



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 189 OF 2018

TWIGA CHEMICAL INDUSTRIES LIMITED.....PLAINTIFF

VERSUS

GAME RANCHING LIMITED.....1ST DEFENDANT

DR. DAVID HOPCRAFT (*Sued as the Administrator of the Estate of the late*

JOHN NORMAN HOPCRAFT.....PROPOSED 2ND DEFENDANT

LADY CLAIRE GEORGINA HESKETH (*Sued as legal Administrators of the late*

RIGHT HONOURABLE CHRISTIAN

MARY BARONESS HESKETH).....PROPOSED 3RD DEFENDANT

LORD THOMAS ALEXANDER HESKETH (*Sued as the legal administrators of the late*

RIGHT HONOURABLE CHRISTIAN

MARY BARONESS HESKETH).....PROPOSED 4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 18th December, 2018 brought pursuant to Order 8 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules, where the Applicant seeks the following Orders:

a) Leave be granted to the Plaintiff to amend the Plaintiff dated 7th December, 2006 in the manner set out in the Draft Amended Plaintiff attached hereto.

b) That the costs of this application be in the cause.

The Application is premised on the grounds on the face of it and supported by the Affidavit of Anantharaman Ramamurthy, the Plaintiff's Director who deposed that the Plaintiff filed the suit herein seeking *inter alia*, a declaration that the lease issued to the 1st Defendant in respect of the Plaintiff's parcel of land known as L.R No. 7590/4 is null and void. The Plaintiff also sought an order of eviction of the 1st Defendant from all that parcel of land known as L.R No. 7590/4. He explained that on or about the 4th day of October 1962, the Plaintiff leased all that property known as L.R No. 7590/4 to the late Right Honourable Christian Mary Baroness Hesketh for a term of 999 years. He explained that Clause 2(5) of the Lease Agreement stipulated that she was not to assign, sublet or otherwise part with the possession of the demised premises or any part thereof without the consent in writing of the Lessor first. He averred that on or about 22nd April 1964, the late Right Honourable Christian Mary Baroness Hesketh, without obtaining prior authority from the Plaintiff, purported to transfer the suit property to John Norman Hopcraft (*the proposed 2nd Defendant*) in contravention of the provisions of Clause 2(5) of the Lease Agreement executed between the Plaintiff and the Right Honourable Christian Mary Baroness Hesketh. Further, despite the fact that the proposed 2nd Defendant had no legal interest in the suit premises that it could legitimately transfer to any person but on or about 17th day of March 1997 the proposed 2nd Defendant purported to transfer the suit property to Game Ranching Limited (*1st Defendant*). He states that the late Right Honourable Christian Mary Baroness Hesketh and John Norman Hopcraft were omitted as Defendants in this suit notwithstanding their

involvement in the fraudulent and illegal transactions in respect of the suit property. He therefore sought leave of this court to amend the Plaintiff, to correct the aforesaid errors as per the draft amended Plaintiff annexed to the application. He reiterated that the amendments sought herein were necessary for the just and timeous determination of the whole dispute between the parties and shall not cause prejudice to the Defendants.

The Defendant opposed the application by filing a replying affidavit sworn by its Managing Director where he averred that any claim for the recovery of land is required under law to be brought to court within 12 years. He insisted that the application to amend the Plaintiff had been filed more than 12 years after the Plaintiff was filed. He contended that no explanation was given for the delay in filing the application to amend the plaintiff. Further, that John Norman Hopcraft is deceased and no claim can be instituted against him. He reiterated that the proposed joinder of three other parties will be embarrassing and prejudicial to it and that the proposed amendments were time barred.

The Plaintiff through its Managing Director filed a further affidavit where he deposed that following the disclosure that the 2nd Proposed Defendant was deceased, they carried out an investigation to establish the administrator of the estate of John Norman Hopcraft. Further, that the investigations revealed that the administrator of the estate of John Norman Hopcraft is Dr. David Hopcraft and sought leave to amend the Plaintiff seeking to include him as a Defendant.

The 2nd Proposed Defendant filed a Supplementary Affidavit where denied being the Administrator of the estate of the late John Norman Hopcraft and insisted there was no legal evidence in support of that allegation and the proposed amendments will therefore prejudice the Defendant.

The Application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the instant Notice of Motion application including the respective affidavits and rivaling submissions, the only issue for determination is whether the Plaintiff can be granted leave to amend the Plaintiff and join the proposed Defendants to this suit.

The Plaintiff in its submissions stated that the amendment sought which is to enable joinder of the proposed parties, is necessary for the determination of the real questions in controversy. It further submitted that the joinder sought by the Plaintiff did not constitute a new cause of action hence, the 1st Defendant's argument that the suit was time barred was grossly misplaced. It contended that the suit was yet to be set down for hearing and the Plaintiff upon grant of the orders sought did not intend to file any further documents. Further, that the 1st Defendant indicated to this court that they would entirely rely on the Plaintiffs documents in defending the suit and as a consequence, no prejudice shall be occasioned by the proposed amendment. To support its averments, it relied on the following decisions: **Pizza Harvest Limited v Felix Midigo [2013] eKLR; Werrot and Company Ltd & Others v Andrew Douglas Gregory & Others HCC No.2363 of 1998 (1998) LLR 2848 (CCK); Daniel Ngetich & Another v K-Rep Bank Limited [2013] eKLR; Ballinger v Mercer [2014] EWCA Civ 996; [2014]1 wlr at paragraph 25; and Equity Bank Limited v West Link Mbo Limited Civil Application 78 of 2011 (UR 53/2011 [2013] eKLR.**

The 1st Defendant submitted that the cause of action against the estates of the proposed 2nd, 3rd and 4th Defendants arose in the year 1977 and the time to file the claim expired in 1989. Further, that the 1st Defendant has been in adverse and uninterrupted possession of the land in question to the exclusion of the Plaintiff for over 12 years. It contended that the instant application displayed quite a sloppy approach where the averments were not backed up by any evidence other than the Plaintiff's bare statements. Further, that the Plaintiff had not annexed the agreement and search referred to in the draft plaintiff nor had they annexed evidence to prove the death of the late Right Honourable Christian Mary Baroness Hesketh. It further submitted that there was no evidence provided before this court to show that indeed the proposed 3rd and 4th Defendants are the legal representatives of the deceased persons. It reiterated that the instant application had not met the tenets of granting the orders sought because it had been made in bad faith; will prejudice the expeditious disposal of the matter; departed from the original pleadings and introduced a totally new claim. It claimed that the 2nd proposed Defendant is deceased thus no claim can be instituted against him. Further, by operation of the law, a suit will automatically abate where a sole Plaintiff or sole surviving Plaintiff dies and the cause of action survives or continues if no application is made within one year following the death. To buttress its averment, it relied on the following decisions: **Rubina Ahmed & 3 Others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank [2009] eKLR; Municipal Council of Thika and another v Local Government Workers Union Thika Vbranch Civil Appeal No. 41 of 2001 cited with approval in the case of Manjat Singh Sethi & 2 Others v Paramount Universal Bank Limited and 2 others [2013] eKLR and Philomena Ingosi Lumala v Jackton Mwanzi Kakamega Hccc No. 209a of 1991; Central Kenya Ltd v Trust Bank & 4 others Civil Appeal No. 222 of 1998; Amos Kabiru Kimemia v Industrial & Commercial development Corporation [2008] eKLR; and Rebecca Mijide Mungole & Another v Kenya Power and Lighting Company Ltd & 2 Others [2017] eKLR.**

The power to amend pleadings is donated by section 100 of the Civil Procedure Act which provides *inter alia*:

“That court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

While Order 8 Rule 5 (1) of Civil Procedure Rules provides as follows:

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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.”

In the case of **Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991** the Court of Appeal clearly set out

the parameters under which Courts may grant leave to amend the pleadings and held thus:

“a) the power of the court to allow amendments is intended to determine the true substantive merits of the case; b) the amendments should be timeously applied for; c) power to amend can be exercised by the court at any stage of the proceedings; d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; e) the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”

While in the Court of Appeal case of *Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR*, Apaloo J.A. recognized that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.”

Further in the case of *G.L. Baker Ltd v Medway Building and Supplies, Ltd, (1958) 3 All ER. 540*, Jenkins, after quoting the old O.VI, r. 18 of the Rules of the Supreme Court in England p.546, stated as follows:

“There is no doubt whatsoever that it is a guiding principle of Cardinal importance on this question that, generally speaking, all such amendments ought to be made as may be necessary for the purpose of determining the real questions in controversy between parties.”

In yet another case of *Eastern Bakery v Castelino [1958] EA 462 (CAU)* where it was held at page 462 that:

“The court will not refuse to allow an amendment simply because it introduces a new case.... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character ... or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ...” Further to the above, the Court of Appeal also 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.”

On the issue of joinder of parties, the Court of Appeal in *William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others (2016) eKLR* held that:

“...Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

See also the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR*.

In this instance, I note the fulcrum of the dispute revolves around ownership of the suit land. The Plaintiff has sought leave to amend the Plaint to bring in persons (*estates*) that had engaged in transaction touching on the root of the title in respect to the suit land. The Defendant including one of the proposed parties has vehemently opposed the amendment, with the proposed party denying being an administrator of the deceased estate despite an investigator’s report annexed to the further affidavit revealing that he has been dealing with the suit land by even leasing it out to third parties. The Defendant further states that the amendment sought will prejudice them and will delay in the determination of this case. It is trite that the court can allow amendment of pleadings at any time to determine the real question in controversy. Further, the amendment has to be made timeously and should not prejudice the opposing party nor introduce a new cause of action. On perusal of the respective affidavits, I note the amendments sought actually touch on the real question in controversy as it relates to the root of title to the suit land. However, I note the amendments have not been sought in a timeous manner as this suit was filed in 2006. Be that as it may, while relying on the legal provisions cited above and associating myself with the cited authorities, I find that the amendment has not been sought in bad faith as claimed by the Defendant. Further, there has not been demonstration that the proposed amendments are introducing a new case or changing the cause of action as it had provided a history in respect to ownership of the suit land which is pertinent for this court to appreciate to enable it make a just determination of the dispute herein. I note that in the Defence including Counterclaim, the Defendant only sought for orders of adverse possession. To my mind, the Defendant and proposed Defendants have not demonstrated what injustice nor prejudice they stand to suffer, if the said amendments were allowed. On the issue of joinder, since the two estates actually transacted over the suit land, culminating in the change of ownership which forms the fulcrum of the dispute herein, I find that they are a necessary parties to be joined in these proceedings to enable the court make a just and proper determination of the controversy herein. Further, the Defendant and new Defendants will be allowed time to file their respective Defences including amended Defences, to the Plaintiff’s claim. In the circumstance, I find that the amendment sought is merited and will allow it.

It is against the foregoing that I find the Plaintiff’s Notice of Motion application dated the 18th December, 2018 merited and will allow it.

I direct that the Plaintiff do file and serve the amended Plaint upon all the Defendants within 21days from the date hereof, after which the Defendants are granted leave of 21 days to file and serve their respective Statements of Defence.

Costs will abide the outcome of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 21ST DAY OF MARCH, 2022.

CHRISTINE OCHIENG

JUDGE