



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 291 OF 2011**

**MARY NJERI NJOROGHE.....PLAINTIFF**

**VERSUS**

**GEORGE NDUATI MUNENE.....DEFENDANT**

**RULING**

The Plaintiff is seeking the court's leave to amend the Complaint filed herein in the terms of an annexed draft. The grounds for the application for amendment is that at the time of filing this claim, she did not have in her custody any document relating to the suit premises and such quoted the wrong Land Reference number namely Plot No. 36/1023/111 Eastleigh Section 3 instead of Plot No. 36/111/1023 Eastleigh Section 3. Further, that she has availed a search over the property which shows the proper description of the property as Plot No. 36/111/1023 Eastleigh Section 3. These averments are made in a Notice of Motion and supporting affidavit both dated 24<sup>th</sup> November 2011.

The Defendant filed a Notice of Preliminary Objection to the said Notice of Motion dated 29<sup>th</sup> November 2011 on the following grounds:

1. That the Plaintiff is not the registered owner of the suit property and this is admitted in paragraph 6 & 7 of the Complaint filed herein dated 16<sup>th</sup> June 2011, in paragraphs 6 & 7 of the draft Amended Complaint and also in paragraphs 4, 5 & 6 of the Supporting Affidavit to the application dated 24<sup>th</sup> November sworn by Mary Njeri Njoroge on even date. Further, that the Plaintiff therefore lacks the requisite *locus standi* to bring this action.
2. That on 22<sup>nd</sup> November 2011, the Plaintiff through her Advocate conceded in open Court that the official Search dated 27<sup>th</sup> October 2011 and annexed to her Supporting Affidavit reflects the true position in regard to the ownership of the suit property.
3. That the application dated 24<sup>th</sup> November 2011 is *res judicata*, the Plaintiff's initial oral application on 22<sup>nd</sup> November 2011 having being disallowed and no appeal filed.
4. That the Plaintiff's suit as filed vide the Complaint dated 16<sup>th</sup> June 2011 is incurably defective and the proposed amendment injects no life into the suit but further extinguishes the same and renders it null and void *ab initio* for all purposes.
5. The proposed draft amended Complaint does not disclose a reasonable cause of action against the Defendant and is an abuse of Court process.
6. The Application dated 24<sup>th</sup> November 2011 is hopelessly misconceived, frivolous and vexatious and the same should be struck out and its costs borne by the Applicant's Advocate personally.

The Defendant's counsel in submissions dated 28<sup>th</sup> May 2013 argued that the Plaintiff is not the registered owner of the suit property, and has not produced any judgment or decree of any court holding

that she is the rightful owner of the suit property . Further, that she therefore has no *locus standi* to seek injunctive relief against perceived trespassers on the suit property. It was also submitted that the Plaintiff's counsel made a similar oral application to amend its plaint on the same grounds on 22<sup>nd</sup> November 2011, which application was disallowed, and he was granted leave to appeal the said ruling. The counsel submitted that the present application was therefore contrary to the express provisions of section 7 of the Civil Procedure Act which provides for the doctrine of *res judicata*.

The Plaintiff's counsel in reply submissions dated 10<sup>th</sup> July 2013 argued that the Plaintiff has been in possession of the suit property until the Defendant, who is her estranged husband, started constructing structures thereon. Further that the said Njau Investment Limited has never occupied the suit property, and that there is a suit pending in court namely NRB HCCC 1357 of 2007 (ELC) challenging the fraudulent transfer of the suit property to the said company, and also seeking cancellation of the title in its name.

It was further submitted by the Plaintiff's counsel that the application to amend the Plaint is not *res judicata* for the reason that despite the oral application for amendment having been made, the merits of the entire case could not have been said to have been determined or litigated fully. Further, that a judge's opinion as to the probability of success of a suit expressed in an interlocutory application cannot be taken to mean a final decision in the matter, and he relied on decisions in **Assanand v Pettit (No.3)1989 KLR 252** and **Bulhan & Another vs Eastern and Southern frican Trade and Development Bank (2004) 1 KLR 147** to this effect.

Counsel also argued that under Order 8 rule 5 of the Civil Procedure Rules the Court has wide discretion and power to grant amendments and nothing under the order bars a subsequent application to amend. He cited several judicial authorities in this regard. He also relied on the provisions of Article 159(d) of the Constitution on the need to administer justice without undue regard to technicalities, and on section 1A of the Civil Procedure Act on the overriding objective of the Act being to facilitate just, expeditious, proportionate and affordable resolution of civil disputes

I have read and carefully considered the pleadings and submissions by the parties to this application. The main issue to be decided is whether the preliminary objection raised by the Defendant has merit and should be upheld. It was held in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** that a preliminary objection must be on a pure point of law, and cannot be raised if any fact has to be ascertained. It is evident from the submissions made by the parties that a majority of the grounds of objection raised by the Defendant require the establishment of certain facts as to the ownership of the suit property before they can lie. Principally, these are grounds 1, 2, 4, 5 and 6 of the said Preliminary Objection cited hereinabove. These grounds therefore do not raise pure points of law.

The only ground that raises a pure point of law in my view is ground 3 to the effect that the application herein is *res judicata*. I have perused the court record of 22<sup>nd</sup> November 2011 and it is indeed the position that the Plaintiff's counsel made an oral application to amend the Plaint filed herein, and cited the same grounds as those in the present application. The said oral application was denied. Section 7 of the Civil Procedure Act has in this regard the following mandatory provisions regarding suits or issues already heard and determined:

**“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

The issue of the amendment of the Plaint was heard and argued on its merits, and the judge gave a ruling on the same as well as her reasons for the ruling. While it is true that Order 8 Rule 3 of the Civil Procedure Act gives the court wide discretion to amend pleadings, once that discretion has been exercised on way or another, the Court's decision becomes subject to provisions of section 7 of the Civil Procedure Act. The Plaintiff's only option in the circumstances is to review or appeal the ruling made on 22<sup>nd</sup>

November 2011.

I therefore uphold the Defendant's Preliminary Objection to the extent that I find the Plaintiff's Notice of Motion dated 24<sup>th</sup> November 2011 *res judicata*. The said Notice of Motion is hereby struck out. The costs of the said Notice of Motion and Notice of Preliminary Objection shall be borne by the Plaintiff.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_14<sup>th</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2013.

**P. NYAMWEYA**

**JUDGE**