parcels of Land known as **L.R. No. 11509, 11510 and 11511**. During the pendency of the suit, the Registrar of Titles revoked the Plaintiff's titles. This has led to the amendment where the Plaintiff seeks declarations inter-alia, that the cancellation is null and void. It is my finding that the new cause of action arises out of the same facts or substantially similar facts as the cause of action in respect to which relief has already been claimed in the suit.

As regards the prayer for the joinder of Chief Lands Registrar the Court record shows that the Defendant took out and served the Third Party Notice, dated **18th October 2006**, upon the Attorney General on behalf of the Commissioner of Lands and Registrar of Titles. However, the Plaintiff now seeks declaratory orders against the Chief Lands Registrar in respect to the action of revoking the titles. The Defendant in the Grounds of Opposition averred that the Attorney General being named twice in a suit will constitute a misjoinder. I have noted that the Attorney General was first joined to the suit through Third Party Notice but now the Plaintiff has direct claim against the Chief Lands Registrar who will be represented by the Attorney General. There is no need of joining the Attorney General again as a party to this suit.

Order 1 Rule 10 of the Civil Procedure Rules allows for substitution and addition of parties to a suit where the Court deems necessary for the determination of the real dispute. Since the Attorney General represents Government bodies, the Chief Lands Registrar should be enjoined to the suit but leave out the words ***through the Attorney General*** as the Attorney General is already a party to the suit.

Having now considered the Notice of Motion dated **22nd October 2013**, the Court finds it merited and on the foregoing, I allow the Plaintiff's application and make orders as follows;-

- 1. The Chief Land Registrar is hereby joined as the 2nd Defendant in the suit herein.***
- 2. The Plaintiff is hereby granted leave to amend her Plaintiff in terms of the draft annexed to the application dated 22nd October 2013 and file the same within 7 days of the date hereof.***
- 3. The Plaintiff be served within 14 days of the date of filing.***
- 4. The 1st and 2nd Defendants and Interested Party are granted leave to file Amended Defences within 14 days of receipt of service.***
- 5. Costs of this application shall be in the cause.***

It is so ordered

Dated, Signed and Delivered this **25th day of June, 2015**

L.GACHERU

JUDGE

In the Presence of:-

Mrs Kuria holding brief Gathaara for the Plaintiff/Applicant

None attendance for the Defendant/Respondent

None attendance for the Third Party/Respondent

M/s Lunyolo for the Interested Party/Respondent

Hilda: Court Clerk

Court:

Ruling Read in open Court in the presence of the above counsels and absence of the Counsels for the Defendant and third party. Orders issued herein to be served on the absent counsels by the Plaintiff's Counsel to ensure that there is ***expeditious compliance*** with the orders given today.

L.GACHERU

JUDGE