



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 300 of 2012

IN THE MATTER OF THE SALE OF PART OF LAND REFERENCE NUMBER 5948/14

JEPCHIRCHIR TERIKI SEII.....APPLICANT

VERSUS

MEDAD NGUNJIRI GITHAIGA.....1ST RESPONDENT

JOSEPH WAMBUGU GITHAIGA.....2ND RESPONDENT

RULING

1. On 6th July 2012 this court was presented with the Notice of Motion dated and filed on 5th July, 2012. The same was brought under a certificate of urgency and sought the following prayers:-

1. **THAT this matter be certified as urgent and it be heard exparte in the first instance.**
2. **THAT the Honourable court extends the time for filing the Amended Originating Summons.**
3. **THAT the Honourable court grants leave to file the Amended Originating Summons out of time.**
4. **THAT the Amended Originating Summons dated 4th July 2012 and the Supporting Affidavit of JEPCHIRCHIR SEII sworn on 4th July, 2012, annexed herein, be deemed as filed.**
5. **THAT the costs of this Application be in the cause.**

The application was based on the grounds, amongst other grounds, that the court had granted leave to file an Amended Originating Summons on 19th June 2012 which order lapsed on 3rd July 2012 before the same was filed.

2. It was at that ex parte stage and under a certificate of urgency that the court granted the orders sought under prayers 2,3 and 4 set out above which is the subject matter of the Notice of Motion dated and filed on 24th July 2012. This latter motion which is the subject matter of this ruling seeks a review of the court's orders made on 6th July, 2012 to set the same aside. The Motion in its fourth prayer seeks an order that Jepchirchir Teriki Seii vacates the suit land forthwith or in default she be evicted by the 1st Defendant under the supervision of the officer commanding Karen Police Station or any other. The 1st Defendant raises the grounds that the Applicant never sought and so no leave was granted on 16th June 2012 to amend the Originating Summons and therefore there was none to extend on 6/7/12. Further

that an order to amend pleadings cannot be granted *ex-parte* after the close of pleadings. That the Applicant's application dated 4/7/2012 is full of falsehoods, misrepresentations and the court was duly misled into granting orders which the Respondents seek to review. That the said application is an abuse of the Court's process and intended to defeat the Respondents' Notice of Preliminary Objection dated 4/6/2012 which notice was duly served on the Applicant's counsel. That the fatality in the applicant's suit cannot be cured by an amendment as the Applicant has attempted to do.

The application is supported by an affidavit sworn on 24/7/2012 by the 1st Respondent. He deponed that when the matter came up for hearing in Court on 19/6/2012, the Applicant withdrew her application for injunction filed by a Notice of Motion dated 29/5/2012. The 1st Respondent deponed that the Court's directions on that date did not afford the Applicant an opportunity to file an amended originating summons as the Court was made to believe. Further that the Applicant's application and affidavit are false, and constitute perjury on the face of the court and therefore the order granted on 6/7/2012 was grounded on false averments and/or subornation of perjury as contained on the face of the Applicant's application, affidavits and submissions made to this Court. More so that the amendments being introduced are intended to defeat his Preliminary Objection dated 4/6/2012 which was duly served upon the Respondent on the same date.

The 2nd Respondent deponed that he is the registered owner of the land where the house the subject of these proceedings stands and the Applicant has invaded and occupied his house and he stands to suffer irreparable loss and damage unless the applicant is ordered to vacate the land. Further that the Applicant continues to illegally occupy the property and unless ordered by this Court she will continue in unlawful occupation. Demanding compensation for the labour and contributions to the suit property cannot be the basis to continue unlawful occupation thereof. The 2nd Respondent also deposed that the Applicant has no interest in prosecuting the suit as she has failed, neglected and refused to comply with the order given on 19/6/2012 and that the suit is scandalous has no merit and is an abuse of the Court Process.

3. The Respondent's application was opposed. The Applicant swore a Replying Affidavit on 4/9/2012. The Applicant on advice by counsel stated that she was allowed by statute to amend her pleading within the law and with the leave of court any time before delivery of judgment and that in granting her application for leave to amend the Court exercised its discretion and such amendment has not prejudiced the Respondents in any way save to lay before Court concisely the issues that ought to be determined on merit. The Applicant deposed that her claim could only be determined on merit as the Respondents had colluded so as to defeat her claim on the suit property and that she sincerely believed that the Respondents are hell bent to prevent the matter from proceeding to hearing on merit and desired that the matter be determined on legal technicalities owing to the facts weighing against them. The Applicant deponed further that there was no reason adduced by the Respondent as to why an order of eviction should be granted to have her vacate or be evicted during the subsistence of the suit and that there is no prejudice occasioned to the Respondents in her continued stay at the residence on the suit property. The Applicant also deposed that the Respondent had not annexed the order which they sought to have reviewed and that there was no basis set in their application for granting an order for review.

4. At the hearing of the application dated 24/7/2012, Mr Mwenda advocate for the Defendants/Applicants submitted that no order was granted on 19/6/2012 and therefore there was nothing to extend on 6/7/2012. He added that the Applicant did not make a full disclosure to the court. He saw the Amended Originating Summons as an attempt to defeat the Preliminary Objection which the defendants had taken against the Originating Summons as filed. Counsel concluded that since the laid down procedure for amending pleadings was not followed by the Applicant, then the present application should be allowed.

Mr Kariu advocate for the Applicant in the Originating Summons submitted that even the defendants had not followed laid down procedure as they had not attached to their application the order sought to be reviewed. He submitted further that pleadings had not closed by the time the Amended Originating Summons was filed. He denied that the Applicant was guilty of any non-disclosures.

5. Provisions for review of an order are to be found in the Civil Procedure Rules under Order 45

Rule 1, which reads,

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed,

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

To find out if the present application brings itself within the above provisions, we must look at the orders of the court granted on 19/6/2012 which I set out herebelow verbatim;

1. **THAT the applicant's Notice of Motion dated 29th May 2012 be and is hereby marked as withdrawn. The costs of the motion shall be in the Originating Summons.**
2. **THAT the Originating Summons dated 29th May 2012 shall be heard on a priority basis after the directions below mentioned.**
3. **THAT the applicant and Respondent are granted general leave to file any further affidavits or lists of documents within 14 days of today's date. Thereafter, the applicant shall take out a date for DIRECTIONS as provided by Order 37 rule 16.**
4. **THAT either party is at liberty to apply to court for any further orders or directions.**

From the above it is abundantly clear that no order granting leave to the Applicant to amend pleadings was given. None therefore existed on 3/7/2012 as alleged requiring an enlargement of time on 6/7/2012. The ground in support of the application that the court granted leave for the filing of an Amended Originating Summons on 19/6/2012 is an untrue statement. It follows that in granting prayer 2 of the Notice of Motion filed on 5/7/2012, the court acted in vain due to the misrepresentation in the Notice of Motion. The same is true in the grant of prayers 3 and 4 which are the natural flow in sequence from prayer 2. The grant of those orders was an error that warrants a review – see **NATIONAL BANK OF KENYA -VS- NJAU (1995 – 1998) 2 EA 249 CAK** where it was held;

“A review may be granted wherever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established.”

That is exactly the case herein. Consequently the orders made on 06/07/2012 were so made in error and are hereby reviewed and set aside.

6. The defendants/applicants have raised two grounds that the Applicant's application which was heard on 06/07/2012 was intended to defeat the defendant's Preliminary Objection dated 4th June 2012 and further that the fatality in the Applicant's suit cannot be cured by an amendment as the Applicant attempts to do by her application on 5th July 2012. To this I say the following. A litigant cannot be stopped from filing what they consider to be necessary to further their cause. Whether such applications as they may file would succeed or fail is a matter for a different discussion. And therefore unless the applications by their number and nature are such that they tend towards being frivolous, they will be filed by a party who chooses to so file. Secondly, even if the Defendant's argument that the amendment was sought so as to defeat their Preliminary Objection were true, and indeed that the

Defendant's Preliminary Objection would succeed but for the amendment to the originating Summons, that would still not be reason enough to limit the Applicant's right to file such application(s) as would progress her case further. And such argument would most definitely not bar the court from exercising its discretion in granting leave to amend for the reason that the overriding consideration in applications for such leave to amend is whether the amendments are necessary for the just determination of the controversy between the parties, see **CENTRAL KENYA LIMITED -VS- TRUST BANK LIMITED (2002) 2 EA 365**.

7. It is abundantly evident that the Applicant did not follow the laid down procedure in Order 8, rule 4 in seeking to amend her Originating Summons. The proposed Amended Originating Summons was attached to the certificate of urgency Motion heard by the court on 06/07/2012. This court considered the same when it granted the orders of 6/7/2012 which have now been set aside for the reason that no leave having been granted on 19/6/2012 there existed no order for extension of leave on 6/7/2012. That notwithstanding the court notes that Order (4) granted on 19/06/2012 set the parties hereto at liberty to apply for "any further orders or directions" in addition to the general leave granted in prayer (3) of the said date, that, is to say, 19/06/2012. Such general leave was for the parties to file any further affidavits or documents before taking a date for directions under Order 37 rule 16 of the Civil Procedure Rules. The Applicant in the Originating Summons then took out the application dated 5/7/2012 and which was heard on 6/7/2012.

8. Even if one were to state that no specific leave to amend was sought before the orders of 6/7/2012 were given, which indeed is the position, Order 3 granted by the court on 19/6/12 would come to the aid of the Applicant in taking out the application for amendment of the Originating Summons on 5/7/2012, the Originating Summons having been filed on 28/5/2012 and the directions in Order 37 rule 16 of the Civil Procedure Code not having been given. In any event Order 8 Rule 3 Civil Procedure Code allows for amendments of pleadings at any stage of the proceedings before judgment is entered in the following words:-

"Order 8 Rule 3(1) subject to Order I rules 9 and 10, Order 24 rules 3,4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings"

Order 8(4) Civil Procedure Code refers to originating process such as the one herein and of course an Originating Summons is a pleading. That is strongly supported by authority such as in the case of **EASTERN BAKERY -VS- CASTELINO (1958) EA 461** wherein the court held that:-

".....amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated in costs."

9. It is not lost to the court's mind that the application under consideration is one for review. Nonetheless parties were granted "general leave" on 19/6/2012 and the application of 5/7/2012 followed thereafter. This court considered the application on 6/7/2012 as already stated earlier above. The proposed amendments to the Originating Summons would merely place before the court, the matters in controversy for the court's determination. And if the "general leave" granted by the court on 19/6/2012 were to be said not to have been directly and specifically granted for an amendment, this court hereby specifically invokes Section 3A of the Civil Procedure Act and in giving effect to the overriding objective of the court in Sections 1A and 1B of the Civil Procedure Act, and further avoiding technicalities as empowered by Article 159 2(d) of the 2010 Constitution, and further considering that grant of leave to amend pleadings is a matter of judicial discretion, and having regard to the principles for amendment of pleadings such as is stated in the **4th Edition of BULLETIN AND LEAKE** at page 124,

"The guiding principle of cardinal importance on the question of amendment is that generally speaking, all such amendments ought to be made for the purposes of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any

proceedings. The Rule of conduct of the Court is that, however negligent or careless may have been the first omission, and however late the proposed amendment, th amendments should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated for by costs but if the amendment will put the other side into such a position that they must be injured it ought not to be made.”

and in the interest of justice, and so that litigation may be expedited, this court hereby grants leave for the amendment of the Originating Summons and orders that the Amended Originating Summons marked “JEP – 1” and its annexed affidavit are deemed as filed. The Defendants are granted leave to file their Replies thereto, if any, within 14 days of today or of service of the same in the event that service has not yet been effected. The Defendants will have the costs of the applications filed on 5/7/2012 and 24/7/2012.

Orders accordingly

DATED AND SIGNED AT NAIROBI THIS **30TH DAY OF JANUARY, 2013.**

P.M. MWILU

JUDGE

DELIVERED ON **30TH JANUARY, 2013** BY

P. NYAMWEYA

JUDGE.

In the presence of:-

..... Advocate for Plaintiffs
..... Advocate for 1st Defendant/Applicant
..... Advocate for 2nd Defendant/Applicant
..... Court Clerk

P. NYAMWEYA

JUDGE