



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 665 OF 2013

MARTIN WESULA MACHYO.....PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA LIMITED.....1ST DEFENDANT

NGURU ENTERPRISES.....2ND DEFENDANT

RULING

The application before court is a chamber summons dated 26th March 2014 brought by the Plaintiff under sections 1A, 1B and 3A of the Civil Procedure Act and Order 1 Rule 10(2), 14 and 25 and Order 8 Rule 3 of the Civil Procedure Rules. The Plaintiff is seeking leave to join Everose Machyo, Robert M. Nguru T/A Nguru Enterprises and Edmug Agencies Ltd as the 2nd Plaintiff, 2nd and 3rd Defendants respectively. The Plaintiff has also sought leave to amend the plaint in terms of an annexed draft plaint and that upon joinder of the proposed parties, the draft plaint be deemed duly filed subject to payment of relevant court fees.

The application is supported on grounds that Everose Machyo is the previous registered joint owner while Robert M. Nguru T/A Nguru Enterprises is the auctioneer while Edmug Agencies Limited is the purported purchaser. The Plaintiff contends that the inclusion of these parties in the suit is necessary for the final determination and effectual adjudication of all the issues.

The application is further supported by an affidavit sworn by the Plaintiff on 26th March 2014. The Plaintiff avers that, he and Everose Machyo were jointly registered as owners of Land Reference No. 209/7383/263 House Number C-17 located at Kimathi estate, Nairobi (hereinafter referred to as the suit property). His case is that on 21st May 2013, the 2nd Defendant threatened to sell the suit property by way of public auction.

The Plaintiff avers that although there was intimation by the 1st Defendant that the property was sold, no auction took place and that the purported bids were a hoax since the property was sold by way of private treaty. The Plaintiff contends that the parties being sought to be joined have substantial interest in the outcome of the suit and are therefore necessary parties for complete adjudication of the dispute.

The Plaintiff contends that although he was granted leave to amend his pleadings in late January 2014, he was unable to do so for reasons that he had not received his original file from his erstwhile advocates to enable him engage the current advocates on record.

The 1st Defendant opposed the application through a replying affidavit sworn by Patrick Wainaina on 6th June 2014 who states that he is the assistant manager-legal of the 1st Defendant. The 1st Defendant contends that the current application was an abuse of the court process since the Plaintiff had been granted leave to amend his plaint in January 2014 but failed to do so. According to the 1st Defendant, the plaintiff had not shown any reason why he failed to amend his plaint since the application to discharge his advocates was filed long after leave to amend had been granted.

It is the 1st Defendant's contention that the Plaintiff's application for injunction was dismissed on among other grounds that the Plaintiff had failed to establish a prima facie case and further, that the property had been sold. The 1st Defendant avers that the suit property was sold on 24th May 2013 and hence, that the same was legally under the ownership and quiet enjoyment of a third party as evidenced by an annexed memorandum of sale, certificate of public auction, copies of payment cheque as well as a letter dated 24th May 2013 from the auctioneer.

While stating that the Plaintiff's remedy if any is a claim of damages against it, the 1st Defendant avers that the proposed amendments would bring unnecessary parties to the suit and serve no meaningful purposes in a claim of damages against it. The 1st Defendant contends that the Plaintiff had not demonstrated how addition of the proposed parties would assist the court in determination of the issue of damages against it were the court to make a finding that it was culpable. According to the 1st Defendant, the proposed amendments would obfuscate and not clarify the issue for determination as they would bring confusion on the fundamental facts and therefore, that amendments that only tend to complicate determination of a matter cannot be allowed.

The 2nd Defendant responded to the application through a replying affidavit sworn on 14th May 2014 where he contended that on 17th January 2014, the Plaintiff was granted leave to file and serve his application for leave to amend plaint within 14 days. The 2nd Defendant avers that despite the lapse of the said period, the Plaintiff did not seek an extension of time within which to file the application and therefore, that the instant application is incompetent.

The 2nd Defendant stated that the amendments proposed by the Plaintiff were brought in bad faith in response to refusal of his application for injunction. The 2nd Defendant contends that he is already a party to the suit despite no orders being sought against him in the amended plaint. It is the 2nd Defendant's averment that the application before court is fatally defective as it ought to have been brought by way of a notice of motion and not a chamber summons.

According to the 2nd Defendant, the intended amended plaint is unacceptable as it is a complete repudiation of the Plaintiff's admissions on record. The 2nd Defendant avers that the intended amended plaint was not practical as it sought to have the 3rd Defendant's title cancelled and restored to the Plaintiff despite his admission to having borrowed Kshs 3 million and only repaying Kshs 600,000/-.

The application was canvassed by way of written submissions and the Plaintiff in submissions dated 21st May 2015 stated that the Court has a unfettered discretion when considering an application for addition and or amendment of pleadings which must be exercised judiciously. Counsel submitted that although the Plaintiff was allowed to amend his pleadings in January 2014, the time frame given by the Court could not be satisfied since the Plaintiff changed its advocates and the original file had not been released to the advocate on record who filed the instant application immediately after appointment.

It is the Plaintiff's submission that he has a right to file an application for addition of parties or amendment at any stage of the proceedings and that an excusable delay should not be used to decline a prayer for amendment. The Plaintiff relied on the case of **Central Kenya Limited -v- Trust Bank Limited (2000)2 EA 365** for the proposition that mere delay is not a ground for declining to grant leave and that the policy of the law is that amendments to pleadings are to be freely allowed unless prejudice or injustice which cannot be property compensated for in costs would be occasioned to the opposite party.

The Plaintiff also placed reliance on the case of **Registered Trustees Church of God in East Africa (K) vs. Fredrick Maekwe Matar & 8 others (2013)eKLR** where it was stated that even if the application for leave to amend was to be declared incompetent for having been filed outside the period allowed by the court, the plaintiff would still have an option of seeking fresh leave through another application.

While submitting that the Plaintiff believed that his property had not been sold at the time of filing suit, Counsel stated that from the 1st Defendant's memorandum of sale, the property was purportedly sold on 24th May 2013. The Plaintiff submitted that the sale was fraudulent necessitating the addition of the 3rd Defendant and the consequent amendment of the plaint to enable him plead all the facts of the case. It is the Plaintiff's submission that the 1st Defendant's assertion that his remedy lies only in damages was a fallacy and that the 3rd Defendant who stood to be directly affected by the orders should the plaintiff be successful must be heard and is therefore a necessary party.

The Plaintiff relied on the case of **Andy Forwarders Service Ltd & another vs. Price-Waterhouse Coopers Ltd & another (2012) eKLR** where it was stated that a person may be joined not because there is a cause of action against him but because that person's presence is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter. Counsel averred that Order 1 Rule 10(2) of the Civil Procedure Rules expressly provides for addition of parties whose presence may aid the court to effectually and completely adjudicate upon the issue between the parties.

While submitting that no new facts were being introduced by the proposed amendments, the Plaintiff submitted that the amendments had been necessitated by the joinder of the purchaser in these proceedings. Counsel argued that the Plaintiff had a right to sue the proposed third party separately if he so wished but that since the cause of action arose from the same transaction, it would be important that the matter be heard in the same proceedings. The Plaintiff referred the Court to the case of **Hiram Bere Kinuthia & 2 others vs. Edick Omondi & 3 others (2014) eKLR** where the court allowed the plaintiff to amend his pleadings on the basis that the matters giving rise to the amendment arose from similar facts and circumstances as the cause of action.

The Plaintiff contended that the Defendants had not stated the prejudice they would suffer upon the joinder of the proposed third party or indicated that a defence which had accrued had been taken away by the amendment. Counsel stated that Order 1 Rule 3 provides for the joinder of Defendants against whom any reliefs was sought arising out of the same transaction or a series of transactions. The Plaintiff submitted that it would be unnecessary for him to sue the 3rd Defendant for cancellation of the title in a separate suit thereby clogging the court with numerous matters over similar issues.

Counsel reiterated that the court has a free hand to allow amendments of pleadings under section 100 of the Civil Procedure Act and Order 8 Rule 3 of the Civil Procedure Rules so as to bring the real issues in controversy for determination. It is the Plaintiff's submission that the Court has discretion to allow amendments to pleadings at any stage of the proceedings before judgement is pronounced. Reference was made to the cases of **AAT Holdings Ltd vs. Diamond Shields International (2014) eKLR**, **Peris Wachera Kamoche vs. Thegege Enterprises Ltd & anor (2013) eKLR** and **Andrew Ouko vs. Commercial Bank Ltd & 3 others (2014)eKLR** where the gist of the court's finding was that amendments should be allowed to allow parties ventilate the real issues in controversy.

Counsel submitted that the Defendants would have an opportunity to reply, cross-examine the Plaintiffs or even call their own witnesses to testify on the issues raised in the amended plaint. The Plaintiff argued that it is only fair to allow him to bring forward his entire claim against the Defendants in tandem with Article 50(1) of the Constitution which requires disputes between parties to be determined in a fair manner.

In respect to the submission that his remedy lies only in damages, the Plaintiff submitted that it is not for the Defendants to tell the court which prayers are available but rather, the court to determine upon hearing the parties. Counsel submitted that the Plaintiff was desirous of amending the Plaint and had pleaded that

the statutory power of sale had not arisen and was therefore wrongly exercised. It was also submitted that the Plaintiff had indicated that the sale was actuated by fraud and conspiracy and that it would be justifiable for the Plaintiff to substantiate the pleaded particulars of fraud.

The Plaintiff relied on the case of **Nicholas Ruthiru Gatoto vs. Kenya Ndaragu Merchants & 2 others (2014) eKLR** for the proposition that where a statutory notice was not served, the sale is null and void. Counsel submitted that the Plaintiff believed that the sale of his property was null and void and that the court can make a declaration that the statutory power of sale was wrongly exercised. Lastly, it was submitted that none of the Defendants had opposed the joinder of the 2nd Plaintiff to the suit.

The 1st Defendant filed submissions dated 23rd June 2015 where it was contended that although the court has discretion to allow an application to amend pleadings, the same should be exercised judiciously. Counsel argued that in January 2014, the court allowed the Plaintiff to amend his pleadings which was not done and that no substantive reasons for the failure had been advanced. The 1st Defendant submitted that the application by the Plaintiff's advocate to be discharged from acting was filed on 14th February 2014, a month after leave to amend had been granted and therefore, that the change of advocates does not provide a substantial ground to allow the amendment sought.

Counsel made reference to section 100 of the Civil Procedure Act and Order 8 Rule 3 of the Civil Procedure Rules and submitted that the broad criteria which should guide the court in the exercise of its discretion are whether the amendment is necessary for purposes of determining the real issues and whether it was just to do so. The Court was referred to the case of **Kassam vs. Bank of Baroda(K)Ltd(2002)1KLR 296** where it was stated that leave to amend a pleading may be granted or refused according to the circumstances of each case and with due regard to the interests of all the parties and policy and object of the law.

In further submission, the 1st Defendant stated that the application for injunction having been refused, the Plaintiff's property was free to be sold and therefore, that the Plaintiff's belief that the property had not been sold was untenable. Counsel submitted that the Plaintiff's assertions that the sale was fraudulent hence necessitating the joinder of the 3rd Defendant was unfounded and further, that the 3rd Defendant was a bonafide purchaser for value who was protected by section 99 of the Land Act.

It is the 1st Defendant's submission that the Plaintiff's remedy if any, is a claim for damages against it and therefore, that the proposed amendments to bring in other unnecessary parties would serve no meaningful purpose in a claim for damages against it. Counsel argued that the Plaintiff had not demonstrated how the addition of the proposed parties would assist the court in the determination of the only issue of damages against the 1st Defendant. It was further submitted that allowing the amendment in the manner proposed in total disregard of the rights of the purchaser would be unfair and that in the circumstances, the amendment would be tantamount to introducing a new and inconsistent cause of action in the Plaintiff.

As to whether damages was the only remedy to be granted if the Plaintiff was successful, it was submitted that the Plaintiff had admitted that statutory notices had been issued and that the Court dismissed an application for injunction and allowed the 1st Defendant to sell the property. Counsel submitted that the allegations that the sale was fraudulent were unfounded and that the standard of proof of fraud is more than a mere balance of probabilities as stated in the case of **R. G. Patel vs. Lalji Makanji (1957)EA 314**.

The 1st Defendant submitted that no evidence of fraud had been tendered and that the statutory power of sale was properly exercised in the sale of the suit property to the third party. Counsel submitted that it would not serve any purpose to join the purchaser of the suit property since no claim had been made against him. The 1st Defendant relied on the case of **Priscilla Krobought Grant vs. Kenya Commercial Finance Co. Ltd CA 227 of 1995** as cited in the case of **Winfred Wambui Kingori vs. Paramount Universal Bank Ltd & 2 others (2009) eKLR** where the court stated that the applicant's only remedy would be a claim for damages should the applicant be able to prove that there was an improper or irregular exercise of the statutory power of sale.

The Court was further referred to the case of **John Mwenja Ngumba vs. Kenya Commercial Bank & another (2006) eKLR** and **Ze Yu Yang vs. Nova Industrial Products Ltd (2003)1 EA 362** for the proposition that the sale of a charged property extinguished the Plaintiff's equity of redemption and therefore, that the Plaintiff had no remedies touching on the charged property.

The 2nd Defendant in submissions dated 23rd June 2015 stated that on 17th January 2014, the Plaintiff was directed to file and serve his intended application for leave to amend plaint within 14 days. It was submitted that having failed to seek extension of the time within which to file the instant application, the application was fatally defective and incompetent and an abuse of the court process. The 2nd Defendant argued that no sufficient grounds had been adduced as to why the delay was inevitable.

Counsel submitted that although one of the prayers sought in the amended plaint was leave to enjoin the 2nd Defendant, no remedies or prayers had been sought against the 2nd Defendant. Reference was made to the case of **Edward Gatiba Mbugua vs. Barclays Bank of Kenya Ltd (2013) eKLR** where the court declined to allow an amendment seeking to enjoin a party against whom no remedy had been sought.

The 2nd Defendant submitted that the proposed amendments had been brought in response to the court's refusal to issue an interlocutory injunction to the Plaintiff and further, that the amendments sought to retract admissions of fact which had been made by the Plaintiff. It is the 2nd Defendant's submission that whereas the application dated 4th June 2013 was supported by an affidavit sworn by the Plaintiff who admitted having been served with a notice requiring him to clear his outstanding loan within 45 days, the proposed amendment denied that the notice had been issued.

Counsel made reference to the case of **Kenya Cold Storage Ltd vs. Overseas Food Services (Africa) Ltd (1982) eKLR** where the court cited the case of **International Life Insurance Co. (UK) Ltd vs. Chimanbhai Jethbai Amin Civil app. No. 12 of 1968** for the proposition that a party will not normally be allowed to retract a pleaded admission unless it was made under a genuine mistake of fact. It is the 2nd Defendant's submission that the admission of receipt of notice was not made under a genuine mistake of fact. Counsel argued that the orders sought in the intended amended plaint were not practical particularly the order seeking cancellation of the 3rd Defendant's title and restoration to the Plaintiff.

According to the 2nd Defendant, the suit property having been properly sold and transferred to a third party, the only remedy available to the Plaintiff was in damages. Counsel referred the court to the case of **Josephine Nyabonyi Marionga vs. Agricultural Finance Corporation & 2 others(2012)eKLR** where the court stated that once a property is sold and transferred to a third party at an auction, the remedy lies in damages.

Determination

The Court has wide discretion to allow any party to amend his pleadings 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 under Order 8 Rule 3 of the Civil Procedure Rules. The Court of Appeal has stated in the case of **Central Kenya Limited -v- Trust Bank Limited (2000)2 EA 365**

"that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

Thus, the overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

The 1st Defendant submitted that allowing the amendments in the manner proposed would be tantamount

to introducing a new and inconsistent cause of action in the Plaint. Order 8 Rule 3 (5) provides that an amendment may be allowed notwithstanding that the effect would be to add or substitute a new cause of action provided such cause of action arises out of the same facts or substantially similar to the cause of action out of which relief has been claimed in the suit. In my view, this objection must fail since the proposed amendments which intend to join the purchaser of the suit property as the 3rd Defendant arise out of the similar facts and circumstances as the cause of action.

The Defendants have contended that the application before court is incompetent since the Plaintiff had on 17th January 2014 been granted leave to file an application for leave to amend the plaint within 14 days. They aver that the Plaintiff had not advanced any substantive reasons as to why the application for leave to amend was not brought within the stipulated time. To put the record straight, the Plaintiff was on 17th January 2014 granted 14 days leave to file a formal application to amend his plaint.

The Defendants do not however indicate what prejudice they are likely to suffer if the application for amendment is allowed. The court in the case of **Central Kenya Limited –v- Trust Bank Limited** (supra) stated that mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation. In my view, is no prejudice which cannot be compensated by an award of costs will be visited upon the Defendants if the application for amendment is allowed as the Defendants will have the opportunity to respond to the amendment if they so wish.

The Defendants further contended that since the suit property had been sold and transferred to the proposed 3rd Defendant, the Plaintiff's only remedy if successful, was in an award of damages against the 1st Defendant. They thus objected to the application for amendment on grounds that it sought to introduce parties who would not assist the court in determination of the issue of damages against the 1st Defendant if found culpable.

The Plaintiff has made allegations of fraud against the Defendants and has further contended that the purported sale of the suit property was irregular, unlawful and null and void *ab initio*. A determination thereof and the remedies available to the Plaintiff can only be discerned after a full trial. The 1st Defendant contends that the proposed 3rd Defendant is an innocent purchaser for value who is protected by Section 99 of the Land Act. That section does not offer protection to a purchaser where there is fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which the purchaser had actual or constructive notice. These issues can only be determined at the trial where the proposed 3rd defendant is afforded an opportunity to participate and respond to the issues.

It is therefore only fair and just to join the proposed 3rd Defendant to avert a situation where adverse orders affecting his title may be issued without him being given an opportunity to be heard. The proposed 3rd Defendant will not be prejudiced in any way since any defence available to him will be open to him as if the proceedings are being instituted at the time of allowing the amendment. See **Atieno vs. Omoro (1985) KLR 677**. The upshot of the foregoing is that the Plaintiff's chamber summons dated 26th March 2014 is allowed as prayed on the following terms:-

- i. That the amended plaint be filed and served within fourteen (14) days from the date of this ruling.
- ii. That the 3rd Defendant be served with summons and the amended plaint within fourteen (14) days from the date of the ruling.
- iii. That the Defendants have leave of fourteen (14) days from the date of service of the amended plaint upon them to file their amended statements of defence if need be.
- iv. The Plaintiff shall pay the costs of the application to the 1st, and 2nd Defendants.

Ruling dated, signed and delivered this 28th day of August 2015.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendant