



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

ELC CASE NO.299 OF 2011

BETH WAMBUI MWAURA1ST PLAINTIFF

ALBERT P. MWAURA KIERO 2ND PLAINTIFF

WILFRED K. NJENGA 3RD PLAINTIFF

VERSUS

IBRAHIM LEI ELESONDAI *alias*

ELESUNDAI 1ST DEFENDANT

JOSPHINE SEKELOM KILUSO..... 2ND DEFENDANT

THE COMMISSIONER OF LANDS..... 3RD DEFENDANT

REGISTRAR OF TITLES, KAJIADO 4TH DEFENDANT

JOSEPH MWANGI GITAU 5TH DEFENDANT

RULING

1. The matter is for ruling on application dated 23.5.2013 which seeks the following orders:
 1. That the Plaintiffs/Applicants be, and is hereby given leave to amend its plaint filed on 24th October, 2011 as per the draft annexed hereto.
 2. That the Amended Plaint annexed hereto be treated as the Plaintiffs/Applicants Plaint and that the same be deemed as having been dully filed and served.
 3. That the Defendants/Respondents be at liberty to file an Amended Defence if it so wishes.
 4. That the costs of this application be costs in the cause.

The Application is based on the following grounds:

1. That the proposed amendments are intended to bring before this honourable court the real matters in controversy between the parties herein so that the same are determined on their true and substantive merits.

2. The proposed amendments will not occasion any prejudice to the Defendants/Respondents.
3. The proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by the Plaintiffs/Applicants in this suit and are merely intended to bring before this Honourable court, the real issues in dispute between the parties and in particular, the actual relief claimed by the Plaintiff/Applicants herein.
4. It is therefore in the interest of justice that the Plaintiffs/Applicants should be granted leave to amend its Complaint filed herein.

2. The Notice of Motion is supported by the affidavit of Beth Wambui Mwaura sworn on 23.5.2013. The application is opposed by the 1st and 2nd Respondent and they have filed grounds of opposition dated 16.7.2014 and filed the same date.

3. The Applicant Notice of Motion is brought under **order 8 Rule 1** and **5(1)** and **order 51 Rule 1** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law. The Applicant case is that they seek to bring to court the real issues for determination. They aver that there are some developments since filing Complaint which have necessitated the amendment of the Complaint.

4. The Applicants state that after filing Complaint, they discovered that on 24.10.2011 the 1st Defendant misrepresented to the Land Registrar Kajiado district by alleging that the original title was lost whereas they knew it was with the 1st Plaintiff who was given by the 1st Defendant upon payment of the agreed purchase price of suit land and subsequently the 1st and 2nd Defendant caused it to be sub-divided into various portions some of which were sold to proposed 5th Defendant.

5. The Plaintiffs attribute the alleged fraud to the 2 Defendants and the proposed 3rd, 4th and 5th Defendants and thus the need to enjoin them as parties in the suit. The Applicant cites Section 100 Civil Procedure Act to support contention that parties to a suit have right to amend their pleadings though not absolute as it is subject to court discretion. The Applicant also relies on the case of **CENTRAL KENYA LTD. Civil Appeal No.222/1998** though not availed to court. And also Barclays Bank **DCO VS. SHAMSUDIN (1973) E.A. 451** not attached or availed to court.

6. The Respondent's case is that, the suit is founded on Sale Agreement of 14.9.1988 and thus statutorily barred by the provisions of Cap 22 Laws of Kenya. Further the Respondent contends that to seek to enjoin and agitate the cause against the 1st and 2nd Defendant or proposed 5th Defendant is clearly an abuse of court process. The Respondent argues that Sale Agreement has no nexus whatsoever to LR.No. Kajiado/Kitengela/3716.

7. The intended amendment is intended to defeat the Defence plea of limitation. The Defendants argued further that the intended 5th Defendant was never party to the land dispute but he merely acted as an advocate. Further it is argued that the intended amendment is inconsistent with or in contrast with original averment. Further it is argued that the concealment of Machakos Misc. Application (JR) No.4/09 between Plaintiffs and the 1st Defendant is an abuse of court.

8. The Respondent contends that there will be prejudice occasioned to Respondent and the damages thereof cannot be compensated by costs. The Respondent relies on authorities of **JOSHUA KULEI VS. RADIO AFRICA, 2012 eKLR 490**.

STEPHEN KIPKEBUT t/a RIVERSIDE LODGE & ROOMS (2009) eKLR HCC.No.252/02.

GEORGE GIKIBU MBUTHIA VS. CONSOLIDATED BANKS K. LTD and another (2014) eKLR HCC.937/86.

JAMES OCHIENG ODUOL VS. RICHARD KULOBA 2008 eKLR CA 122/02.

And seek the Application to be dismissed. The Plaintiff/Applicants instituted suit herein on 24.10.2011 via a Complaint dated 24.10.2011 claiming specific performance and other prayers vide

prayers in Plaintiff namely:

- a. **Specific performance**
- b. **Defendants be ordered to transfer land reference Kajiado/Kitengela/3716 (New numbers 40429 – 40440) to the Plaintiffs, 1st Plaintiff 10.0 acres, 3rd Plaintiff 1.0 acres.**
- c. **Cost of the suit.**
- d. **Any other relief that the court may deem fit in the circumstances.**

9. The Applicants aver that they paid a consideration, fenced off their portions and took possession and occupied them immediately. At the time of lodging of the suit, the Applicants had already realized that the 1st Defendant had sub-divided the subject on the Sale Agreement and transferred to the 2nd Defendant. However, after lodging the suit they realized that some of the portions have been transferred to non-parties and they thus blame the 1st and 2nd Defendants and the intended 3rd, 4th and the 5th Defendants.

10. The intended Amendment sets the particulars of fraud attributed to the existing and intended Defendants and thus the Applicants seek to have court exercise discretion in their favour by allowing the intended amendment. The court notes that the shape of the offices of 3rd and 4th intended Defendants are not the same after the repeal of GLA and RTA. However the transition provisions of the Constitution of Kenya vide schedule 6, Rule 33 provides for the succeeding offices to the abolished offices such that the intended 3rd Defendant is replaced by National Land Commission and the 4th intended Defendant is replaced by Chief Land Registrar.

11. The allegations raised in the intended amendment if adduced in evidence during the trial against the intended Defendants or their successors would be contrary to the provisions of Article 25(c) and 50(1) Constitution of Kenya on due process if they will not be parties. If 5th intended Defendant was issued with title No.40437 and 40436 as alleged, how would the Applicants recover them without enjoining the intended 5th Defendant? If the 3rd and 4th Defendant offices were involved in fraud as alleged, how will it be adduced without them being given a hearing?

12. The Respondents submit that in authority of **JOSHUA KULEI *Supra***, the court cannot allow a person to be sued outside statutorily limited period. Their position is that the agreement subject of suit having been executed in 1988 the suit is not only time barred but also the intended addition of parties will be suing them outside statutorily allowed period. The Respondents also rely on case of **STEPHEN KIPKEBUT *Supra***, where the Respondents argue that Nambuye J, dismissed an amended Plaintiff filed without leave for want of regularity.

13. The Respondents rely on the case of **GEORGE GIKUBU MBUTHIA *Supra***, where the application was rejected for amendment as it was filed after 27 years since suit was instituted. Another authority relied on, **JAMES OCHIENG ODUOL *Supra***, is on the same legal position as that of **JOSHUA KULEI *Supra***, where court opined that amendment to allow time barred cause would not be allowed. The court observes that specific performance based on agreement of 14.9.1988 would on the face of it be apparently offending the provisions of Section 4 (2) of Cap 22 Laws of Kenya.

14. However, **IN THE AUTHORITY OF NYERI CIVIL APPEAL NO.6/2011 as consolidated 2th 26 and 27 of 2011, MACHARIA MWANGI AND 87 OTHERS VS. DAVIDSON MWANGI KAGIRI & OTHERS**, the court held that where the agreement is void and the claimant is possession resulting trust could obtain. The claimant's claim to be in possession and occupation and have paid entire purchase price. The issue of resulting trust might arise in the circumstances. Further the intended Defendants are alleged to be part of the architect of the fraud designed to deprive the Applicants their property in the subject matter.

15. Under Order 8 Rule 3:

“the court may at any stage of the proceedings ... allow a party to amend pleadings.

Rule 5 states that:

“an amendment may be allowed notwithstanding its effect will be to add or substitute new cause of action ... if it arises out of the same facts....”

In view of the foregoing, the court is inclined to exercise discretion in favour of the applicants in order to determine the real issues arising in the matter. The Respondents who are alleged to be the chief architect of the fraud alleged have not demonstrated that they will suffer any prejudice which cannot be compensated by way of costs. The intended Defendants once joined can always seek to be struck out of the case if they have grounds to do so.

16. The court therefore makes the following orders:

1. The amended Plaintiff be filed and served within 14 days provided intended 2nd and 3rd Defendants are corrected to be in line with the current legal and Constitutional provisions.
2. The Respondents at liberty to amend pleadings or reply within 14 days of service.
3. Costs to the Respondents in any event.

Orders accordingly.

Signed and Delivered at Machakos, this 11th day of December, 2014.

CHARLES KARIUKI

JUDGE