



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC NO. 569 of 2008

STEPHEN KIMOTHO KARANJA.....PLAINTIFF

VERSUS

PAUL WANDATI MBOCHI.....DEFENDANT

RULING

The matter coming up for determination is the Notice of Motion dated 3rd October 2013 brought by the Defendant /Applicant. The applicant seeks for Orders that the Defence filed herein on 22nd November, 2012 be amended as per the draft amended defence herein and the same be deemed as duly filed and served. Further, that the costs of this application be in the cause.

The application is grounded on the reasons stated on the face of the application, being that; the Defendant intends to join new parties to the suit as per the draft defence as well as introduce a new cause of action against his co-defendant and the Plaintiff; further that Defendant has a counter-claim against the Plaintiff as well as a claim against the new co-defendant so enjoined. That it is necessary that the Defendant be allowed to amend his defence in order that all matters and or issues in controversy are conclusively dealt with .

The application is also supported by the annexed affidavit of **Paul Wandati Mbochi**, who alleged that he is a neighbor of the Plaintiff. Further that the issue in dispute arise from boundary dispute. It was deponed that the two parcels of land in issue, are as a result of subdivision of Title No.Limuru/Ngecha/779 between the deponent, his two brothers and the Plaintiff who purchased his parcel of land from the deponent's brother, **Joseph Igamba Mbochi**. The deponent further contended that since the issue disputed is boundary, a Government Land Surveyor should be enjoined so that orders of re-survey may be issued against him. He urged the court to allow the application.

The application is opposed by the Plaintiff herein who averred that the application is totally incompetent and bad in law, misconceived and an abuse of the court's process. Further, that the application is not brought in good faith as it is meant to delay the Plaintiff's suit. It was submitted that the application is frivolous and vexatious as the parties sought to be enjoined are not necessary parties to the suit and the claim for boundary dispute cannot be adjudicated in the manner sought in the draft amended defence and counter claim. The plaintiff prayed for dismissal of the applicant's application.

The parties herein canvassed this Notice of Motion by way of written submissions. I have now carefully considered the pleadings herein, the relevant laws and the written submissions and I make these findings.

The applicant herein has filed this Notice of Motion under **Order 5 Rules 1, 3(1) (2)** and **Order 1 Rules 9 and 10** of the **Civil Procedure Rules**.

Order 1 Rule 9 provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties. Further **Order 1 Rule 10** provides that:-

*“ Where a suit has been instituted in the name of the wrong person as Plaintiff or where it is doubtful it has been instituted in the name of the right Plaintiff, the court **may** at any stage of the suit if **satisfied** that the suit has been instituted through a bona-fide mistake and that it is **necessary** for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit”.*

Though the applicant had indicated that the application herein is premised under *Order 5*, of the Civil Procedure Rules I have noted that *Order 5* deals with the issue of Service of summons.

The issue of amendments are dealt with by **Order 8** and therefore **Order 8 Rule 5** provides that:-

“ 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”.

The court therefore has discretion to allow an amendment to any pleadings and also allow substitution and/or joinder of any party to a suit. However, the said discretion must be exercised judicially.

The Defendant herein has sought to amend the Defence as per the draft amended Defence. In the said draft amended Defence, the applicant has enjoined the County Surveyor and the Land Registrar, Kiambu County as parties to the suit.

The applicant has alleged that the two intended Defendants are necessary parties as the issues herein involve a boundary dispute and he intend to request the court to order for re-surveying of the two disputed parcels of land. The Defendant has also filed a **counter-claim**, seeking for re-surveying of the two parcels of land in dispute.

I have noted that the suit herein was filed in the year 2008. Thereafter **Justice Khamoni** issued a Ruling on 16th October 2009 and observed that “ *this was a dispute that required the solution on ground by the Land Registrar and District Surveyor before a court of law may properly consider the prayers sought*”.

It was submitted by the Plaintiff/Respondent that the Kiambu Land Registrar and District Surveyor visited the disputed site in the presence of the Plaintiff and Defendant on 13th April, 2010. Indeed from the Court’s records, the Land Registrar and land Surveyor appeared in court on 22nd March 2012 and tendered their reports.

The Defendant alleges that he is seeking for amendment of the Defence and joinder of the intended Defendants as they are necessary parties to the suit. However, the two intended Defendants have already appeared in court and tendered their report.

The instant suit was filed in the year 2008, but the applicant did not seek to amend the pleadings before the two intended Defendants appeared in court and tendered their reports. The application by the Defendant is just meant to delay the suit and that is against the spirit of *Sections 1A and 1B of the Civil Procedure Act* which deals with the overriding objective to **facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the Act**.

Having considered the reasons advanced by the applicant, I find and hold that the two intended Defendants are not necessary in this suit. They can be called as witnesses by either the Plaintiff or the Defendant. The court also has power to grant any other relief for the interest of justice which power is denoted by **Section 3A** of the **Civil Procedure Act**.

In deciding this Notice of Motion, I will be persuaded by the case of **Kessam Vs Bank of Baroda (k) Ltd, 2002 KLR 294** where the court held that:-

“Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of court. The power to allow amendment is intended to do justice but not to work injustice to the other side. The same is also necessary for the purpose of determining the real question in controversy between the parties”.

In the instant application, the Defendant application has been brought about five years after the suit was filed. The parties to be enjoined have already tendered their reports in court and I find that they are not necessary in determining the real question in controversy. The two intended Defendants can actually be summoned in Court as witnesses. The court has wide discretion and inherent power to issue any relief as provided by Section 3A of the Civil Procedure Act. If the court deems necessary then it may issue any order for re-surveying of the two parcels of land and Defendant does not need to amend his Defence to include such a prayer as counter-claim.

For the foregoing reasons, the court finds that the Defendants /Applicant’s Notice of Motion dated 3rd October, 2013 is not merited. The same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, Signed and delivered this **27th day of June, 2014**

L. GACHERU

JUDGE

In the presence of

Mr Gisemba holding brief for Mrs Koech for the Plaintiff

M/S Mokono holding brief for M/s Njoroge for the Defendant/Applicant

Kabiru Court Clerk

L. GACHERU

JUDGE