



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 299 OF 2016

ABDILAH MUIGAI MUIRURI PLAINTIFF

VERSUS

FAITH NYOKABI DEFENDANT

RULING

1. The Application before me is dated 2nd February 2022 filed by the Plaintiff. It seeks the following orders: -

i) The Plaintiff/Applicant be granted leave to amend their plaint as set out in the draft amended plaint herein annexed.

ii) That upon prayer 1 being granted, the Plaintiff be granted leave to enjoin Umoja III C Residence Organization as a 2nd Defendant in this matter.

iii) The Draft Amended Plaint together with the accompanying amended witness statements and documents be deemed as duly filed and served.

iv) Costs of this application be provided for.

2. The application is premised on various grounds and is opposed by **Faith Nyokabi** the Defendant.

3. The background is that through a plaint filed on 31st March 2016, the applicant commenced this suit against the defendant. In the plaint, the applicant pleaded that on 21st August 2006, he was allocated **Plot numbers 170 and 171** within **L.R No. 11379/3** by Kiambu Dandora Farmers Company Limited. That upon allocation, he took possession and went ahead and erected a perimeter wall. However, on or about 26th March 2016, some agents of the Defendant, trespassed onto the suit property and pulled down a section of the perimeter wall. In the suit, the Plaintiff asked for a declaration that he is the rightful owner of the suit land; a permanent injunction to restrain the defendant from the suit land; an order restraining Umoja III Central Limited from dealing with the suit property, costs and any relief that the court may deem just and fair to grant.

4. The application is based on the grounds inter alia that the Director of Survey has conducted a survey on the entire **L.R No. 11379/3** and found out that the suit property including **L.R No. 209/9500** falls within **L.R No. 11379/3** and that the Defendant alleged to have purchased the suit properties from Umoja 111C Residence Organization as a portion of **L.R No. 209/9500** belonging to Sakari Holdings Limited and as such it is necessary to join Umoja III C Residence Organization who had inadvertently been left out. The application is supported by the affidavit of the Plaintiff who has more or less elaborated on the above.

5. The Defendant filed grounds of opposition. She averred that the application was an abuse of court process, since it was defective and bad in law. She also opposed the granting of prayer 3 since the proposed 2nd Defendant must be served with summons and all pleadings to enter appearance.

6. At the hearing of the application, **Mr. Murunga, learned counsel** for the Plaintiff relied on the Plaintiff's affidavit in support of the motion. **Ms. Mbabu, learned counsel** for the Defendant relied on their grounds of opposition and further submitted that the firm on record for the Plaintiff was **Murunga and Associates** and the current Application had been filed by **MAW Advocates LLP**. No notice of change had been filed and also the supporting affidavit did not indicate who the drawer was and hence the said application was fatally defective. Counsel also argued that there was no evidence showing that survey had been conducted and no survey map had been annexed to the affidavit. In response, Counsel Murunga stated that he remains the advocate on record for the Plaintiff and he is a Partner at MAW Advocate LLP. According to counsel there was an oversight in not notifying the Defendant and the court should be guided by **Article 159 (2) (d) of the Constitution**. On the issue of the survey report, Counsel sated that the same had been filed earlier and was part of their list of documents

attached to the draft amended plaint.

7. I have considered the application and oral submissions made by both counsel and the issue for consideration is whether the application is merited.

8. In *St Patrick's Hill School Ltd vs. Bank of Africa Kenya Ltd [2018]* the Court of Appeal set out the principles under which Courts may grant leave to amend the pleadings as follows: -

- 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 an amendment notwithstanding the expiry of current period of limitation.*

9. The reason why the applicant wishes to join the proposed 2nd defendant is because the Defendant purchased the suit property from the proposed 2nd Defendant and they would be seeking some specific reliefs against them. The role of the proposed 2nd Defendant is crucial for the determination of the suit. On this aspect, I see no prejudice to the Defendant because she will still have an opportunity to challenge the pleadings upon amendment.

10. On the issue of whether or not there was no notice of change of advocates filed at the time of filing the instant application, I note that Mr. Murunga submitted that he is the partner of MAW Advocates and that his law firm was previously known as Murunga and Associates. Counsel Murunga had also requested this court to do substantive justice as provided for under **Article 159(2) (d)** and not to dismiss the application on that ground. In respect to the same, I find that to be a mere procedural technicality which can be cured. The same is not fatal. *In Kenya Ports Authority -vs Kenya Power and Lighting Company Limited (2012) eKLR*, the court stated:

“Combining the meanings of these words, procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice”

11. I will agree with the submissions made by Counsel for the Plaintiff and being guided by **Article 159 (2) (d) of the Constitution** and the principle of *de minimis non curat lex*, I would grant them leave to file the notice of change with a view of regularizing their appearance on record.

12. Consequently, and having regard to the findings that I have made in this ruling, I will allow the application dated 2nd February 2022 and make the following disposal orders: -

- i) *The Plaintiff is granted leave to amend the Plaint.*
- ii) *Umoja III C Residence Organization be and is hereby joined to this suit as the 2nd Defendant.*
- iii) *The amended plaint to be filed and served on the 1st and 2nd defendant within 7 days from the date of this ruling.*
- iv) *The Plaintiff is also granted leave to file and serve his notice of change of advocates simultaneously with the amended plaint.*
- v) *Upon service the Defendants are granted 15 days to file and serve their pleadings in this suit.*
- vi) *Costs shall abide the suit.*

13. It is so ordered.

Dated, Signed and Delivered at Nairobi this 15th day of March 2022.

E. K. WABWOTO

JUDGE

In the Virtual Presence of:-

N/A for the Plaintiff.

Ms. Mbabu for the Defendant