



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**HCC NO.5 OF 2009**

**PALS WAGENAAR.....PLAINTIFF**

**VERSUS**

**1. ROSE C.A. NYASEME  
2. FRANKLIN NYASEME  
3. WALTER E. OMINDE.....DEFENDANTS**

**RULING**

1. This ruling follows interpartes hearing of the application dated 25/3/2013 and filed on 26/3/2013. The application is a Notice of Motion brought under order 1 Rule 10(2) and Order 8 Rule 3(3) of Civil Procedure Rules, 2010 and sections 1A, 1B and 3A of Civil Procedure Act, and all enabling provisions of law. The interpartes hearing took place on 23/9/2013.

2. The following prayers are sought:-

- (i). That the Court be pleased to expunge or strike out the name of 3rd defendant/Applicant **WALTER EDWIN OMINDE** from the further Amended Plaintiff dated 25/2/2013.
- (ii) Consequent upon such expunging or striking out, the Court be pleased to strike out or expunge such partes of the further Amended Plaintiff that concern or touch on 3rd defendant/Applicant.
- (iii) That the plaintiff's suit against the 3rd defendant be dismissed.
- (iv) That the plaintiff bears the costs of this application.
- (v) That the court gives such further or other orders as it may deem fit and expedient.

3. The grounds advanced in support of the application stipulate, inter alia, that the suit was originally filed against one **JOEL E.D. NYASEME** who is now deceased; that the said Joel E.D Nyaseme then retained a firm of advocates to represent him; that subsequently a defence was filed. Then later the 3rd defendant herein applied for leave to be enjoined as a co-plaintiff and that leave was granted on 6/10/2010.

4. Notwithstanding all this, the plaintiff proceeded to amend the plaintiff joining the then current 3rd defendant as 2nd defendant in the amended plaintiff. The amended plaintiff however was struck out on 2/11/2011.

5. The plaintiff then sought leave to amend the original plaintiff but the application for that leave only intended to enjoin the 1st and 2nd defendants in the amended plaintiff to replace the deceased **JOEL E.D. NYASEME**. No leave was sought to enjoin the 3rd defendant/applicant herein. However,

- when leave to enjoin the 1st and 2nd defendant was granted, the 3rd defendant was also enjoined as a party later in a further amended plaint without leave of Court. It is the contention of the 3rd defendant that such move was made irregularly and the 3rd defendant is bound to suffer irreparable loss.
6. The supporting affidavit to the application gives a rather lengthy history of the matter but the salient aspects are as follows: The 3rd defendant sold land parcel No. **KISUMU/MUNICIPALITY/1/223** to the plaintiff on 21/11/2008. The plaintiff was registered as owner and took possession of the land. Then the deceased defendant – **JOEL E.D. NYASEME** – emerged and laid claim to the land. The plaintiff then filed this suit against Joel. The 3rd defendant felt it was necessary to be enjoined as co-plaintiff and made an application to that effect. He was allowed to be enjoined as such on 6/10/2010.
  7. According to 3rd defendant, he became a co-plaintiff and it is therefore untenable to enjoin him as 3rd defendant. In spite of this however, the plaintiff proceeded to enjoin him as 2nd defendant and as 3rd defendant in the further Amended plaint now under consideration.
  8. The further amended plaint itself was said to be filed irregularly. After the first amended plaint was struck out, the plaintiff applied for leave to file an amended plaint to include 1st and 2nd defendant and was actually granted such leave and actually filed such amended plaint on 5/2/2013. But the further amended plaint was filed on 25/2/2013 without leave of Court and proceeded to include 3rd defendant as a party. This is what necessitated the filing of this application.
  9. The 3rd defendant/Applicant contends it was imperative that leave be sought; that he cannot be a co-plaintiff and 3rd defendant at the same time; that the plaintiff's move is legally untenable; and that the current plaint including him as 3rd defendant is a nullity since the orders making the 3rd defendant a co-plaintiff in the case have not been varied or set aside.
  10. It would appear that the plaintiff responded to the application by way of grounds of opposition dated 27/3/2013. The grounds were filed sometimes in April 2013 but the actual date of filing is not clear from the court stamp. The application is said to ignore clear provisions of Sections 1A, 1B, 3 & 3A of Civil Procedure Act, Order 1 (whose violated rule is unstated) and the doctrine of stare Decisis. The application is seen as intended to shield the 3rd defendant from answering to the plaintiff regarding the title to the suit land. It was stated too that the plaintiff's alternative, if the 3rd defendant is not enjoined, is to file a fresh suit against the 3rd defendant and such move fails to consider the factor of time.
  11. During hearing the counsel for 3rd defendant reiterated what is already contained in the grounds on the face of the application and the supporting affidavit. As I have already set out what the grounds and supporting affidavit contain, there is no need of stating the contents of the hearing here.
  12. Counsel for 1st and 2nd defendants stated that it didn't matter much to him which way the application is decided. ALL he wanted to see is that the 3rd defendant is not treated as 3rd defendant and co-plaintiff in the same suit.
  13. Counsel for plaintiff termed it erroneous to assert that when leave to amend was given, then it was spent when the plaint was amended first. His contention was that when leave is granted, all pleadings open. According to him, the last pleading was reply to defence filed on 12/2/2012 and served on them on 13/2/2012. As pleadings close 14 days after service, pleadings in this instant were to close on 27/2/2012. During that entire period, parties could amend pleadings without leave of Court. The further amended plaint was filed on 26/2/2012 and no leave was therefore required. No extension of earlier leave, counsel submitted, was also required.
  14. Plaintiff's counsel further said that according to Order 1 Rule 10(4) if a party is added to the pleadings the plaint shall be amended to reflect such addition and that is why the further amended

plaint was filed. Counsel also said that to date, there are no pleadings showing the 3rd defendant as co-plaintiff. He expressed the position that according to order 8 rule 6 the order authorizing inclusion of the 3rd defendant as co-plaintiff had ceased to have effect as the period given to effect it had lapsed.

15. The plaintiff's counsel stated that the plaintiff has a claim against all the defendants and allowing the application would mean that the plaintiff files a fresh suit against the 3rd defendant.

16. The 3rd defendant's counsel countered the plaintiff's counsel arguments by pointing out that leave to amend is specific and can be actualized only once. The leave to amend in this case, he said, was actualized and an amended complaint was filed. Thereafter, it is only the defendant who could amend without leave as he is allowed to do so under Order 8 rule, 1(2) of Civil Procedure Rules, 2010.

The defendant's right to amend accrued as a matter of law but the plaintiff, having exercised his right to amend, had no right to re-amend.

17. According to counsel for 3rd defendant, the consent to include 3rd defendant as co-plaintiff was not one for amendment. It is not a consent therefore that can be said to have lapsed. It could only lapse if reviewed or if there was a further consent. That being the case, the 3rd defendant is still a co-plaintiff and making him a co-plaintiff and 3rd defendant in the same suit leads to an absurdity.

18. I have paid careful attention to the material laid before me by all sides involved. The first argument of the 3rd defendant is that he was made a co-plaintiff vide an order given on 6/10/2010. That order, he argued, has not been varied or set aside and therefore the 3rd defendant is still a co-plaintiff in the case. But is that the position? The order of 6/10/2010 allowed the 3rd defendant's application dated 20/7/2010 and filed on the same date. The application sought to have the 3rd defendant granted leave to become a co-plaintiff. What the 3rd defendant was granted therefore was leave to become a co-plaintiff. Leave in this sense means permission. The order was clear and unambiguous that the 3rd defendant was to regularize – meaning to amend – the pleadings to become a co-plaintiff within 14 days.

19. The fact of the matter is that the 14 days expired without the 3rd defendant regularizing – or amending – the pleadings to become a co-plaintiff. The defendant's counsel would wish the court to believe that the order of 6/10/2010 would not involve amendment. What he didn't say however is how the 3rd defendant would be included in the plaint without amending it. Inclusion of the 3rd defendant as co-plaintiff would necessarily involve putting his name in the plaint and adding a few paragraphs stating his description and cause of action, among others. This is essentially amending the plaint.

20. The 3rd defendant never did this within the period of 14 days that the order expressly gave him. Order 8 rule 6 of Civil Procedure Rules is apt on this point and states as follows:

***8(6) where the Court has made an order giving any party leave to amend, unless that party amends within the period specified or if no period is specified, within 14 days, the order shall cease to have effect, without prejudice to the power of court to extend the period.***

The 3rd defendant was given 14 days to amend his pleadings. That period expired without him doing so. He therefore didn't become a co-plaintiff and the order to become co-plaintiff ceased to have effect.

21. It is wrong therefore to argue that the 3rd defendant is a co-plaintiff. He is not and it would appear that while the 3rd defendant originally had intention to become a co-plaintiff, he later changed his mind and decided not to become a party to the suit. This assertion begs an explanation. And the explanation is as follows: The plaintiff made an application dated 27/1/2011 and filed on the same date seeking to make the 3rd defendant a co-defendant in the suit. One of the reasons given for that application is that the 3rd defendant had failed to join himself to the suit as co-plaintiff despite being granted leave to do so. The 3rd defendant replied to the application

- vide grounds of opposition dated 16/2/2011 and filed on 22/2/2011. The application had sought to make 3rd defendant a 2nd defendant at the time and he asserted as follows in reply ***“That the proposed 2nd defendant is neither a proper party nor is he a necessary party to these proceedings in either the capacity of a plaintiff or a defendant”***. It is necessary to point out that the 3rd/2nd defendant was asserting this long after the order granting the leave to make him a co-plaintiff.
22. This settles it. Here is the same party who was granted leave to become a party on 6/10/2010 now stating on 16/2/2011 that he cannot be a plaintiff or defendant in the case. When the 3rd defendant's counsel then states that the 3 defendant is a co-plaintiff, he is being less than candid. He is, in other words, being economical with truth.
23. It follows therefore that the averment that the 3rd defendant is a co-plaintiff is fallacious. It is not true also to assert that the order of 6/10/2010 is still in force. It ceased to have effect after the period of 14 days expressly given by the Court.
24. The 3rd defendant's further argument is that the further amended plaint was irregularly filed as leave of the court was not obtained. I would like to consider this argument together with the plaintiff's counter – argument on the same issue.
25. The plaintiff's counsel had an amended plaint filed on 18/3/2011 joining the 3rd defendant as 2nd defendant. That plaint was struck out on 2/11/2011. That in effect took the parties back to the original plaint. The original plaint had only one defendant. That defendant later died. Counsel for the plaintiff then made an application dated 24/9/2012 and filed on 27/9/2012 seeking to join **ROSE CAROLINE ABIERO NYASEME** and **FRANKLINE ERICK ODHIAMBO NYASEME** as defendants in place of the deceased defendant – **JOEL E.D. NYASEME**.
26. That application was settled vide a consent order entered before me on 23/1/2013 allowing the two aforesaid persons to become parties to the suit. It is important to note that the 3rd defendant did not feature anywhere in the consent. The plaintiff's counsel then filed an amended plaint dated 4/2/2013 enjoining **ROSE C.A. NYASEME** and **FRANCLIN F.O. NYASEME** as 1st and 2nd defendant respectively. But the plaintiff's counsel was not done yet. He later filed another application styled **FURTHER AMENDED PLAINT** this time joining the 3rd defendant – **WALTER EDWIN OMINDE** – as a party. This was done without leave of Court.
27. The basis for doing so, and this is the plaintiff's counsel's argument, is that when the order of 23/1/2013 to amend the plaint was given, the pleadings became open. He therefore was entitled, he argued, to file the further amended plaint without leave of Court.
28. Counsel for 3rd defendant rejected this argument. He argued that amendment is pleading - specific and once the authorized amendment takes place the order of amendment is spent. He however pointed out, correctly in my view, that amendment of a plaint would, where necessary be followed by amendment of defence without leave of Court. He said, again correctly in my view, that a plaintiff is not entitled to amend the plaint using an order already spent in amending an earlier plaint. Leave of court is required, he said, to effect further amendment. The arguments are valid and are backed by law.
29. On these arguments, the plaintiff's counsel is wrong. It is incorrect to say that leave to amend opens the pleadings. The correct position is the one taken by the 3rd defendant's counsel. Amendments, unless where the law expressly allows, are pleading – specific. That is why at order 8 rule 7 (1) of Civil Procedure Rules, 2010 the specific order allowing the amendment is required to be inscribed on the amended pleading. In the further amended plaint, counsel for the plaintiff did not, and actually could not, state the order allowing him to join 3rd defendant as a party because the order he was purporting to rely on – which was the one of 23/1/2013 – never mentioned the 3rd defendant, and was not in fact applicable to him.

30. The Court takes the position that counsel for the plaintiff required leave of Court to file the further Amended Plaintiff. The order of 23/1/2013 got spent when he filed the amended plaintiff. In any case, the order of 23/1/2013 didn't allow inclusion of 3rd defendant as a party. That order was express in its intentions and the application on which the order was based was equally express. The 3rd defendant could only be made a party after an oral or written application to that effect.

31. It is clear that both sides exhibited procedural lapses or shortcomings and the court needs to come up with a clear position. We have already seen, for instance, that the 3rd defendant was wrong to think he is a co-plaintiff or that the order made on 6/10/2010 is still in force. We have also seen that the plaintiff's counsel was wrong to think he required no leave of court to include 3rd defendant as a party in the Further Amended Plaintiff. Be that as it may, the court needs to take a broad and flexible approach in this matter in order to ensure that the suit moves forward.

32. If the Further amended plaintiff is struck out, that would necessitate the filing of a fresh suit by the plaintiff. That would also mean extra costs and more waste of time. Save for lack of leave to file the Further Amended Plaintiff, the plaintiff's counsel is otherwise entitled to include the 3rd defendant as a party. This is so because the 3rd defendant's dilatory behaviour after being granted leave to become a co-plaintiff and his manifest change of mind from becoming party to the suit makes it necessary that he be enjoined.

33. It is also borne in mind that it is not fair to disentitle a party to sue. To disallow the plaintiff to sue the 3rd defendant seem to me to be an attempt to take away that right. In order to move forward, the further amended plaintiff should remain as it is. I take this position having regard to Section 19(1) and (2) of the Environment and Land Court Act, 2011, which states as follows:-

**19(1) In any proceedings to which this ACT applies, the court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Provided that.....**

**2. The Court shall not be bound by the procedure laid down by the Civil Procedure Act and shall be guided by the principles of natural justice.**

Of course, I am also fortified in this by article 159(2) (d) of our Constitution which enjoins that justice shall be administered without undue regard to procedural technicalities.

34. The position then is that the Further Amended Plaintiff remains. The 3rd defendant should file his defence and/or other response without delay. The issue of costs needs to be addressed but before coming to that, and for the avoidance of doubt, the application herein is dismissed as the prayers sought are not meritorious.

35. I have already mentioned costs. The 3rd defendant would wish that the plaintiff pay costs. But from the analysis, I have already observed that the 3rd defendant was wrong to think he is a co-plaintiff. The plaintiff had no choice but make him a party to the suit. But I have also said that the plaintiff himself was wrong in seeking to do so without leave of Court. Both sides therefore have their small faults. Costs will therefore be in the cause.

**A.K. KANIARU – JUDGE**

**21/1/2014**